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THE
ENGLISH REPORTS

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EXCHEQUER DIVISION
VII

CONTAINING
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W. GREEN & SON, LIMITED, EDINBURGH
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AGENTS FOR THE UNITED STATES OF AMERICA
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1915

Printed by GREEN & SON, Edinburgh

July 1915

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of EXCHEQUER and EX-
CHEQUER CHAMBER, from Easter Term, 2
VICT., to Michaelmas Term, 3 VICT., both
inclusive. By R. MEESON, Esq., and W. N.
WELSBY, Esq., of the Middle Temple, Barristers-
at-Law. Vol. V. London, 1840.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF
EXCHEQUER, AND EXCHEQUER CHAMBER, EASTER TERM, 2 VICTORIÆ.

EX PARTE EDWIN MARTIN. Exch. of Pleas. 1839.—An attorney who has been re-admitted in one of the superior courts is entitled, under the stat. 1 & 2 Vict. c. 45, s. 3, to practise in any of the others, on signing the roll thereof.

[S. C. 7 Dowl. P. C. 334, 412; 8 L. J. Ex. 193; 3 Jur. 288.]

Martin moved to re-admit an attorney who had already been re-admitted of the Court of Queen's Bench. Some doubt existed, he said, whether the statutes 1 Vict. c. 56, s. 4, & 2 Vict. c. 45, s. 3, which spoke only of persons who had been "duly admitted attorneys" of one Court, applied to the case of an attorney seeking to be re-admitted.

ALDERSON, B. Surely a re-admitted attorney is an admitted attorney.

LORD ABINGER, C. B., and PARKE, B., concurred; and the motion was therefore held to be unnecessary.

[2] PITCHFORD AND ANOTHER *v.* DAVIS. Exch. of Pleas. 1839.—A project having been formed for the establishment of a Company for the manufactory of sugar from beet-root, a prospectus was issued, stating the proposed capital to consist of 10,000 shares of 25*l.* each. The directors began their works, and entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1400 out of the 10,000 shares were taken:—Held, that a subscriber, who had taken shares and paid a deposit on them, was not liable upon such contracts of the directors, without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorized the making of the contract.

[S. C. 2 H. & H. 9; 8 L. J. Ex. 157; 3 Jur. 408. Followed, *Walstab v. Spottiswoode*, 1846, 15 M. & W. 508. Referred to, *Hopcroft v. Parker*, 1867, 16 L. T. 123.]

Debt for goods sold and delivered, work done and materials found and provided, and on an account stated. Plea, *nunquam indebitatus*.

At the trial before Lord Abinger, C. B., at the London Sittings after Hilary Term, it appeared that in the early part of the year 1836, a project was formed for the establishment of a Company under the name of "The United Kingdom Beet-root Sugar Association," and prospectuses were issued, stating the proposed capital to be

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in 10,000 shares of 25l. each, and the names of the directors were announced. In the month of April in that year, the defendant applied for shares, which were accordingly allotted to him, and he paid the deposit on them in June following. In the course of the summer, the Company commenced building their works with the defendant's knowledge, and shortly afterwards a call was declared and paid. The goods for which the action was brought consisted of certain quantities of charcoal and lump alum, which were supplied by the plaintiffs to the directors, on the order of the Secretary, for the use of the Company, in December 1836, and January 1837; and in 1837 sugar, to the value of 500l., had been made and sold. The defendant was not shewn to have interfered in the management of the concern, but he was proved to have been on one occasion at the manufactory, and to have said that he understood the nature of the works, and the mode of manufacturing sugar. The plaintiffs' counsel contended that, under these circumstances, the defendant was a partner in a trading company, and a part-owner of the goods supplied, and as such was liable in this action. It was proved on cross-examination of the plaintiffs' witnesses, that only a small part of the proposed capital had been raised, and that not more than 1400 out of the 10,000 [3] shares had been taken. The Lord Chief Baron told the jury, that without evidence that the defendant knew and assented to the works being carried on with a smaller capital than that which was originally proposed, he could not be bound by the contract of the directors; and it was for them to say whether the works were so carried on with his knowledge and consent. The jury having, under this direction, found a verdict for the defendant,

Erle now moved for a new trial, on the ground of misdirection, and contended that, this being a trading company which had manufactured and sold goods, the defendant must be considered as a partner, and was therefore liable. [Parke, B. *Bourne v. Freeth* (9 B. & C. 632; 4 Man. & R. 512); *Vice v. Lady Anson* (7 B. & C. 409; 1 Man. & R. 113), and *Dickinson v. Valpy* (10 B. & C. 128; 5 Man. & R. 126), are authorities to shew that a shareholder who does not interfere with the management of the concern is not liable.] Those were not cases of trading companies, but mining companies. [Parke, B. It matters not whether they are trading or mining companies.] The goods are sent in on the credit of the Company, of which the defendant, being a shareholder, was one, and he is therefore liable. [Parke, B. No, that is a fallacy; the goods are sent in on the order of the secretary.]

LORD ABINGER, C. B. The question is, whether the directors were the agents of the defendant in carrying on the business with so small a capital. I thought at the trial, and am still of the same opinion, that where a prospectus is issued, and shares collected, for a speculation to be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that [4] respect are fulfilled. But if it be shewn that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts. In this case, there was very little, if any, evidence to shew that, and I am satisfied with the finding of the jury.

PARKE, B. I think the case was properly left to the jury. The defendant, by taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the proposed capital obtained. The secretary who gives the order to the tradesman is the party primarily liable; the directors also, who give the order to the secretary, may be liable. A third party may become liable, if it can be shewn that he has authorized the act of the directors in making the contract. But, by proving the defendant to be an original subscriber, unless the proposed capital is raised, no such authority is shewn. Then, is there in this case, sufficient evidence of authority to contract, with knowledge that the directors were acting without the proposed capital having been obtained? The jury have found that there was not, and I think that the finding of the jury is right.

ALDERSON, B. The authority given by the subscribers to the directors is a conditional one, depending on the terms of the prospectus being fulfilled. In this case that condition had not been fulfilled, and therefore the defendant is not bound by the contract of the directors; and the jury have found that he had not ratified the act of the directors, with a knowledge of that condition not having been performed.

Rule refused.

- [5] CROXON v. WHITEHALL WORTHEN. Exch. of Pleas. 1839.—On an issue joined, in an action by indorsee against maker of a promissory note, on the fact of presentment, a promise made by the defendant to pay the bill, after it became due, is *prima facie* evidence to prove the issue.

[S. C. 2 H. & H. 12 ; 8 L. J. Ex. 158 ; 3 Jur. 290.]

Assumpsit by the indorsee against the maker of a promissory note for 100l., payable to the defendant's order three months after date, at Messrs. Smith, Payne, & Co.'s, bankers, London, indorsed by the defendant to Samuel Worthen, by him to Joseph Hill, and by Hill to the plaintiff. The declaration averred, in the usual form, presentment of the note when due, at Messrs. Smith, Payne, & Co.'s. There was also a count on an account stated. The defendant pleaded, First (to the account stated) non-assumpsit; 2ndly, that he did not make the note; 3rdly, that it was not duly presented for payment, in manner and form, &c.; on which issues were joined.

At the trial before Coleridge, J., at the last Chester Assizes, the plaintiff proved the making of the note by the defendant, but gave no direct evidence of its presentment; but two letters of the defendant were put in, in which he asked for indulgence, and stated that he had been drawn into making the note by Hill, the indorser. The plaintiff's attorney also proved a conversation between himself and the defendant after the note became due, when, the note being produced to the defendant, he engaged to pay it by instalments. It was objected for the defendant, that this evidence did not support the third issue, but that the plaintiff was bound to prove the fact of presentment. The learned judge reserved the point, and a verdict passed for the plaintiff for the amount of the note and interest, leave being given to the defendant to move to enter a nonsuit.

Evans now moved accordingly. The subsequent admission did not dispense with direct proof of the issue, that the note was duly presented. The question is different since the new rules, now that a precise issue is joined on [6] the allegation of presentment; and in no case has such evidence as this been yet held sufficient to support the precise issue so joined. It is laid down that a subsequent promise is not sufficient to dispense with direct proof of notice of dishonour, unless made with knowledge of the default; yet the party must know whether he has had notice; which is not the case as to presentment. The defendant must now take issue on some particular fact; and if it be intended to insist that that step in the proceedings has been waived, that should be replied. [Parke, B. The case of *Lundie v. Robertson* (7 East, 232) seems to be precisely in point, and disposes of this question.] That was before the new rules.

LORD ABINGER, C. B. I do not see that the question is at all affected by the new rules. The defendant is the party to pay the note, which he has made payable at a particular place: as against him, therefore, it appears to me that his subsequent promise admits all that was necessary to entitle the plaintiff to recover.

PARKE, B. I am of the same opinion. *Lundie v. Robertson* appears to me to dispose of this question. Under the old form of pleading, the plaintiff could only have supported his declaration on the ground of the subsequent promise being a *prima facie* admission of presentment having been duly made; therefore the new rules make no difference.

ALDERSON, B. The defendant is supposed to know the law: he knows, therefore, that he is not liable unless the note has been duly presented; with that knowledge, he undertakes to pay it. Is not that evidence for the jury that he knows it has been presented? I do not see how [7] the new rules make any difference. Before they were framed, all the material allegations of the declaration were put in issue by the general issue; therefore the plaintiff was to prove all—that is, each and every of them: now, each must be separately denied; but still the same evidence will apply to the particular allegation put in issue.

Rule refused.

WELLS v. HOPKINS. Exch. of Pleas. 1839.—To an action by the indorsee against the drawer of a bill of exchange, the defendant pleaded that the bill was given in payment of the price of 17 pockets of hops sold by the plaintiff to the defendant, as hops of a certain grower, and answering certain samples, to be delivered by the

plaintiff to the defendant within a reasonable time: that, although a reasonable time had elapsed, the plaintiff had not delivered to the defendant any hops answering the samples, or any hops whatsoever; and that there was no consideration for the bill except as aforesaid. Replication, *de injuriâ*. It appeared that the plaintiff had delivered to the defendant 17 pockets of hops, but inferior to the samples:—Held, that the general allegation in the plea, that the plaintiff had not delivered any hops whatever, was immaterial, and might be rejected: and that, without it, the plea shewed a total failure of consideration, and was an answer to the action.—Held, also, that if the plaintiff relied on the defendant's acceptance of the inferior hops, he ought to have replied it.

[S. C. 2 H. & H. 12; 8 L. J. Ex. 158; 3 Jur. 290.]

Assumpsit by the indorsee against the drawer of a bill of exchange, dated 30th June, 1838, for 122l. 15s. 9d., payable three months after date to the order of the defendant, and by him endorsed to the plaintiff. There was also a count upon an account stated.

To the first count, the defendant pleaded, that the said bill of exchange in that count mentioned was drawn, accepted, and indorsed as therein also mentioned, in payment of the price of divers, to wit, 17 pockets of hops, just before then, to wit, on the 30th day of June, in the said year 1838, sold by the plaintiff to the defendant, as and for hops of a certain planter, to wit, one ——— Hilder, and answering certain samples then produced and shewn by the plaintiff to the defendants, and to be within a reasonable time after the said drawing, acceptance, and indorsement of the said bill, delivered to the defendant: and the defendant in fact says, that although a reasonable time for the delivery of the said hops had at the commencement of this suit elapsed, yet the plaintiff has not delivered any pockets of hops answering the said samples, or either of them, or any hops whatsoever, but the plaintiff [8] has hitherto neglected and wholly refused so to do: and the said hops so sold to the defendant as aforesaid remain and are wholly undelivered: and the consideration on which the said bill was drawn, accepted, and indorsed as aforesaid, has wholly failed: and the defendant further says, that, save as aforesaid, there never was any value or consideration whatsoever for the drawing, acceptance, or indorsement of the said bill, as in the first count mentioned, or for the payment to the plaintiff of the amount thereof, or any part thereof. Verification.

To the 2nd count the defendant pleaded non assumpsit.

Replication to the 1st plea, *de injuriâ*.

At the trial before Erskine, J., at the last Worcester Assizes, it appeared that 17 pockets of hops had been delivered, and remained in the defendant's possession at the time of the trial: but evidence was adduced to shew that the hops delivered did not correspond with the samples; and the jury were of that opinion, and found a verdict for the defendant on the special plea, the learned judge having given the plaintiff leave to move to enter a verdict for the amount of principal and interest due upon the note.

Ludlow, Serjt., now moved accordingly. The allegations in the plea were not proved; and if they were, it was no answer to the action. It was proved that the hops were delivered, and no steps were taken to return them. All the cases shew that there must be a total failure of consideration, to constitute an answer to such an action. In *Morgan v. Richardson* (1 Camp. 40), Lord Ellenborough held that though, where the consideration for a bill of exchange fails entirely, that would be a sufficient defence to an action upon it by the original party, it is no defence to such an action that the consideration fails partially; but that, under [9] such circumstances, the giver of the bill must take his remedy by an action against the person to whom it was given. [Parke, B. In that case the hams, the consideration for the bill, had been accepted, but afterwards turned out to be of an inferior quality. That was clearly a partial failure of consideration only.] This plea alleges that the plaintiff had not delivered any pockets of hops answering the samples, or any hops whatsoever; the issue raised by which is, whether any hops whatever had been delivered; and that issue ought to have been found for the plaintiff. The defendant does not state the transaction truly in his plea, even if he had not accepted the hops. [Parke, B. There is no doubt that the plea would have been good without that allegation, "or any hops whatsoever;" but the difficulty is, whether, there being that allegation, the plaintiff

was not bound to take issue on it. Did you prove the acceptance of the hops? No question was raised as to that. If the defendant meant to rely on the want of acceptance, he should have raised that issue on the pleadings. But here the only issue is, whether there was a delivery or not. This is not like the cases where a different thing was delivered, as saw-dust instead of sugar; but the delivery is of articles of the same nature, though inferior in value.

PARKE, B. It seems to me that no rule ought to be granted; and on this ground, that every material allegation in the plea was proved at the trial, and that the general allegation, that no hops whatever were delivered, was immaterial and might be rejected. Let us see what are the facts material and requisite to be proved, that are stated in this plea. It states that the bill was drawn and indorsed in payment of the price of certain hops, sold by the plaintiff to the defendant, as and for hops of a certain planter, and which were to answer certain samples, and then it alleges that the plaintiff had not delivered any hops [10] answering the said samples. That would be a good plea without more, and would shew a total failure of the consideration, which is to deliver hops answering to the samples within a reasonable time. If such inferior hops were accepted, that would be quite a different case, and would create a new contract. The only difficulty was, whether, in consequence of the introduction of this immaterial averment into the plea, the plaintiff was not put under a difficulty as to the mode of replying, and whether it was not therefore open to him, under the general traverse, to shew the delivery of some hops. But I think that would not be sufficient, and that it would be no answer to the plea, unless he had delivered others which were accepted: and that it would therefore be necessary in the replication to aver the acceptance of such others. The plaintiff is not, therefore, in a condition, on the pleadings as they stand, to take advantage of such a case: and even if he were, it did not appear that he had such a case to make in point of fact. The substance, therefore, of the plea being proved, the defendant was entitled to the verdict.

ALDERSON, B. I am of the same opinion. The latter allegation in the plea was an immaterial one, which need not be proved. It is a total failure of consideration, if there be a bargain for a certain kind of goods to be delivered in a reasonable time, and no such goods are delivered within a reasonable time. It is not enough for the seller to say he has delivered goods of a totally different kind, unless the other party accepts those other goods.

GURNEY, B., concurred.

Rule refused.

[11] DEARDEN v. EVANS. Exch. of Pleas. 1839.—Where large masses of stone had fallen from time to time, from some cliffs above upon the field of a copyhold, and had become thereby partially imbedded in the soil, there being no evidence to shew when any particular portion of them had fallen:—Held, that they were the property of the lord, and that the copyholder could not remove them for his own profit.

[S. C. 2 H. & H. 7; 8 L. J. Ex. 171; 3 Jur. 703.]

Trover for stones. Pleas, first, not guilty; secondly, that the stones were not the property of the plaintiff; on which issues were joined. At the trial before Alderson, B., at the last Liverpool Assizes, it appeared that the plaintiff was the lord of the manor of Rochdale, and that upon a field called Steanor Bottom Wood, which was part of a copyhold farm of the defendant within the manor, there lay a great quantity of stones of various sizes and weights, varying from the size of a man's hand to the weight of several tons, and known by the name of cobs, which had in course of time fallen from some neighbouring rocks, called the Redis-shore Scouts. Some of these were wholly, some partially, imbedded in the soil; the smaller ones lay loose upon the surface. It appeared that the lord had leased the quarries within the manor, and that the lessees had been in the habit of taking these cobs under their lease. The last fall of any stones from the rocks (which were not the property of the plaintiff) was stated to have been between thirty and forty years ago: the defendant was admitted to his copyhold in 1826. The part of the Steanor Bottom Wood not covered by the cobs

was used by the defendant as pasture land. It appeared, also, that in two instances the lord had been applied to for permission to remove some of the stones by other persons, and that the defendant had also in the first instance applied for permission to remove them, but, upon refusal, had done so without leave. Of late years the stones had become valuable for the purpose of making sleepers for a railway, and the defendant had broken up, and removed and sold, many of them for that purpose. At the trial, it was contended for the defendant that these were not minerals to which the lord was entitled, but mere chattels, which the copyholder had a right to take. The learned [12] judge was of opinion that *prima facie* they formed part of the soil of the close, and that if the defendant alleged that they were mere chattels, it was for him to shew when they came there, of which there was no evidence. His lordship left it to the jury to say, whether these stones had not fallen some time or other from the rocks above on the defendant's land, although there was no evidence to shew when any particular portion had fallen: and the jury having so found, the learned judge directed the verdict to be entered for the plaintiff, with nominal damages.

Wightman now moved for a new trial, on the ground of misdirection. The lord could be entitled to these stones only on the ground that they were annexations to the freehold, as being part of the stratum of the soil. But they were clearly no part of the original formation of the close, and were unattached to the soil except by their own weight. The general soil of the close was perfectly distinct from them. It is clear they would be mere loose chattels at the time of their first falling. [Alderson, B. There was nothing to shew that they were not there before the grant of the copyhold.] The question is, would the copyholder be guilty of waste by removing them? It is laid down that a copyholder cannot open new mines or quarries: but it seems that if he find open mines he may use the stones: see *Peachey v. Duke of Somerset* (1 Stra. 447): so, also, he cannot be guilty of waste by removing loose stones, when incumbering the surface. [Parke, B. It is not disputed that he might remove them for the improvement of the close, for the purposes of agriculture.] The whole cause of action, if any, arises on the removal; the subsequent sale of them does not alter the case.

LORD ABINGER, C. B. If it were necessary to decide whether a copyholder might remove stones, loose and re-[13]cently brought upon the land—or even larger stones which were incumbering the land, for the advantage of the copyhold estate, I probably should not be disposed to negative the proposition that he has such right. Probably even a tenant for years might do this, because he could not otherwise profitably enjoy the farm. But this is quite a different case—the question being, whether large stones, imbedded in the soil, and which perhaps may have been there since the deluge, may be removed by the copyholder. Now I think the evidence shews that the lord has exercised a right to remove these stones for his own profit, and although it was to the detriment of the copyholder. The case seems to me to be just the same as if a copyholder were to elaim a right to remove a portion of the land itself: these are stones imbedded in the soil, and form part of it, and part of the value of the land. I think, therefore, the verdict was quite right, and the conclusion of law drawn by the learned judge quite right also.

PARKE, B. I also think there is no ground for this rule; for that the point contended for by Mr. Wightman does not arise. If it had been shewn that these stones had come from the adjoining hills by some convulsion of nature, or by the act of God, while the defendant was the copyholder, his argument would be well founded; then they would belong, either to the party from whose lands they had been severed, or to the copyholder, as having fallen by accident upon his soil; and the lord would have no more right to them than in the case of an ordinary occupier of land under a land-lord. But that question does not arise here. These stones have been in the same state as far back as living memory goes, and are to be considered a portion of the soil, just as much as the gravel which forms a portion of the bed of a river, or as a great part of the soil in different parts of the country, which have been detritus from the neighbouring hills: therefore I think [14] they must be considered part of the soil belonging to the lord, and granted to him as part of the copyhold estate. And in that point of view, the evidence was strong to shew the right of the lord to take them as part of the soil. The learned judge so considered it, and the evidence justifies the view taken by him. If, therefore, the copyholder takes them for any purpose not

authorized for the benefit of the copyhold tenement, he is liable. The verdict was therefore right, and the ruling of the learned judge quite correct.

ALDERSON, B. It is quite clear that these stones were there before the defendant, for he came in 1826, and the last fall of stones was thirty or forty years ago: he took the copyhold, therefore, with the stones on it. I left to the jury the only point raised before me, and which was, in fact, the only question between the parties.

Rule refused.

DOE D. TOMES v. CHAMBERLAINE. Exch. of Pleas. 1839.—Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5 per cent. per annum on the purchase-money until the completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession on the same terms:—Held, that this was only a tenancy at will, which might be determined without notice to quit.

[S. C. 9 L. J. Ex. 38.]

Ejectment for a piece of land at Leamington. At the trial before Lord Denman, C. J., at the last Warwick Assizes, it appeared that the defendant had been let into possession of the land in question by the plaintiff under an agreement of purchase, dated the 22nd Feb. 1833, by which it was stipulated that the defendant should be let into possession forthwith, paying interest after the rate of 5l. per cent. per annum on the amount of the purchase-money until the completion of the purchase, which was to be completed by the 22nd May then next. The defendant had remained in possession of and built upon the land, and no evidence was given to shew that any conveyance had [15] been tendered to him, or that the plaintiff had taken any steps to enforce the completion of the purchase: but the defendant failing to pay the interest punctually, the present ejectment was brought, no notice to quit having been first given. It was contended for the defendant, that by the operation of the agreement a tenancy from year to year was created between the parties. The learned judge was of opinion that the defendant had nothing more than an estate at will, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Goulburn, Serjt., now moved accordingly. By this agreement, a reservation in the nature of an annual rent, under the form indeed of interest, was made payable. That created a tenancy between the parties, at all events until the 22nd of May following; and the defendant afterwards continued to hold on the same terms. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession" (Litt. s. 68; 2 Bla. Comm. 145). This is quite a different case. *Saunders v. Musgrove* (6 B. & Cr. 524; 9 D. & R. 529) is an authority to shew that the payments in this case became due as rent.

LORD ABINGER, C. B. I think there is no ground for a rule. If this were a case in a court of equity, it is clear the court would not allow the vendor to take back the estate, unless he were in a condition to fulfil the contract on his part. But in a court of law, we can only look at the legal title. This is not an estate for years, for life, in tail, or in fee: there is no annual reversion of rent, but only a reversion of interest until the principal money is paid, and the contract completed. In the case cited, there was a clear intention to create a tenancy at a fixed annual rent; here there is nothing of the kind.

[16] PARKE, B. At law, this is nothing more than an estate at will; there is a provision also for payment of interest, but not by way of compensation for the occupation of the land: the agreement for payment of interest is quite independent of the occupation of the estate. In *Saunders v. Musgrove*, it was clear that a sum of 100l. a year was to be paid as a compensation for the occupation of the premises, by equal half-yearly payments: that was clearly in the nature of a rent until the 25th of December then following, and if the contract were not then completed, to go on upon the same terms. That is not so here; and if the party be let into possession, he has nothing but the lowest estate known to the law, viz an estate at will, which may be determined by demand or by entry.

ALDERSON, B. I am of the same opinion. *Saunders v. Musgrove* was in effect the case of a letting at a yearly rent.

GURNEY, B., concurred.

Rule refused.

WARD v. PEARSON. Exch. of Pleas. 1839.—A declaration in assumption stated, that in consideration that the plaintiff would employ the defendant to build on a certain plot of ground, a room, booth, or building, and to fit it up according to certain plans agreed upon, for the sum of 20l., the defendant promised to erect the same by the 28th June, 1838. The defendant pleaded non assumpsit, and that the agreement was rescinded. The contract proved was, that the defendant should place upon a plot of ground, hired for the purpose by the plaintiff, certain seats and tables, to be completed four or five days before the 28th June, 1838, (the day of the Coronation), for 25l.; and it did not appear that there were any plans agreed upon. The judge at the trial having directed the declaration to be amended in conformity with the contract proved, the Court refused a new trial.

[S. C. 7 Dowl. P. C. 382; 2 H. & H. 2; 8 L. J. Ex. 163.]

Assumpsit. The declaration (as originally framed) stated, that [in consideration that the plaintiff would employ the defendant to build on a certain plot of ground a certain room, booth, or building, and to fit up and complete the same according to certain plans then agreed upon between the plaintiff and defendant, at and for the sum of 20l., the defendant promised the plaintiff to erect the same by the 28th of June, 1838]; and that the plaintiff, confid-[17]ing in the said promise of the defendant, employed the defendant to put up the said building according to the plans so fixed upon as aforesaid. Breach, that the defendant did not erect the said room, booth, or building, whereby the plaintiff was damnified, &c.

Pleas,—1st, non assumpsit; 2ndly, that the contract was rescinded by the consent of the plaintiff and defendant; on which issues were joined.

At the trial before Lord Abinger, C. B., at the London Sittings after Hilary Term, it appeared that the plaintiff, who was a licensed victualler, having hired some ground for the purpose of letting it out to spectators to view her Majesty's Coronation, employed the defendant, a carpenter, to put upon it some seats and tables, which were to be completed four or five days before the coronation (28th June, 1838), for 25l., and it did not appear that any plans were prepared. It was objected for the defendant, that there was a variance between this evidence and the declaration, and that an entirely different contract was proved from that alleged. The plaintiff's counsel thereupon applied to the learned Judge to amend the declaration, and he directed an amendment to be made in conformity with the contract proved. The declaration being amended, the part within brackets stood thus: [in consideration that the plaintiff would employ the defendant to erect upon a certain plot of ground certain seats or tables, at and for a certain sum, to wit, the sum of 25l., the same to be completed and finished four or five days before the day of the coronation, to wit, the 28th day of June, 1838, the defendant undertook, &c.]. The jury found for the plaintiff upon both issues, with 5l. damages.

Platt now moved for a new trial, contending that the amendment ought not to have been made, the contract proved being essentially different from that stated on the record. The defendant's pleading the second plea cannot [18] alter the rights of the parties on the first issue. [Alderson, B. But it shews the amendment was not material to the merits of the case.] The contract, as proved, differed from that alleged in the nature of the work to be done, in the time for doing it, and in the price.

LORD ABINGER, C. B. I am in general rather averse to making amendments, because I think it tends to produce laxity and carelessness in pleading: but in this case I thought myself bound to make the amendment, although I did it reluctantly.

PARKE, B. This seems to me to be precisely the case which the act of Parliament was meant to meet; it was an amendment in a matter wholly immaterial to the merits of the case, and which in no decree prejudiced the defendant in his defence: I entirely approve, therefore, of the course my Lord took. Unless the power of

amendment be liberally exercised, the rule which restricts parties to one count would operate very harshly.

ALDERSON, B. I think this is a case falling exactly within the act of Parliament. The parties came to try two things; first, whether there was a contract at all; secondly, whether it had been rescinded; and not to try the particular nature or terms of the contract. If this amendment were not allowed, it would be directly contrary to the meaning and spirit of the act. The defendant has clearly not been prejudiced in his defence thereby, for after the amendment was allowed, he called witnesses to prove that there was no contract at all, or if there was, that it had been rescinded by consent.

MAULE, B. This contract never having been reduced into writing, it remained quite open between the parties in what precise terms it would be proved; and if the plain-[19]-tiff were compelled to prove it exactly as it was stated in the declaration, in one precise form of words, it would do the greatest possible mischief. I think it is exactly the case which the act of Parliament meant to provide for.

Rule refused.(a)¹

BROWN AND ANOTHER v. FLEETWOOD. Exch. of Pleas. 1839.—Where A. purchased of B. his business of an attorney, the purchase-money to be paid by two instalments, and the conveyance contained a proviso giving A. the power, within a limited time, either of completing the purchase, or giving B. notice of his abandonment of the contract, in which case B. was to repay 50l. of the purchase-money:—Held, that B.'s discharge under the Insolvent Debtors' Act, before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50l. after such notice given; for that it was not a contingency capable of valuation at the time of the insolvency.

[S. C. 7 Dowl. P. C. 387; 2 H. & H. 6; 8 L. J. Ex. 169; 3 Jur. 289.]

Covenant on an indenture made between the plaintiffs and the defendant, dated 29th March, 1837, by which the plaintiffs agreed to purchase of the defendant his business as an attorney, for which they were to pay the sum of 200l. down, and a further sum of 200l. within a specified period. The deed contained a proviso giving the plaintiffs the power, within a year and a half, either of completing the purchase, or giving the defendant notice of their abandonment of the contract: in which latter case the defendant, one month after such notice, was to repay them 50l. of the purchase-money. The declaration alleged notice of abandonment by the plaintiffs within the specified time, a demand of the 50l. within a month after notice, and a refusal to pay the same. The defendant pleaded his discharge under the Insolvent Debtors' Act in bar of the action. At the trial before Patteson, J., at the last Stafford Assizes, it appeared that the defendant was discharged under the Insolvent Act in August 1838, and that the plaintiffs gave notice to abandon the contract in the September following. The plaintiffs had a verdict for 50l., the defendant having leave to move to enter a verdict for him, if the Court should be of opinion that this was a debt proveable in the Insolvent Debtors' Court, and from which the defendant was therefore protected by his discharge.

[20] Whately now moved accordingly. The value of this debt was capable of being ascertained and proved: it ought therefore to have been inserted in the defendant's schedule, but that not having been done, the discharge is a bar to this action. The case falls within the words of the 7 Geo. 4, c. 57, s. 51.(a)² This was a sum of

(a)¹ See *Sainsbury v. Matthews*, 4 M. & W. 343.

(a)² Which enacts, that the discharge of any such prisoner, so adjudicated as aforesaid, shall and may extend to any sum and sums of money, which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person or persons who would be a creditor or creditors of such prisoner, for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner, for the value of such sum or sums of money so payable as aforesaid, which value the said Court shall, upon application at any time made in that behalf, ascertain, &c.; and such creditor shall be entitled, in respect of such value, to the

money, payable at a future time, the value of which the Court might upon application have ascertained. It was also ascertainable by the plaintiffs, who had to pay it. In *Ex parte Tindal* (8 Bing. 406), it is laid down by Tindal, C. J., that it is not the less a contingent debt, capable of being proved, "because such event may never happen; for, though the debt may never be paid, it is nevertheless payable if the contingency does happen, and as such it is, strictly and properly speaking, payable on a contingency." [Parke, B. That was not a case of insolvency, but of bankruptcy. The 56th section of the Bankrupt Act, 6 Geo. 4, c. 16, makes express provision for the proof of contingent debts: but there is no such clause in the Insolvent Act.] The 51st section of the Insolvent Act seems to have a similar operation. He also cited *Lawrance v. Walker* (3 Dowl. P. C. 614).

LORD ABINGER, C. B. As far as that case goes, it is [21] against you. I am of opinion that there is no ground for the rule: this is a species of contingency which does not admit of valuation; non constat that the parties may choose to give up the contract at all.

PARKE, B. I am of the same opinion. It is clear that the insolvent is not discharged from any debt which cannot be proved before his discharge. It is different in case of bankruptcy; there the debt may either be valued at the time of the bankruptcy, or the party may wait until the contingency occurs. In the case of insolvency there is no provision for future valuation; the insolvent is discharged only from such debts as are capable of valuation at the time of the insolvency. It is perfectly clear that this was not; it was wholly uncertain at that time whether the business would be profitable or not, or whether the plaintiffs would choose to give it up or not.

ALDERSON, B. This debt was wholly incapable of valuation, either by the party who was to exercise the option, or by the party against whom it was to be exercised. In *Ex parte Tindal*, the question was, whether the debt was the subject of immediate valuation, or whether the parties were to wait until the contingency occurred.

Rule refused.

WRAY v. MILESTONE. Exch. of Pleas. 1839.—Where A. & B. had been partners in certain transactions for the purchase and sale of wool, having also had other dealings together; and they settled a general account, in which was an item to B.'s debit "to loss on wool," and which shewed a balance of 15l. against him: and B. signed the account and admitted the balance due:—Held, that A. might afterwards maintain an action to recover the amount of the item for the loss on the wool. Held, also, that it was no answer to such action, that, after the account was settled, the plaintiff had assented to a proposal of the defendant, that he should take out the balance in butcher's meat.

[S. C. 2 H. & H. 32.]

Debt for goods sold, and on an account stated. The defendant pleaded, 1st, payment into Court of 10l., and [22] that he was not indebted to a greater amount, which sum the plaintiff took out of Court in discharge of the causes of action to that amount; and 2ndly, a set-off for goods sold, and work and labour done, which was denied by the replication. At the trial, before the assessor of the sheriff of Yorkshire, it appeared that the plaintiff and defendant had been partners in some transactions as to the purchase and sale of wool, and that an account had been stated between them, relating to that and other matters of business, one of the items in which, against the defendant, was "to loss on wool." The account shewed a general balance of 15l. in favour of the plaintiff, and opposite that sum the defendant wrote "Due from me to Mr. Wray"—to which he signed his name. It appeared also that, after the settlement of this account, the defendant proposed to the plaintiff that he should take out the balance in butcher's meat, which he expressed his readiness to do. The present action was brought to recover the amount of the item entered in the account as the "loss on wool." It was objected for the defendant, 1st, that this being a partnership transaction, and it not appearing that a final balance had been struck of the partner-

benefit of all the provisions made for creditors by this act, without prejudice nevertheless to the respective securities of such creditor, excepting as respects such prisoner's discharge under this act.

ship account, and an express promise made to pay such balance, the action could not be supported: and 2ndly, that after the agreement to take out the debt in butcher's meat, the implied promise to pay it in money on request, which was necessary to support the declaration, did not arise. The learned assessor overruled the objections, and the plaintiff had a verdict for 6l. 3s. 4d.

Bliss now moved for a new trial, on the ground of misdirection. First, the authorities establish, that in order to sustain an action at law for a partnership debt, there must have been not only a final settlement of the balance on the partnership transactions, but also an express promise to pay such balance. The judgment of Buller, J., in *Foster v. [23] Allanson* (2 T. R. 479), proceeds expressly on that ground. *Moravia v. Levy* (id. 483, n.), and *Fromont v. Coupland* (2 Bing. 170; 9 Moore, 319), are authorities to the same effect. *Backstraw v. Imber* (Holt, N. P. C. 368) appears to be inconsistent with these authorities, but it was only a nisi prius decision, and it was cited and considered of doubtful authority in *Fromont v. Coupland*. And upon principle such a promise must be necessary to charge the party; because the mere settlement of an account does not change the nature of the items, nor the ability or disability of the parties. In *Henley v. Soper* (8 B. & Cr. 16; 2 Man. & R. 153), there was a decree of a colonial court ascertaining the balance, which might well be considered equivalent to a promise to pay it, both parties having appeared and submitted to the jurisdiction of the Court. At all events, it ought to have been left to the jury to say whether this was a final settlement.

Secondly, the express contract to take out the balance in butcher's meat, superseded the implied promise to pay the amount on request. [Parke, B. It was a mere assurance that if the defendant would pay in butcher's meat, the plaintiff would take it so: there was no binding contract.] It might be nudum pactum as to the sums for which the plaintiff had a legal demand, but not as to the partnership account, for which he could not sue in law.

LORD ABINGER, C. B. I think there is no ground for the motion, and that there is quite sufficient evidence of this being a final account. This was not the case of a general continuous partnership, but only in a particular adventure: and it was quite natural that the parties should take a settlement on the conclusion of each adventure, as shipowners settle on the conclusion of each voyage. Then the account being settled, there is an unqualified acknowledgment, signed by the defendant, that 15l. is due from [24] him to the plaintiff on the general balance of accounts between them. The cases cited and relied on in *Foster v. Allanson* were cases where there had been a settling in different characters, e.g., as executors and suo jure, in which case the settling did not alter the nature of the debt. If the item forms part of a settled account, with a promise to pay the balance, I think there is no need of an express promise to pay the particular item. As to the promise to take the amount in butcher's meat, it seems to me that the assessor was quite right in his ruling on that point: it was a mere expression of the plaintiff's willingness to take it in meat, if the defendant so paid it. At all events, the defendant should have shewn that he so tendered it.

PARKE, B. While this argument has been proceeding, I have looked through the notes of the assessor, and I am satisfied that there is no foundation for the motion. As to the necessity of an express promise, if there be any case which lays it down that an express promise is necessary after an account stated, which was meant to be a final account, I dissent from that doctrine. In many cases, the very nature of the transaction will explain with what view the account was stated: and if it be stated so as to shew a final balance then to be paid, the party will be liable. Here the partnership item is introduced as an item in the general account, and the defendant acknowledges the balance, and thereby becomes liable to pay; there is no occasion afterwards to go through the form of words that he promises; the transaction speaks for itself. With regard to the alleged agreement as to butcher's meat, in the first place, it was not made until after the account was signed, and the defendant had become liable; but I think also that it clearly was nudum pactum; it only amounted to this,—that the plaintiff was willing so to receive the amount, if the defendant so paid it; and it does not apply to the partnership item only, as to which there [25] was no previous liability at law; it could not, therefore, from the nature of the thing, be a binding contract between the parties to pay in that particular mode: independently of the objection that it was not made until after the settlement of the account.

ALDERSON, B. I think, if it were required, that there is an express promise in this case. There is a statement of accounts between the parties, and an admission that so much is due on the wool transaction: that is an item entered to the debit of the defendant, and the account containing it he signs, and thereby promises to pay that item.

MAULE, B. I know of no rule of law which requires, in this or in any other case, an express promise. The law requires a promise; which may be collected, sometimes from an expression in words, sometimes from other matters. Sometimes an account is so stated as in itself to import no promise: then a subsequent promise in words supplies the legal promise stated in the declaration. Here it is clear that the statement of the account itself imported a promise to pay the items included in it. As to the agreement about the butcher's meat, it is clear it was merely by way of accommodation to the defendant.

Rule refused.

HALLETT v. HALLETT. Exch. of Pleas. 1839.—An arbitrator who had power to enlarge the time for making his award, by indorsement on the order of reference, made the following indorsement:—"I direct that a rule of this court shall be applied for by counsel's hand, to enlarge the time of making my award." No such rule was applied for: but the parties subsequently attended meetings before the arbitrator and made no objection to the regularity of the enlargement.—Held, first, that the indorsement was itself a sufficient enlargement of the time: but secondly, that if it were not, the irregularity had been waived.

[S. C. 7 Dowl. P. C. 389; 2 H. & H. 3; 8 L. J. Ex. 174; 3 Jur. 727.]

Archbold had obtained a rule to shew cause, on the part of the plaintiff, why the award made in this cause [26] for the defendant should not be set aside, on the ground, that the time for making the award had not been regularly enlarged. The cause was referred by order of Nisi Prius, containing a clause empowering the arbitrator, in the usual terms, to enlarge the time by indorsement on the order. The several indorsements made by him were in the following terms:—"I direct that a rule of this Court shall be applied for by counsel's hand, to enlarge the time for making my award." The original time for making the award had expired before it was made. It appeared, however, from the affidavits in opposition to the rule, that the arbitrator (who was a layman) had applied to the plaintiff's attorney, on the 24th of May last (the day before the expiration of the time for making his award), for the form of an indorsement to enlarge the time, and that the attorney had supplied him with the above form: and further, that the attorney had attended all the subsequent meetings before the arbitrator, and made no objection to the regularity of the enlargement.

Barstow shewed cause. First, the indorsement itself is sufficient. The arbitrator states his own intention to enlarge the time, and although he does also that which is mere redundancy, viz., directs an application to be made to the Court for the purpose, that does not vitiate the indorsement. But, at all events, if the time has not been regularly enlarged, there has been a complete waiver of the irregularity by the subsequent attendance of the plaintiff's attorney; and the Court will not, when such a trick has been practised as in the present case, interfere to set the award aside. He cited *Halden v. Glasscock* (5 B. & Cr. 390; 8 D. & R. 151).

Archbold, *contra*. This enlargement was irregular. The form given by the plaintiff's attorney was not complied [27] with, for no rule of Court was applied for. Nor is the plaintiff bound by the act of his attorney in giving that form; it was given, not in his character of attorney for the plaintiff, but rather as the friend of the arbitrator. The arbitrator, therefore, had no authority to make an award: not under the original rule of reference, because it had expired; nor by consent, because the consent must be limited to the terms in which it was given, viz., on the granting of a rule of Court for the enlargement.

PARKE, B. I think this rule ought to be discharged with costs. It is not necessary finally to decide whether the enlargement was proper in itself, although I incline to think it was; because, although not in words, yet in substance, the arbitrator expresses his own opinion that the time ought to be enlarged, though he goes on to direct that a rule of Court should be applied for for the purpose, which, accord-

ing to the original submission, was not necessary. But, at all events, it is clear there is ample evidence that the attorneys of both parties—and there is quite sufficient proof that they were authorized by the parties—subsequently went on with the reference, which affords good evidence of a new submission by parol on the terms of the original submission. It is clear, therefore, that we ought not to set aside the award, and the rule must be discharged with costs.

ALDERSON, B. I am of the same opinion. I am inclined to think this was a good enlargement. The arbitrator has power to enlarge the time by indorsement: then he says, in substance, I mean to enlarge the time for making my award, and I ask the concurrence of the Court in my doing so. The Court does not intimate its concurrence, but that was unnecessary; so that it stands on the expression of the arbitrator's own opinion, that the time ought to be enlarged. I am strongly inclined to think it [28] was a good enlargement in point of regularity. But, at all events, it is clear that the parties have gone on as upon a good enlargement, and therefore we ought not to set aside the award. The rule must be discharged with costs, and I cannot doubt that the plaintiff's attorney will pay them.

GURNEY, B., and MAULE, B., concurred.

Rule discharged with costs.

TURNOR v. DARNELL. Exch. of Pleas. 1839.—By the 85th section of the 1 & 2 Viet. c. 110, the case of a remanded insolvent is taken entirely out of the operation of the act, and therefore a writ of detainer may be lodged against him as heretofore, and no writ of summons need be sued out, nor any application made to a Judge under the 3rd section.

[S. C. 7 Dowl. P. C. 346; 2 H. & H. 35; 3 Jur. 408.]

Knowles moved for a rule to shew cause why the defendant should not be discharged from the custody of the sheriff of Middlesex, under the following circumstances: The defendant had taken the benefit of the Insolvent Debtor's Act, and on the 11th of February last, was ordered by that Court to be discharged, after being in prison for the space of five months at the suit of the plaintiff. On the 12th of February, the plaintiff lodged a capias against him, in the form prescribed by the 1 & 2 Viet., c. 110, but no application had been made to a Judge for an order under the 3rd section of that act, nor had any writ of summons been sued out: the question was, whether either of these was necessary. Knowles directed the attention of the Court to the 85th section of the statute, which enacts that "in all cases where it shall have been adjudged that any prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his or her creditors, with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if [29] this act had not passed." [Parke, B. A Judge's order could not be obtained in this case, because the plaintiff could not make an affidavit that the defendant was about to quit the country. Then the question is, whether the 85th section does not leave the parties in exactly the same position as before, as to the process in such a case.] According to the positive enactment of the 2nd section there ought to be a writ of summons, because no doubt this is the commencement of an action. [Alderson, B. The 85th section says the prisoner shall be detained, &c. in the same manner as if this act—i.e. the same act which requires the writ of summons—had not passed.]

PARKE, B. There would have been no difficulty at all, if the 2nd section had contained the same words as the first—"except in the cases and in the manner hereinafter provided for." But the question is, whether s. 2 is not superseded altogether as to this case, by s. 85; and I think the effect of the latter section is, to take the case entirely out of the operation of the act, and leave it as if the act had not passed; that in this particular case, therefore, we must operate an exception upon s. 2, and there is no necessity for a writ of summons.

ALDERSON, B. That construction is not at all inconsistent with the general provisions of the act, because the 85th section applies to a particular class of creditors who were expressly mentioned in the Insolvent Debtors' Act.

The other Barons concurred.

The Court, however, considering the question as one of some importance in practice, gave Knowles the option of taking a rule nisi if he thought fit; but he declined, on consideration, to draw up the rule.^(a)

[30] SUGARS v. CONCANEN. Exch. of Pleas. 1839.—An application to set aside an arrest made on a Judge's order, under the 1 & 2 Vict. c. 110, s. 3, must be made promptly; and as it seems, within the time for putting in bail.—In order to excuse the delay, on the ground of a previous application at chambers, the rule must be drawn up on reading the summons, or it must be shewn by affidavit.

[S. C. 2 H. & H. 5; 8 L. J. Ex. 159.]

J. W. Smith had obtained a rule to shew cause why the bail-bond executed by the defendant in this case should not be delivered up to be cancelled, on entering a common appearance. It appeared that an order of Coltman, J., had been obtained, for issuing a *capias* against the defendant, under the 1 & 2 Vict. c. 110, s. 3; upon which he was arrested on the 28th of March. The present application was made on the 17th of April, on the ground of an irregularity in the copy of the *capias* served, which (following the old form) stated the writ to be returnable within four calendar months instead of one. The debt and costs had since been paid.

W. H. Watson shewed cause, and objected that the application was too late. The rule that applications of this nature must be made promptly, had not yet been applied in practice to the case of an arrest under the 1 & 2 Vict. c. 110, s. 3, but there could be no doubt that it equally applied to it in principle. He cited *Brashour v. Russell* (4 Bing. N. C. 31; 5 Scott, 268), where it was held, that an application to discharge a defendant out of custody for a defect in process, must be made within the ordinary time for putting in bail. The Court then called on

Smith, to support the rule. He argued that the writ of *capias* under the new act stood upon a ground somewhat different from the ordinary bailable process before, being issued after hearing affidavits, and the Judge exercising a discretion. He stated also, in order to account for the delay, that an application had first been made at chambers to set aside the writ; and on Watson's objecting that [31] that did not appear upon the affidavits or the rule, he produced the summons and Judge's order, and urged that the Court would take judicial notice of the Judge's signature thereto. [Parke, B. No; because if the rule had been drawn up on reading it, the other side might have given some explanation of it by affidavit.] They must be fully cognizant of it. [Alderson, B. That is not the question; but whether, the rule not being drawn upon reading it, they might not reasonably suppose you did not mean to rely on it.]

Per Curiam. Rule discharged with costs.

BORTHWICK v. RAVENSCROFT. Exch. of Plea. 1839.—The defendant, whose real name was Humfrey D. Ravenscroft, was described in the writ of summons, and *distringas* thereon, as Henry R. On an application to set aside the *distringas*, he entitled his affidavit in the cause "*B. v. Humphrey D. R., sued as Henry R.*" Held incorrect, there being no such cause until appearance.

[S. C. 7 Dowl. P. C. 393; 2 H. & H. 4; 8 L. J. Ex. 160; 3 Jur. 703.]

Gray had obtained a rule to shew cause why the *distringas* issued in this cause should not be set aside for irregularity, on the ground that the defendant, whose real name was Humphrey Davies Ravenscroft, was described in it as Henry Ravenscroft, and that it had issued after the expiration of more than four months from the teste of the writ of summons.

Humfrey shewed cause, and objected that the affidavit of the defendant, on which the rule had been obtained, was wrongly intitled. The title of the cause was stated

(a) The application was subsequently renewed by Humfrey, when the Court again expressed their opinion that the case was not within the statute, and refused the rule.

tobe—*Borthwick v. Humphrey Davies Ravenscroft, sued as Henry Ravenscroft*. He contended that this was a misdescription of the cause.

Gray, contra, urged that the defendant had rightly designated himself by his proper name:—

But per Curiam. There is, at present, no such cause [32] as that described in the affidavit: after appearance, the title might properly be changed: but until then there is no such cause as is there stated.

Rule discharged without costs.

IN THE MATTER OF PARKER AND OTHERS. (THE CASE OF THE CANADIAN PRISONERS.)

Exch. of Pleas. 1839.—The Court will not grant a habeas corpus to bring up a prisoner for the purpose of being discharged, on the ground that he is illegally in custody, unless there be an affidavit from himself, or it be shewn that he is so coerced as to be unable to make one.—The return of a writ of habeas corpus to bring up a prisoner in the custody of the gaoler of Liverpool, for the purpose of discharging him, stated that the prisoner was indicted for high treason in Upper Canada, and before his arraignment petitioned the lieutenant-governor, in accordance with the Colonial Act of 1 Vict. c. 10, (which authorizes the pardon of persons indicted for high treason, on condition of being transported from the province, &c.), confessing his guilt, and praying for a pardon on such conditions as the governor and council should think fit; that the governor consented that mercy should be extended to him, on condition that he should be transported to Van Dieman's Land for life, to which condition the prisoner assented; that thereupon the governor, by letters patent, pardoned the prisoner on the above condition; that there being no means of transporting him directly from Upper Canada to Van Dieman's Land, it became necessary to take him to Quebec, in Lower Canada, that being the most convenient place for the purpose; whereupon, and in order to carry the condition into effect, the prisoner was conveyed, by warrant of the governor of Upper Canada, into Lower Canada, and then, by warrant of the governor of Lower Canada, delivered into the custody of the sheriff of Quebec for safe keeping until he could be transported; that there not being any means of conveying him directly from Lower Canada to Van Dieman's Land, it became necessary to convey him to England, to be taken from thence to Van Dieman's Land, and thereupon he was delivered by the sheriff of Quebec into the custody of the captain of a vessel, to be conveyed to England; who, having arrived at Liverpool with the prisoner on board, and there not being the means immediately ready for conveying him thence to Van Dieman's Land, delivered him into the custody of the gaoler of Liverpool, to be kept while means were preparing to transport him thither.—The Court refused to discharge the prisoner; on the ground that, even if the condition of the pardon were not lawful, or if, being lawful, the prisoner was not an assenting party to it, he was still liable to be tried for the treason in England, and therefore any subject might detain him in custody until he was dealt with according to law.

[S. C. 7 Dowl. P. C. 208; 2 H. & H. 45; 8 L. J. Ex. 81. Referred to, *R. v. Mount*, 1875, L. R. 6 P. C. 305.]

In Hilary Term (Jan. 24th) Roebuck moved for writs of habeas corpus, to be directed to William Bateheldor, the governor of the borough gaol of Liverpool, commanding him to bring up the bodies of John G. Parker, Randall Wixon, James Brown, and Leonard Watson, in order that they might be discharged out of custody. He moved on an affidavit of Mr. Waller, clerk to Messrs. Ashurst & Gainsford, solicitors, stating that he (the deponent) had applied to Mr. Bateheldor, on behalf of the prisoners, for [33] a copy of the warrant under which they were detained, and had received the copy annexed thereto; and also on an affidavit of Mr. Ashurst, stating that it was recited in such warrant that the prisoners had been convicted of treason, which statement he believed to be untrue, and that they had never been tried by any court of law. The Court having intimated that there ought to be an affidavit from the prisoners themselves, Roebuck referred to the case of the *Hollentot Venus* (13 East, 196), to shew that that was not necessary.

But per Curiam. There a reason was assigned for not producing an affidavit from

the party herself. Before granting a habeas corpus to remove a person in custody, we must ascertain that an affidavit is not reasonably to be expected from him. An affidavit is absolutely necessary, either from the party who claims the writ, or from some other person, so as to satisfy the Court that he is so coerced as to be unable to make it.

Accordingly, on the following day, Roebuck renewed his application on the affidavits of the four prisoners themselves, stating that they had never been arraigned, tried, convicted, or sentenced by any court in Canada or elsewhere, and that they were totally ignorant of the term for which they were detained. Although, in *Hobhouse's case* (3 B. & Ald. 420), it was laid down that the writ of habeas corpus did not issue of course, but that the Court must exercise a discretion upon it; yet here the Court, finding that the prisoners were detained on a warrant, the force of which was spent on their arrival in England, and which could not authorize the detention of any person here, and which also contained untrue allegations as the grounds on which it proceeded, would consider this sufficient to constitute a *prima facie* [34] case, and to call upon the party detaining the prisoners to shew to the Court the grounds of their detention.

The writs having been granted, the following return (*mutatis mutandis*) was made in the case of each of the prisoners:—

“I, William Batcheldor, keeper of her Majesty's gaol of and for the borough of Liverpool, in the writ to this schedule annexed named, do certify and return, in obedience to the said writ, that by a certain statute of her Majesty's province of Upper Canada, in North America, [1 Vict. c. 10], intituled, ‘An Act to enable the government of this province to extend a conditional pardon in certain cases to persons who have been concerned in the late insurrection,’ made and passed in the first year of the reign of her present Majesty, by the Queen's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the said province, under and by virtue of a certain act of Parliament, made and passed in the thirty-first year of the reign of his late Majesty King George the Third, intituled ‘An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, An act for making more effectual provision for the government of the province of Quebec in North America, and to make further provision for the government of the said province;’ and which first-mentioned statute was duly passed by the legislative council and assembly of the said province of Upper Canada, and assented to in her Majesty's name, by the person who had been and was appointed, at the time of passing the said first-mentioned statute as aforesaid, by her Majesty, to be the governor of the said province of Upper Canada; reciting, that there was reason to believe that among the persons concerned in the late treasonable insurrection in that province, there was some to whom the lenity of the government might not improperly be extended, on account of the artifices used by desperate and unprincipled persons [35] to seduce them from their allegiance; it was, amongst other things, enacted, that upon the petition of any person charged with high treason committed in the said province, preferred to the lieutenant-governor before the arraignment of such prisoner, and praying to be pardoned for his offence, it should and might be lawful for the lieutenant-governor of the said province, by and with the advice and consent of the executive council thereof, to grant, if it should seem fit, a pardon to such person, in her Majesty's name, upon such terms and conditions as might appear proper, which pardon being granted under the great seal of her Majesty's said province, and reciting, in substance, the prayer of such petition, should have the same effect as an attainder of the person therein named for the crime of high treason, as far as regarded the forfeiture of his estate and property, real and personal; and that in case any person should be pardoned under that act, upon condition of being transported or banishing himself from that province, either for life or for any term of years, such person, if he should afterwards voluntarily return to that province, without lawful excuse, contrary to the condition of his pardon, should be deemed guilty of felony, and should suffer death as in case of felony. And I do further certify, that by another statute of her said Majesty's province of Upper Canada, intituled, ‘An act to provide more effectually for the punishment of certain offences, and to enable the governor, lieutenant-governor, or person administering the government of this province, to commute the sentence of death in certain cases, for other punishment in this act mentioned,’ made and passed in the seventh year of the reign of his late Majesty King William the Fourth, in the

manner and by the persons and authority required for that purpose by the said act of Parliament made and passed in the thirty-first year of the reign of his late Majesty King George the Third—after reciting that it was expedient to make further provision for the effectual [36] punishment of certain offences thereafter mentioned,—it was enacted, that in case of the conviction of any person after the passing of that act, of various felonies and offences (particularized in the return), the person convicted of such offence might be sentenced to such punishment as was then provided by law for any such offence, or if the Court, which was to pass sentence on such convict, should think fit, it might be sentenced to be imprisoned only, or imprisoned and kept to hard labour, or in solitary confinement, in the common gaol, or in any penitentiary or house of correction that had been or might be provided in that province for such purpose, for any term not exceeding seven years. [The act then contained various provisions, which were particularly set out in the return; and continued]—and that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, to commute the sentence of death, which might be passed upon any person convicted of a capital crime, other than high treason or murder, for transportation for life or term of years, to such place in his Majesty's dominions as might be assigned for the reception of convicts, or for banishment from that province for life, or any term of years, or for solitary confinement, or confinement with or without hard labour in any penitentiary or house of correction that might be appointed for such purposes, either during life, or for any term of years. And I do further certify, that by another statute of her Majesty's said province of Upper Canada, intitled, 'An act respecting the transportation of convicts,' made and passed in the seventh year of the reign of his late Majesty King William the Fourth, in the manner and by the persons and authority required for that purpose by the said act of Parliament made and passed in the thirty-first year of the reign of his late Majesty King George the Third, after reciting that it was expedient to facilitate the transportation of offenders to such place or [37] places in his Majesty's dominions as might be assigned for the reception of convicts, and to make further provision in respect to the punishment of transportation, it was enacted, that notwithstanding anything contained in a certain act of the Parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, intitled, 'An act for the further introduction of the Criminal Law of England in this province, and for the more effectual punishment of certain offenders,' it should be lawful, after the passing of that act, to sentence offenders to transportation, not only in such cases where by any law then in force, or thereafter to be passed, it was expressly provided that such offenders might be transported, but also in every case in which, by the provisions of the said act passed in the fortieth year of his late Majesty King George the Third, the person convicted would be liable to be banished from that province: provided always, nevertheless, that no offender should, under the authority of that act, be sentenced to be transported except by such court, and in such cases, and for such term of time, as the same offender might, according to the said act, be banished from that province; and that nothing in that act contained should extend, or be construed to take away or affect the power of sentencing offenders to be banished according to the act thereinbefore recited, when it should appear proper to pass such sentence: and that all and singular the provisions then in force, which were contained in the said act of the Parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, respecting persons returning to that province before the expiration of the period for which they had been banished by sentence of a court, or had consented to be banished, according to the terms of any conditional pardon granted to a convict sentenced to suffer death, should equally extend to, and be in force with respect to, any person returning from transportation after that act, when such person should have been sentenced to be transported, or having been capitally convicted, should have been pardoned on condition of being transported for a time to be mentioned in such sentence, or for life, where that might be lawful, and should in the opinion of the court passing such sentence appear proper, to such place as the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, should appoint. And that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, to determine, upon

reference to his Majesty's government in England, to what foreign possession of his Majesty convicts should be transported from that province, under the provisions of that act; and that an instrument under the sign manual of the governor, lieutenant-governor, or person administering the government of that province, and directed to the Judges of the Court of King's Bench, declaring to what colony or place it had been determined to transport any convict, should be sufficient authority for the Judge who passed sentence on such convict, or, in his absence, for any other Judge of the said Court, to make his warrant, authorizing any person or persons to carry and secure such convict, in and through that province, towards the sea-port or place from whence he or she was to be transported; and if any person or persons should rescue such convicts, or any of them, or assist them, or any of them, in making their escape from such person or persons as should have them in their custody as aforesaid, such offence should be punishable in the same manner as if such convict had, at the time it was committed, been confined in a gaol or prison, in the custody of the sheriff or gaoler, after sentence for the crime of which he should have been convicted. And that if, by reason of any difficulty occurring which might prevent the transport-[39]-ation or reception of any convict in any colony or possession of his Majesty, the sentence which should have been passed on any such convict could not be carried into effect, such convict might be detained in prison for a period, not longer than that for which he should have been sentenced to be transported, unless it should appear expedient to pardon such convict, in which case it might be made a condition of such pardon that the convict should banish himself from that province for a period not exceeding the residue of the time for which he was to have been transported. And I do further certify, that after passing the said first-mentioned statute, to wit, at a special session of Oyer and Terminer and gaol delivery began and holden at Toronto, in the home district of the said province, on Thursday the 8th day of March, in the first year of the reign of her said Majesty, before the Honourable John Beverley Robinson, Chief Justice of the said province, and others his fellows, justices and commissioners of our said lady the Queen, under and by virtue of her said Majesty's Commission under the great seal of the said province, issued in pursuance of another statute of her Majesty's said province, duly passed in the same manner and by the same authority as the said first-mentioned statute, on the 12th day of January, in the first year of her Majesty's reign, and intituled 'An act to provide for the more effectual and impartial trial of persons charged with treason and treasonable practices committed in this province,' the said J. G. Parker was indicted for the crime of high treason, and before the arraignment of the said J. G. Parker, he the said J. G. Parker humbly petitioned the lieutenant-governor of the said province in accordance with the said statute first herein mentioned, confessing his guilt of the treason charged against him as aforesaid, and professing his penitence, and praying for the merciful consideration of his case, and that her Majesty's gracious pardon might be extended to him upon such conditions as the said lieute-[40]-nant-governor of the said province, by and with the advice of the said executive council, should see fit; and the said lieutenant-governor, by and with the advice of the said executive council, did, in her said Majesty's behalf, consent that mercy should be extended to him the said J. G. Parker upon the conditions following, that is to say, that the said J. G. Parker be transported and remain transported to her Majesty's penal colony of Van Dieman's Land for and during the term of his natural life; to which terms and conditions the said J. G. Parker did assent, and the said lieutenant-governor did thereupon, in her Majesty's name, on the 22nd of October, in the year of our Lord 1838 aforesaid, by letters patent under the great seal of the said province of Upper Canada, dated the day and year last aforesaid, pardon, remit, and release the said J. G. Parker of and from all and every punishment whatsoever which might be inflicted upon him the said J. G. Parker by reason of the treason so as aforesaid confessed by him, upon condition nevertheless that he the said J. G. Parker should be transported and remain transported to the said penal colony of Van Dieman's Land for and during the term of his natural life. And I do further certify and return, that there being no means of transporting the said J. G. Parker directly from Upper Canada aforesaid to Van Dieman's Land aforesaid, it became and was necessary to take him to Quebec, in her Majesty's province of Lower Canada in North America, for the purpose of carrying the said condition in the said pardon into effect, the said place called Quebec being the readiest and most convenient place for that purpose; whereupon, and in order to carry the said condition into effect,

the said J. G. Parker was, after the said pardon, conveyed by the authority and warrant of the said lieutenant-governor of Upper Canada, from the said province of Upper Canada unto the said province of Lower Canada, and was there, upon his arrival in Lower Canada aforesaid, by virtue of a warrant in that behalf of Sir John [41] Colborne, governor of the said province of Lower Canada, delivered into the custody of the sheriff of the district of Quebec, in Lower Canada aforesaid, for safe keeping until he could be transported according to the said condition, the same being the proper and most convenient custody in that behalf. And I do further certify and return, that there not being any means of conveying the said J. G. Parker directly from Lower Canada aforesaid to Van Dieman's Land aforesaid according to the said condition, it became and was necessary, in order to carry the said condition into effect, to convey the said J. G. Parker to England, to be taken from thence to Van Dieman's Land, in fulfilment of the said condition: and thereupon afterwards, to wit, on the 17th day of November, 1838, the said J. G. Parker was delivered by the said sheriff of Quebec into the custody of Digby B. Morton, captain of the bark 'Captain Ross,' for the purpose of being conveyed to England aforesaid, to the end that the said J. G. Parker might be thence again transported to Van Dieman's Land as aforesaid. And the said Digby B. Morton having arrived with the said ship at Liverpool as aforesaid, to wit, on the 17th day of December last, with the said J. G. Parker on board thereof, and there not being the means immediately ready for conveying him from Liverpool aforesaid to Van Dieman's Land as aforesaid, it became and was necessary that the said J. G. Parker should be placed in some safe custody until the means could be provided for conveying him to Van Dieman's Land as aforesaid; and the said gaol of and for the said Borough of Liverpool being the fittest and most convenient place for that purpose, he the said Digby B. Morton did, on the day and year last aforesaid, deliver the said J. G. Parker into my custody at Liverpool aforesaid, and I have kept him in my custody whilst means have been and are preparing with all possible dispatch for the causing the said J. G. Parker to be transported to Van Dieman's [42] Land as aforesaid. And these are the causes of my detaining the said J. G. Parker in my custody, and whose body I have ready, as by the said writ I am commanded."

This return having been made, it was moved to discharge the prisoners on the ground of its insufficiency, and the case was fully argued on several days in Hilary and Easter Terms.

Counsel for the prisoners, M. D. Hill, Falcner, Roebuck and Fry; for the Crown, the Attorney-General, the Solicitor-General, Sir F. Pollock, and Wightman.

The points made on behalf of the prisoners were as follows (a):—

I. That the return stated no conviction of the prisoners, and that without a conviction there could be no authority to any person in this country to hold them in custody. That no provincial statute could give such authority, but it must be founded on an act of the imperial legislature. That the only act on which such authority could be rested was the Transportation Act, 5 Geo. 4, c. 84, s. 17, which in its terms applied only to convicted persons; that is, to persons on whose guilt there had been an actual adjudication by some Court or Judge. That the pardon here could not be considered an attainder, since the Provincial Act expressly enacted that it should have such effect only as regarded the forfeiture of property: and that the proceedings were in themselves repugnant to the principles of English law, everything having been done in private, without any means afforded to the prisoners to resist them by themselves or by counsel on their behalf.

II. That the return did not state that there had been any judgment of transportation, but merely that the Governor of Upper Canada had thought fit to commute [43] the punishment, on the petition of the prisoners to that effect. That a power of transportation in invitum was not known to the Common law of England, and

(a) The case having been previously argued in the Court of Queen's Bench, it is not deemed necessary to state the arguments in this Court in detail, especially as the judgment proceeded on other considerations: see the report in the former Court at length, 1 Perry & Davidson. A full report of all the proceedings in both Courts, with an able introduction on the writ of habeas corpus, has also been published by Mr. Fry, one of the counsel for the prisoners.

could much less be exercised by a colonial government. On this point the following authorities were cited: Hobart, 61; 1 Bla. Comm. 137; Co. Litt. 133 a.; Hawk. Pl. Cr. c. 33 (vol. iv. p. 297). And to shew that the practice of transportation began shortly after the plantation of the American colonies, and was exercised only with the assent of the prisoner, reference was made to Kelynge's Reports, pp. 4 and 45; and North's Life of Lord Guildford, vol. ii. p. 24.

III. That the provincial statute could not, at all events, have any operation out of the limits of the province of Upper Canada, which was, in relation to this country, a foreign state, at least as regarded the punishment of criminals. On this point the learned counsel referred to the principle of the Civil law—"Extra territorium jus dicenti impune non paretur (Dig. lib. ii. tit. 1, s. 20); to the stat. 31 Geo. 3, c. 31, which established the present government of Canada; to the judgment of Lord Loughborough in *Folliott v. Ogden* (1 H. Bl. 135), and of Lord Ellenborough in *Woolf v. Orholm* (6 M. & Sel. 99); to Story's Conflict of Laws, c. 16, p. 516; to the cases of *Buchanan v. Rucker* (9 East, 192; 1 Campb. 63), and *Bequet v. McCarthy* (2 B. & Adol. 951); and to the provisions of the statutes 11 Geo. 4 and 1 Will. 4, c. 30, and 1 & 2 Vict. c. 9.

IV. That, even assuming the transportation not to be unlawful in itself, it had been illegally carried into effect, the Governor of Lower Canada having no authority to intervene and to direct the captain of the vessel to bring the prisoners to Liverpool, and the intention of the Crown that they should be brought there and detained by the gaoler of Liverpool, not being signified by any legal docu-[44]-ment, or through any constitutional authority; and the warrant not being directed personally to Mr. Batchelor:—2 Inst. 186, and 1 Bla. Comm. 136, being referred to.

V. That the return was clearly insufficient for uncertainty, because it did not set out the various documents necessary to enable the Court to see that the detention of the prisoners was justified by law. On this head the following authorities were cited: *Bushell's case* (Vaughan, 135; T. Jones, 13; 6 How. St. Tr. 999), *Thomlinson's case* (12 Co. 104), *Seeles's case* (Cro. Car. 557), *Anon.*, 1 Ventr. 336; *Watson v. Clarke* (Carth. 69, 75), *Iker v. Clarke* (Salk. 349; Com. 24; 12 Mod. 114), *Deybel's case* (4 B. & Cr. 245), *Souden's case* (id. 294), and *Nash's case* (id. 295).

For the Crown it was answered:—

I. II. That although no conviction or judgment of transportation was stated in the return, yet proceedings were set forth which were tantamount to a conviction, the prisoners having confessed their guilt, and prayed for pardon, which had been granted on condition of their undergoing a sentence of transportation, which was legally enforceable against them, even in invitos:—that the Crown had power, where crimes had been confessed which rendered the prisoner liable to the punishment of death, to substitute for it any lesser punishment. Several instances were cited, in which it was alleged that such a power had been exercised,⁽ⁱ⁾ and it was expressly recognised by the stat. 20 Geo. 3, c. 46. That Canada was not a foreign state, but [45] a colony of England, and as such a part of the British empire, whose judicial proceedings the courts of this country were bound to support: the cases of *Folliott v. Ogden* and *Woolf v. Orholm* were therefore inapplicable.

III. The provincial statute, 1 Vict. c. 10, was one which it was perfectly competent to the legislature of Canada to pass, by virtue of the authority vested in it by the stat. 31 Geo. 3, c. 31, and it expressly conferred on the governor and council the power which they had exercised in granting the pardons in the present instance. It was an act of mercy, and so consistent with, instead of being repugnant to, the laws of England. A provision of the same nature was indeed contained in the Habeas Corpus Act, 31 Car. 2, c. 2, the 14th section of which enacted, that if any person convicted of felony should, in open court, pray to be transported, and the Court should think fit to give him leave for that purpose, he should be so transported. The

(i) The cases of the Earl of Clancarty, in the reign of Will. 3; of Sir John Maclean, in 1704; of Margery Day, in 1725; and of many persons implicated in the rebellion of 1745. It was stated that the patents of their pardon, founded on the confession of the prisoners before trial, and granted on the condition of transportation to America, remained in the Patent Office; and notes of them had been supplied to the Attorney-General by Mr. Dealtry.

expression in the provincial Act, "on such terms and conditions as might appear proper," must be construed to include every species of punishment known to the law; and although transportation might not be known to the common law, it had been frequently sanctioned as a mode of punishment by the legislature, and must be recognised by the Court as one well known to and consonant with the law. To the objection, that the attainder worked a forfeiture of property only, the answer was, that the 2nd section was inserted, not so to limit the effect of the attainder, but to prevent the absurdity which would follow in allowing a party pardoned of high treason, on condition of transportation, to remain a holder of lands in Canada. The pardon being conditional, the condition must be performed, otherwise the pardon would not operate at all. But the 5 Geo. 4, c. 84, s. 17, was a legislative recognition of transportation as a punishment which might be legally employed in the colonies. The learned counsel then entered on a review of all the acts passed by the imperial [46] legislature in reference to transportation, from the 18 Car. 2, c. 3, to the 5 Geo. 4, c. 84, to shew that they referred only to transportation from the United Kingdom, and therefore that the recital of the 5 Geo. 4, c. 84, that there were "laws in force" in part of the King's dominions not within the United Kingdom, authorizing transportation from the Colonies, clearly shewed that such must be colonial laws, which had therefore received thereby the sanction of the Imperial Parliament. The conclusion was, that the pardon would be valid in Canada; and if so, all steps subsequently taken in execution of it, within any part of the Queen's dominions, must equally be valid.

IV. For the same reason, the means taken by the Governor of Lower Canada to carry the pardon into effect, were also legal: it being, moreover, expressly averred in the return, that there were no direct means of transport from Canada to Van Dieman's Land. That a warrant was required only when prisoners were in execution, not when they were in custody under process of a court, or, as here, by virtue of proceedings tantamount to a sentence of a court: 1 Bla. Comm. 136; *Rex v. Clarke* (1 Salk. 349).

V. Lastly, the return was sufficiently precise, without setting out the documents verbatim; since it stated the whole truth of the matter, and gave the Court sufficient information to enable them to see the grounds and the validity of the prisoners' detention. The cases of *Rex v. Suddis* (1 East, 306), and *Barnes' case* (2 Rol. Rep. 157), were cited as decisive authorities against this objection: and the cases referred to on the other side were distinguished.

But, independently of these grounds, it was insisted that, even if it were conceded that the return was insufficient, the prisoners were not therefore entitled to their discharge. It appeared to the Court, from the return, that they were in custody on a charge of treason committed within the [47] Queen's dominions, which they had confessed, and for which, if the provincial statute were a nullity, and if they renounced the conditional pardon, they were liable to be tried in England, or to be sent back to Canada for that purpose: 31 Car. 2, c. 31, s. 16. On this point the following authorities were cited: *Rex v. Kimberley* (2 Str. 848), *Lundy's case* (2 Ventr. 314), *Rex v. Platt* (Leach's Crown Law, 157), *Rex v. Marks* (3 East, 157), and *Ex parte Krantz* (1 B. & Cr. 258; 2 D. & R. 411).

To this last objection it was replied on the part of the prisoners, that if the return were quashed, it was for all purposes non-existent, and then nothing whatever appeared to shew that the prisoners were lawfully detained.

Cur. adv. vult.

On a subsequent day (May 6th) the judgment of the Court was delivered by LORD ABINGER, C. B. This is a case of a Habeas Corpus to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoners. The Court is bound to look at the substance of the return; if it contains sufficient matter in substance to shew that the prisoner is lawfully detained, we cannot discharge him upon Habeas Corpus, though the return should in some respects be informal, or should go into matter not essential to the question. The return, then, in substance is, that by an act of the legislature of Upper Canada, the lieutenant-governor, with the advice of the executive council of that province, was enabled to grant a pardon under the great seal, upon such terms as might appear proper, to such persons then under charge of high treason committed in that province, as should petition the lieutenant-governor before their arraignment, praying for pardon, and that the same act provides, that in case any [48] person should be pardoned under that act upon condition of being

transported or banishing himself from that province either for life or for any term of years, such person, if he should return to the province before the period of his transportation or banishment, should be guilty of felony, and liable to suffer death; and after the passing of that act, the prisoner was duly indicted at a special Court of Oyer and Terminer, held by authority of another act of the same legislature, for the crime of high treason; that before his arraignment, in accordance with the statute, the prisoner petitioned the lieutenant-governor, confessing his guilt of the treason charged against him, and praying that her Majesty's pardon might be extended to him upon such conditions as the lieutenant-governor, by and with the advice of the executive council, should see fit; that the lieutenant-governor did, with the advice of the council, consent that her Majesty's mercy should be extended to him, upon condition that he should be transported and remain transported to her Majesty's colony of Van Dieman's Land for the term of fourteen years next ensuing the date of his arrival at Van Dieman's Land, to which terms and conditions the prisoner assented, and therefore the lieutenant-governor did, by letters patent under the seal of the province, remit and release the prisoner from all and every punishment that might be inflicted upon him by reason of the said treason so confessed, upon the condition, nevertheless, that he should be and remain transported for the term aforesaid. The return then states, that there being no means of conveying the prisoner directly from Upper Canada to Van Dieman's Land, it became necessary to convey him first to Quebec, in Lower Canada, and then to England, for the purpose of transporting him to Van Dieman's Land, and that accordingly he was transmitted by authority of the lieutenant-governor of Upper Canada to Quebec, and thence, by authority of the executive government there, which issued letters patent in the name of [49] her Majesty to command that the prisoner should be delivered to Digby Morton, the master of the bark "Captain Ross," to be by him conveyed to England, to such place as her Majesty should think fit, to the end that he might thence be transported to Van Dieman's Land: that Digby Martin accordingly brought him to Liverpool, the same being the place which seemed fit to her Majesty, and which was the most proper place for the purpose, and there delivered him to the gaoler of Liverpool, who detains him in his custody whilst means are preparing to transport him to Van Dieman's Land. This is the substance of the return, against which many ingenious objections have been urged; the principal of which seem to be, that the legislature of Upper Canada had no authority to make any such law; that if they had, it could be binding only within the precincts of that province; that it could communicate no authority to any person out of that province, and therefore could give none to the gaoler of Liverpool; that even if it could have that effect, the pardon granted under that law being conditional, it was not competent to the prisoner to accept a pardon, whereby he submitted himself to imprisonment or transportation; or that if it were competent to him to accept a pardon with such a condition, he has still a right to retract his consent, and to be set free from the obligation imposed upon him by the condition. All these topics have been elaborately argued on both sides, and have received due attention from the Court; but in the view which we take of the case, we do not think it necessary to pronounce any opinion upon them. If the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon; or if, having assented to it, his assent be revocable, we must consider him to have retracted it by this application to be set at liberty, in which case he is equally unable to avail himself [50] of the pardon. Looking then at the return, the position of the prisoner appears to be this: that he has been indicted for high treason committed in Canada against her Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in England; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of Liverpool, under such circumstances as would justify any subject of the Crown of England in taking and detaining him in custody until he be dealt with according to law. Any subject who held him in custody with a knowledge of the circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of Liverpool, or any other person who has him in custody, with knowledge of these circumstances, to let him go at large? If the prisoner cannot be lawfully transported under his present circumstances, it is to be presumed that the government, upon being so certified, will

take proper measures for prosecuting him for the crime of treason in England. For these reasons, we are of opinion that the prisoner must be remanded.

The prisoners were remanded accordingly.

GISBORNE v. HART. Exch. of Pleas. 1839.—Where an action of assumpsit, the declaration in which contained a count upon a promissory note for 22l. 11s. 9d., and a count upon an account stated for 30l., was referred to arbitration, and the arbitrator found that the plaintiff had good cause of action for, and was and is legally entitled to have, claim, and recover of and from the defendant, the sum of 22l. 11s. 9d., being the amount of the promissory note mentioned in the pleadings in the said cause:—Held, that the award was bad, inasmuch as it did not dispose of the issue upon the account stated.—In an action upon the award, the declaration stated that the original action was referred by a rule of court to A. B., who duly made his award of and concerning the premises so referred to him, and did thereby find &c. The defendant pleaded, that the said A. B. did not duly make and publish his award of and concerning the premises referred, in manner and form &c.:—Held, that the production of the award and the rule of court was sufficient *prima facie* evidence to support the issue on the part of the plaintiff, until the validity of the award was impeached by evidence *dehors* on the part of the defendant.

[S. C. 7 Dowl. P. C. 402; 8 L. J. Ex. 197; 3 Jur. 536.]

Debt. The declaration stated, for that whereas theretofore, to wit, on &c., a certain cause was pending and [51] undetermined in her Majesty's Court of Common Pleas at Lancaster, wherein the plaintiff and defendant were respectively also the plaintiff and defendant; and thereupon, to wit, on the same day and year aforesaid, by a rule or order of the said Court, upon bearing the attorneys or agents on both sides, and by their consent, it was ordered that the said cause be referred to the award, order, arbitrament, final end and determination of J. S. T. G., Esq., barrister at law, so that he made and published his award in writing, and ready to be delivered to the parties, or either of them requiring the same, on or before the 1st of June then next ensuing; and by the like consent it was ordered by the said Court, that the said arbitrator should be at liberty, if he should think fit, to examine the said parties to the said suit upon oath; and for that purpose the said parties, and also the witnesses to be examined before the said arbitrator, touching the matters referred, should and might be sworn before a Judge of her Majesty's Court of Common Pleas at Lancaster, or some commissioner duly authorized, or the said arbitrator; and that the said parties should produce before the said arbitrator all books, deeds, papers and writings whatsoever, in their or either of their custody or power relating to the matters in difference; and by the like consent it was also ordered by the said Court, that the costs of the said suit should abide the event of the award to be made and published as aforesaid, and that the costs of the reference should be in the discretion of the said arbitrator; and that the said parties should, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end and determination of the said arbitrator, so to be made and published as aforesaid; and by the like consent it was further ordered by the said Court, that if either of the said parties should by affected or wilful delay prevent the said arbitrator from making his award ready to be delivered as aforesaid, in that case the party so offending should pay the [52] other such costs as her Majesty's Court of Common Pleas at Lancaster should direct; and that neither of the parties should bring or prosecute, or cause to be brought or prosecuted, any writ of error, or file any bill of equity against the said arbitrator, or against each other, as by such rule or order, reference being thereunto had, will fully and at large appear: and the plaintiff in fact saith, that afterwards and before the said 1st day of June aforesaid, to wit, on the 30th of May in the year 1838 aforesaid, the said arbitrator took upon himself the said arbitration and reference, and also before the said 1st day of June, to wit, on the said 30th May, duly made and published his award in writing of and concerning the said premises so referred to him, ready to be delivered to the said parties or either of them requiring the same; and did thereby award, find, and adjudge that the plaintiff had good cause of action for, and was and is legally entitled to have, claim,

and recover of and from the defendant, the sum of 22l. 11s. 9d., being the amount of the promissory note mentioned in the pleadings in the said cause; and he did further award, order, and direct that the defendant should, on or before the 1st day of August then next, pay to the plaintiff, or to whom he might direct, at the office of Mr. W. C. Chew, of Manchester, his attorney, the said sum of 22l. 11s. 9d., together with the costs of the said action, and also the costs of the said reference and of his award, such costs in the meantime to be taxed by the proper officer of the said Court of Common Pleas at Lancaster, as by the said award, reference being thereunto had, will fully and at large appear: and the plaintiff further saith, that afterwards, to wit, on the same day and year aforesaid, the costs of the said action, and also the costs of the said reference and award, were duly taxed by the proper officer of the said Court, and amounted when so taxed to a large sum, that is to say, the sum of 82l. 1s., whereof the defendant then had notice; yet the defendant did not nor would, on or before the said [53] 1st August, at the office of the said W. C. Chew, or at any other time or place whatsoever, although often requested so to do, pay to the plaintiff the said sum of 22l. 11s. 9d. in the said award mentioned, or the said sum of 82l. 1s., the costs as aforesaid, but wholly refused so to do, and the same and every part thereof is still due and unpaid, whereby, &c.

The defendant pleaded, first, that the said J. S. T. G. did not duly make and publish his award in writing of and concerning the said premises referred to therein, (a) in manner and form as the plaintiff had above in that behalf alleged.

The second plea set out the pleadings in the cause referred, from which it appeared, that the declaration contained a count on a promissory note for 22l. 11s. 9d., and also a count upon an account stated for 30l.; that to the first count, the defendant had pleaded that he, the defendant, was induced to enter into and make the said promissory note and promise, through and by means of the fraud, covin, and misrepresentation of the plaintiff and his agent and others in collusion with him; concluding with a verification: and to the last count of the declaration, the defendant said that he did not promise in manner and form as the plaintiff had above thereof complained against him. And the plaintiff, as to the said plea of the defendant to the said first count of the declaration, said that the defendant was not induced to enter into and make the said promissory note and promise, through and by means of the fraud, covin, and misrepresentation of the plaintiff and his agents, and others in collusion with him and them, as in that plea alleged; on which issue was joined: the plaintiff also joined issue on the plea of non assumpsit. The plea then set out the award verbatim, and which corresponded with that stated in the declaration. The [54] arbitrator concluded by awarding as follows:—I do find and adjudge that the plaintiff had good cause of action for, and was and is legally entitled to have, claim, and recover of and from the said defendant, the sum of 22l. 11s. 9d., being the amount of the promissory note mentioned in the pleadings in the said cause; and I do award, order, and direct, that the said defendant shall and do, on or before the 1st of August next, pay to the said plaintiff, or to whom he may direct, at the office of Mr. W. C. Chew, of Manchester aforesaid, his attorney, the said sum of 22l. 11s. 9d., together with the costs of the said action, and also the costs of the said reference, and of this my award, such costs in the meantime to be taxed by the proper officer of the said Court of Common Pleas at Lancaster.”

The plaintiff, as to the first plea, joined issue; and as to the second plea, replied that the cause of action of him the plaintiff against the defendant on the said count upon the account stated in the second plea set forth, was upon an account stated between him and the defendant in respect of the same identical sum of 22l. 11s. 9d. mentioned in the said promissory note and the said count thereon, in the said second plea also set forth.

To this replication there was a special demurrer, assigning the following causes, viz.:—That it is not averred with sufficient certainty that any account was stated between the plaintiff and defendant, as alleged in the said count upon an account stated in the replication mentioned, or that the said supposed account was stated in respect of the same identical sum of money mentioned in the said promissory note only, and no other sum; or that any proof or evidence was produced or given before the said J. S. T. G., Esq., on the said arbitration or reference, of any such account

(a) It was said that this was a mistake in the copy for the word “him.”

having been stated, or that the said last-mentioned gentleman, in or by his said award, awarded or decided upon or in respect of any such supposed account stated.

[55] The plaintiff, upon the trial of the issue in fact, proved his case by production of the rule of reference and the award. The defendant contended that this was not sufficient, and that the plaintiff was bound to shew what was the matter referred, without which he failed to shew that the award was valid. The objection was overruled, and the plaintiff obtained a verdict; but leave was given to the defendant to move for a new trial, on the ground of the insufficiency of this evidence. A rule having been obtained accordingly, the arguments on it and on the demurrer were heard together.

Cresswell, for the defendant. The award is bad, inasmuch as it does not dispose of all the matters referred. The matters referred are, in effect, an action on a promissory note and an action upon an account stated; and it was necessary to make a determination on each issue; but the arbitrator has made no award as to the issue on the account stated. These two counts, since the new rules, cannot be considered to be for the same cause of action. The case of *Doe d. Madkins v. Horner* (3 Nev. & P. 344) applies in principle to the present. There an award in an action of ejectment was held bad because it did not find upon which of two demises the plaintiff was entitled to recover; and Littledale, J., put this case:—"Suppose a reference of an action of assumpsit brought to recover 50l. as the price of a horse, and 50l. as the price of a bale of cloth; an award that the plaintiff was entitled to 50l. for the horse would certainly leave the other claim for cloth quite open." So here, the award on the promissory note would leave the claim upon the account stated quite open.

Martin, *contra*. This case has been argued on the assumption that the award is made as to the promissory note alone, but that is not so. Although the action embraced [56] two issues, yet the account alleged in the one may have been stated of the promissory note mentioned in the other; and that is averred to have been so in the replication, and is so admitted by the demurrer. The award does not say that the plaintiff has a good cause of action on the count on the promissory note, but "for the amount of" the promissory note. [Lord Abinger, C. B. You say in the replication that it is the same sum, but the arbitrator has not said so.] The award is substantially a finding on both issues. A finding that the plaintiff has a good cause of action, is a finding in his favour on all the issues: *Dicus v. Jay* (5 Bing. 281). [Parke, B. In that case there was in reality only one issue; for the plea of the general issue, though pleaded to several counts, was at that time considered as raising but one issue. There was no difficulty in entering the verdict as found by the arbitrator in that case; it would be for the plaintiff on non assumpsit for 23l. 13s. 10d., the sum found by the arbitrator. The rule as to the costs of different issues was not then made.] The case of *Rennie v. Mills* (5 Bing. N. C. 249) is in favour of the plaintiff. There Tindal, C. J., says: "I do not see clearly that the arbitrator did not go into the matters of the special count, or that his award is confined to the second count;" and Erskine, J., says: "The language of the award is as much applicable to the special as the general count." Here the finding is quite as applicable to the one as the other.

PARKE, B. In that case there had been no application to set aside the award, and the question was, in what way the Master was to tax the costs. The award would stand. The award here is clearly bad, as not disposing of all the issues. You do not state that the note was laid before the arbitrator as evidence of the account stated. But I do not say that that would be sufficient. The Court endeavoured to avoid coming to a decision on [57] this point in *Dibben v. The Marquis of Anglesea*,^(a) but I doubt if they were correct in the course which they there adopted, because the party could not know what issues the arbitrator intended to find. The defendant must have judgment on the demurrer.

The rest of the Court concurred.

Martin then proceeded to argue on the rule for a new trial. The reference was of the cause, and nothing appeared as to the existence of several counts: and where an award is produced in evidence which is good on the face of it, every intendment must be made in favour of its validity, and no further proof is required to shew its validity,

(a) 2 C. & M. 722; 10 Bing. 568. See *Duckworth v. Harrison*, 4 M. & W. 432.

until it is impeached by the other side. [Parke, B. The issue is, whether there is a valid award of and concerning the matter referred. The plea of "no award" means "no award according to the submission," as was said by Bayley, J., in *Fisher v. Pimbley* (11 East, 193). It means no valid award. Must you not shew the validity of the award in all things?] That must be presumed until the contrary is shewn.

Cresswell and Cowling, contra. This is a declaration upon an award, which professes to be made of and concerning the premises referred; and the plea is, that the arbitrator did not duly make his award of and concerning the premises referred: then the issue on that is, whether an award was made of and concerning the matters referred. To support that issue, the plaintiff must shew not only an award good on the face of it, but good with regard to the matters referred, and that can only be done by shewing what were the matters referred. If the record had been produced, the issues in the action, which were the subject of reference, would have appeared, and the defect of the award, which is the ground of this demurrer, would have [58] been also an answer upon the issue in fact. The burthen of proof was upon the plaintiff.

LORD ABINGER, C. B. The Court have already disposed of the demurrer; and the rule for a new trial must be discharged, as we think sufficient *prima facie* evidence has been produced in support of the declaration. We are not to intend facts for the purpose of vitiating an award; if any presumption is to be made about it at all, it ought to be in favour of it, rather than the contrary. The award may, however, be made bad by evidence *dehors* tendered on the part of those impeaching it, in the same manner as it would be competent for them to do on applying to have it set aside. According to my recollection, it used to be the practice, under the old form of pleading, when an award, good on the face of it, was pleaded, to reply specially matter *dehors* the award which went to nullify it, or, if the award was bad on the face of it, to demur.

PARKE, B. I have entertained some doubt as to what the plaintiff is required to prove in order to support this issue; but, on the whole, I am not disposed to differ from the opinion expressed by my Lord Abinger. I entertain some doubt whether the interpretation put upon the plea in the case of *Fisher v. Pimbley* exactly applies to this or not? That was an action of debt on a bond conditioned for the performance of an award, to which the defendant pleaded that the arbitrators did not make any such award. The plaintiff in his replication asserted that they did make such an award, and proceeded to set out a portion of it; and the defendant, in his rejoinder, having set out the rest of the award, which shewed it to be bad, then demurred to the whole; it was held to be no departure from the plea, as the issue in substance was the existence of an award in fact. I have some doubt whether that principle will apply in the present case, where there is an award expressly set forth in the declaration, and an issue [59] as to that award is raised by the plea. If I am right in this impression, of course the defendant ought to have had a verdict. But I incline to think that there was here sufficient *prima facie* evidence to shew that this was such an award as that which is described in the declaration. The doctrine laid down in *Com. Dig. Arbitrament* (E.), 10, and *Ingram v. Milnes* (8 East, 445), viz. that the existence of other matters in difference will not be assumed to render it void, is applicable to this case. So that, even assuming that the plea puts in issue the validity of the award, as well as the fact that an award has been made concerning the premises in dispute, I think the plaintiff sufficiently supports that issue by producing an award, which must be taken to be made of and concerning the premises, until the contrary is shewn.

ALDERSON, B. I am of the same opinion. The case of *Fisher v. Pimbley* is strongly confirmatory of the view taken by my brother Parke. There the whole award was set out in the rejoinder, and it appeared not conformable to the submission, and consequently so far was no award at all, or at least none such as the law would recognise; and on its being suggested in argument in that case that the defendant ought to have taken issue on the award as stated in the replication, Bayley, J., said "he did not agree with the argument, for there was such an award as that stated in the replication, but not an award made conformable to the submission, and which would have appeared to have been the case if the whole award had been truly set out in the replication." If, therefore, the defendant had gone to trial on a traverse of the replication, it would have appeared in evidence that there was an award, and, though not conformable to the submission, the plaintiff must have had a verdict. The rejoinder in that case was no more than saying that there was no award conformable to the submission, which is

the same as no award at all. Here the party has [60] taken issue on the fact of the award, satisfactory proof of the existence of which has, I think, been given.

MAULE, B. In this case, in order to prove the issue of the existence of an award, the plaintiff, on whom the onus of proving it lay, tendered in evidence the rule of court, together with an award professing to be made of and concerning the cause referred by a rule of court made at such a time. Can there exist a doubt that this amounts to a *prima facie* case to shew that the cause was referred, and an award made in consequence? I entertain none, and therefore concur in thinking that this rule ought to be discharged.

Rule discharged.

HARRIS v. RYDING. Exch. of Pleas. 1839.—A., being seised in fee of certain lands, granted the land to P., his heirs and assigns, reserving to himself, his heirs and assigns, “all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the said premises, &c., with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get &c. the said mines and every part thereof, and to sell and dispose of, take, and convey away the same, at their free will and pleasure; and also to sink shafts, &c., for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the surface of the premises, and the pasture and crops growing thereon”:—Held, that, under this reservation, A. was not entitled to take all the mines, but only so much as he could get leaving a reasonable support to the surface.

[S. C. 8 L. J. Ex. 181. Approved, *Smart v. Morton*, 1855, 5 E. & B. 30; *Dugdale v. Robertson*, 1857, 3 K. & J. 695. Not applied, *Williams v. Bagnall*, 1866, 12 Jur. (N. S.) 987; 15 W. R. 272. See also *Caledonian Railway v. Sprot*, 1856, 2 Macq. H. L. 450; *Taylor v. Shafto*, 1867, 8 B. & S. 247; *Richards v. Jenkins*, 1868, 18 L. T. 437; 17 W. R. 30; *Heel v. Gill*, 1872, L. R. 7 Ch. 714; *Eadon v. Jeffcock*, 1872, L. R. 7 Ex. 390; *Aspden v. Seddon*, 1874, L. R. 10 Ch. 397, n.; *Mundy v. Duke of Rutland*, 1882, 23 Ch. D. 89; *Love v. Bell*, 1884, 9 A. C. 286.]

Case for negligently working a mine. The declaration stated, that before and at the time of committing the grievances thereafter mentioned, the plaintiff was possessed of a certain messuage and buildings, and closes of land, and that before and at the time when &c. a certain other messuage and buildings, &c., was in the possession of one L. T. as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendants, well knowing &c., so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under ground, near and contiguous to and under the said premises so being in the possession of the plaintiff, and the said premises the reversion whereof belonged to the plaintiff, and dug for, and got and moved the mines [61] and minerals, and produce thereof, &c., near to and contiguous to and under the said messuages, &c., that by reason of the premises, the foundations of the said messuages, &c., were then greatly weakened and injured, and the ground on which the same stood, and the said closes, greatly swagged and gave way. [The declaration then proceeded to allege other damage.]

The fourth plea, which was pleaded as to so much of the grievances as were alleged to have been committed near and contiguous to and under the messuages, shewed that one Thomas Clarke Jervoise formerly owned both the land and the mines under it; that he conveyed away the land to one T. P., excepting and reserving to himself, his heirs and assigns, all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals, and all quarries of lime and other stone, of what nature or kind soever, which then were, or at any time and from time to time thereafter should or might be, discovered in or upon the thereby appointed premises, or any part thereof, with free liberty of ingress, egress, and regress, to come into and upon the said thereby appointed, and granted and released premises, to dig &c. the said mines &c., and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found, at his or their respective wills or

pleasures; and also to sink shafts &c. for the raising up works, carrying away and disposing of the same, or any part thereof, making a fair compensation to T. P. (the grantee of the land) for the damage to be done to the surface of the said premises, and the pasture and crops growing thereon. The plea then averred, that no part of the said messuages or buildings were erected on the said land at the time of the grant, and that the plaintiff was representative of T. P.: it then proceeded to shew title in the defendant as representative of T. C. Jervoise, and to allege that the mines in the introductory part of the plea mentioned were the mines excepted by T. Clarke [62] Jervoise out of the grant to T. P., and that the supposed improper working was in the getting and carrying away by the defendant of such mines, without leaving support for the messuages and buildings so built and erected on the said land, and not otherwise.

Replication, that the defendant, at the said times when, &c., in working the said mines &c., could and might, and according to the ordinary and usual mode of mining and getting such minerals in the country, ought to have left support for the said messuages and buildings.

Demurrer, assigning for cause that the replication does not confess and avoid, and does not shew that the grant or exception in it was made with reference to the custom of mining in the said country, or any matter of law by which the words of the grant could be controlled, and is otherwise bad in law.

R. V. Richards, in support of the demurrer. First, the exception in the grant from Jervoise, the grantor, of all mines and every part thereof under the land in question, was a reservation of the right to take the whole of such mines; and that right could not be exercised, if the defendant, who was Jervoise's representative, was bound to leave any part in order to form a prop or support to the surface. In Sheppard's Touchstone, 100, it is said, "That when any thing is excepted, all things that are depending on it and necessary for the obtaining of it are excepted also; as if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them; and he or the vendee may cut them and take them away. And by such an exception, the lessor will have the houghs, fruit, herons, and hawks that breed in them." Here it must be assumed that the party was to do every thing necessary and proper to work and get the mines. The defendant was entitled to work out all the mines, but he could not do so if he is obliged to leave props, which would be of coal, to support [63] the surface. It is not alleged in the replication, that the defendant worked the coals in contravention of the powers contained in the lease. If the lessees chose to alter the state of the surface, by building houses upon it afterwards, that could not affect the rights which the defendant or those under whom he claimed had previously reserved by the exception, and there could be no implied covenant to leave support for such houses. But secondly, the remedy, if any, was in covenant, for the words "making compensation" for damage done to the land in working the mines were a covenant, and not a condition. *Warren v. Arthur* (Sir T. Jones, 205). [Parke, B. The clause as to compensation means for damage done by exercising the powers reserved. This is case for working the mines in an unreasonable manner. If you work the mine in an unreasonable manner, it is not within the clause. Is the covenant to apply to all acts whatever done in getting the mines, or only to all legal acts?] As the defendant has a right to take these coals, whatever the injury may be, it would be a compensation to which the plaintiff would be entitled under this clause; and therefore the proper remedy was covenant. He also objected that the replication was not properly framed, and that it sought to engraft terms which were not contained in the reservation in the grant. He cited *Bowler v. Woolley* (15 East, 444), *Partridge v. Scott* (3 M. & W. 220), and *Wyatt v. Harrison* (3 B. & Adol. 871). He further objected that the declaration was bad, for that it ought to have been trespass and not case, inasmuch as the declaration shewed a *prima facie* possession by the plaintiff of the mines, as being in possession of the surface of the land.

Whateley, contra. It has been argued that the exception in this grant enables the defendant to take the coals in any manner he pleases: but that cannot be so. In all cases [64] of exception out of grants, there is an implied covenant so to use the thing excepted, as not to prejudice the grantee in the enjoyment of the subject-matter of the grant. In Shep. Touch. 100, in the passage preceding the one before quoted, it is said:—"The exception is always taken most in favour of the feoffee, lessee, &c., and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words

in a grant will be excepted by the same words in an exception." And in 3 Atkyns, 136, Willes, C. J., says, "Another maxim is, that such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor." Now, what was here the intention of the grantor? The argument on the other side must go to the extent that he had a right to get the mines so as to render the surface totally useless. But that never could have been the intention of the parties. There was an implied covenant to work the mines in the usual way. It must be necessary to leave support for the surface, whether there are houses on it or not. The defendant was therefore bound to work them in the ordinary and usual mode. [Parke, B. It would have been better to have said in a reasonable mode, which your replication does not do—it says the "ordinary and usual mode." His Lordship referred to *Pomfret v. Rycroft* (1 Wms. Saund. 322, n.).] Secondly, it is said that the defendant had a right to use every means he pleased to get the mines, paying a reasonable compensation, and that this is a covenant, for breach of which an action of covenant was alone maintainable: but the meaning of the clause is, that he should pay compensation for necessary injuries to the crops growing upon the surface; it did not contemplate damage arising from working the mines in an improper way. Suppose he did not come upon the surface of the land at all, but owned the adjoin-[65]-ing land, and sunk a shaft in his own land, and so improperly worked this mine, could it be contended that he came within this clause as to compensation? Clearly not. As to the declaration, that is clearly good. Nothing appears on the face of it to shew that the plaintiff is in possession of the mines, so as to oblige him to sue in trespass for an injury by working them. The cases of *Warren v. Arthur*, and *Partridge v. Scott*, are quite inapplicable to the present.

Richards replied.

LORD ABINGER, C. B. I am of opinion that it is impossible to support these pleas, and therefore it is unnecessary to enter into the question as to the replication.

This is an action upon the case, in which the declaration charges, that the defendants wrongfully and injuriously, and without the leave and license, and against the will of the plaintiff, by themselves, their agents and servants, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient support in that behalf, worked certain mines underground, near and contiguous to, and under premises that were partly in the possession, and partly in the reversion of the plaintiff; that they have done damage to the houses, garden, and land of the plaintiff. That is the grievance complained of. In answer to that, the defendants put in two special pleas. In the first, they set forth the particulars from which their title is deduced, and then they say that they worked the mines, but did not leave any support for the houses, and that they were not bound to do so. So that, upon that plea, it stands that they left no support at all. The second plea, which applies to the land, is to the same purport: and the case is therefore brought to the question, whether or not, upon the conveyances set forth by [66] the defendants, they are justified in what they did: and Mr. Richards contends that they are, because, when their grantor sold the surface to the person under whom the plaintiff claims, he reserved to himself the mines, with certain liberty of getting them, which he says extends to all the mines and minerals. Now, to try this question, I will first suppose that the defendants, or the person they represent, had sold the estate to the plaintiff, or the person he represents, with an exception of the mines generally, without anything else. The exception of the mines and minerals which were so reserved, would vest in the defendants the whole of the mines and minerals—all the property would have been vested in them, but they would have no right to get them, except by the consent of the plaintiff—that they should enter upon the surface; they must have got them by means of access through other shafts and channels with which the plaintiff's land had nothing to do. In that case, supposing the reservation were nothing more than that, could it have been contended, that because they had excepted the mines, and the whole was vested in them, they could get every particle of them in the manner which is contended for, and without leaving support for the land above? Clearly not. The defendants' counsel, therefore, seeks to carry the right of the defendants a step further by the operation of the words in the exception, giving a right of ingress upon the land. Now the meaning of that exception was to meet the difficulty the defendants laboured under of not being able to enter upon the land to sink shafts, and make use of those shafts for the purpose

of getting their mines. I think there is no new right reserved thereby more than the right to use the surface, for the purpose of getting the mines; but it does not enable them to get them to a greater extent, or in a manner unusual and improper, so as to prejudice the surface of the land. I cannot therefore [67] see how the exception relied upon by the defendants at all assists their argument. That exception was rendered necessary by parting with the surface of the land; it applies to the liberty the grantor has of going upon the surface, and does not apply to the right he has below. A compensation is to be paid for the use of that liberty, and the covenant to pay for damage is co-extensive with the liberty he is to use by that exception; but it does not go beyond it, and it is in no respect a bar to an action on the case brought for the improper mode of taking the coal away. That being so, I do not see that the plea furnishes any answer at all, for the declaration states that the mines were worked carelessly, negligently, and improperly, without leaving sufficient support, and the plea does not allege that the defendants did leave a sufficient support, or that they worked the mines consistently with the usage in that respect, or in a reasonable and proper manner, such as is used in working mines. The usage is only evidence of what is reasonable, and the replication, stating evidence, instead of replying to the plea, is for that reason bad. But the plea is no answer, because it does not set forth any sufficient ground to justify the defendants in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them. If, as I stated before, the exception were general without permission to enter upon the land for the purpose, and that exception would not give the grantor the privilege of taking the whole of the coal away, so neither will this exception, which gives him the liberty of coming upon the land, give him a right to take away the coal in a careless, negligent, or improper way; it only gives him a right to enter upon the land, to take the coal in a reasonable manner. I think, therefore, that both these pleas are bad.

[68] PARKE, B. I am also of opinion that the plaintiff is entitled to our judgment. This is an action brought against the defendants for two injuries; one is for "wrongfully, carelessly, negligently, and improperly, and without leaving any sufficient and proper supports in that behalf, working certain mines underground, near and contiguous to and under a certain dwelling-house, garden, and land, in the possession of the plaintiff;" and then there is a similar charge for a like wrongful act, and injuring thereby a dwelling-house &c., which was in the possession of a tenant of the plaintiff. To this declaration there are two special pleas; one relating to the dwelling-houses, and the other to the land included in the declaration; and the substance of these pleas is, that there was at one time a unity of title to the land on which the premises were built, and of the mines under those houses and gardens, and then there was a grant by the owner of both, reserving to himself the mines, and a right to get them. The plea then deduces the title to the surface to the plaintiff, and deduces the title to the mines, and the right to get them, to the defendants; and then it states, "that the defendants did get the mines, and that the alleged improper working of the mines and minerals, in the introductory part of this plea mentioned, was and is the getting and carrying away by the defendants of the said last-mentioned mines and minerals, without leaving support for the said messuages, dwelling-houses, shops, and out-houses, in the said declaration mentioned, so built and erected on the said lands therein mentioned as aforesaid, and not otherwise." There is a similar plea as to the gardens and lands, in which the defendants state "that the alleged improper working was their not leaving proper and sufficient support for the houses, gardens, and lands." To each of these pleas there is a replication; stating that the defendants "could and might, and, according to the ordinary and usual mode of mining and getting such minerals in the county aforesaid, ought to have left support for the said messuages and dwelling-houses, shops and out-houses, [and gardens and lands] in the pleas and in the declaration mentioned." To these replications there is a demurrer. It seems to me that we may at once dismiss the replications, for they are clearly bad. If the law reserves the right to get mines in a reasonable manner, the substance of the replications ought to have been, that they were not got in a reasonable manner, and the ordinary and usual mode of getting them would be evidence, though not conclusive, of what was reasonable. All that the law gives the grantor by virtue of the exception, would be a reasonable mode of getting the mines and minerals; he would not be bound to get them according to the ordinary and usual mode of mining, even at the

time the reservation took place, unless that was the reasonable and proper mode—certainly not according to any variations that might take place in the mode of getting mines in the particular county. Both these replications, therefore, stating that at the time of the injury complained of, (not at the time of the reservation), the defendant's mode of working the mines was not the ordinary and usual one, are clearly bad. The next question is, whether the pleas are good?—I think they are both bad; upon this ground, that they do not bring the defendants within the limits or terms upon which they were entitled to work these mines, according to the true construction of this indenture, by which the surface was granted to the person under whom the plaintiff claims. That question depends upon the terms of the indenture, which are these—the surface is granted to a person of the name of Pershouse, his heirs and assigns for ever. “excepting and reserving out of the said appointment, unto him the said Thomas Clark Jervoise, his heirs and assigns, all and all manner of coal-seams and veins [70] of coal, iron ore and all other mines, minerals and metals, and all quarries of lime and other stone of what nature and kind soever which then were or at any time and from time to time thereafter should or might be discovered in or upon the said thereby appointed premises, or any part thereof, with free liberty of ingress, egress, and regress to and for the said T. C. Jervoise, and his and their agents, servants, and workmen, and all others to be by him or them the said T. C. Jervoise, his heirs or assigns, authorized to come into and upon the said thereby appointed, granted, and released premises, and every or any part thereof, to dig, delve, work for, search, get up, dress and make merchantable the said mines, metals minerals, coals, and quarries of lime and other stone and every part and parcel thereof, and to sell and dispose of, take and carry away whatever might be there found, at his or their respective wills and pleasures.” There is afterwards a clause for compensation, certain powers having first been given with respect to the surface—upon the effect of which, when we come to look at it, I think there cannot be any doubt. The present question however is, what is the meaning of this reservation? The rule of law is that a reservation is to be construed strictly; still, however, it would reserve to the grantor all that was not conveyed by the grant, provided the meaning and intention of the parties be clear. What then is the meaning and intention of the parties here? It is clearly the meaning and intention of the grantor, that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal and iron ore below. By reasonable intendment, therefore, the grantor can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface according to the true intent of the parties to the deed, that is, he only reserves to himself so much of the mines and minerals as could be got, [71] leaving a reasonable support to the surface. That is the true construction of this deed, in order to make it operate according to the intention of the parties. It never could have been in their contemplation that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface, or injure the enjoyment of it; it is very like the case of the grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room; and if he were to remove the supports of the upper room, he would be liable in an action of covenant; for the grantor is not entitled to defeat his own act by taking away the underpinnings from the upper room. So in this case, he would be acting in derogation of his grant, if he were to take away the whole of the coal below, he having granted the use of the surface to the grantee. If that is the true construction of the reservation and power, the defendant ought to have stated in his plea that he took the coal he did take, leaving a reasonable support for the surface in the state it was at the time of the grant. It becomes unnecessary to inquire whether or not he was bound to leave support for an additional superincumbent weight upon the surface; probably he would not be; but this plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state. I think the plea is bad in that respect; the defendants do not bring themselves within the legal construction of the indenture, or within those terms which the law implies to effectuate the intention of the parties.

Then, as to the compensation clause; it seems to me, upon the true construction of the covenant, that the provision applies only to the exercise of rights upon the surface; but supposing it were otherwise, and it applied to [72] any injury of this

sort done by getting the minerals below in an improper manner, not authorized by the power, all that can be said to it is, that it only gives an action of covenant by the covenantee against the covenantor, as well as any other remedy he might have for the acting in that respect without being authorized so to do by the power. It is a cumulative remedy; it does not take away the remedy he would have by law, if the party was not justified in doing the act by the power, but gives him an additional remedy. It cannot be contended that the covenant for compensation is to extend the power; and therefore the question is, whether the defendants were justified by the power given before? If they are, they have a good defence; if not, whether the plaintiff might have brought an action of covenant or not, they are liable to an action upon the case for such damages as he has sustained by the unauthorized act of the defendants.

We are now come to the question which has been raised upon the declaration. We are to assume that the question arises upon general demurrer: and supposing there is an objection to the plaintiff's claim upon the ground of its being founded in trespass, and not in an action upon the case, the general demurrer is too large; for although for an injury to the dwelling-house in the plaintiff's possession, by working the mines under the plaintiff's soil, the action ought to be trespass, and not case, this action being also for an injury to the reversion, and the demurrer being too large, the consequence is that it must be overruled. But the damages having been assessed, it may be said that we are to take notice of the whole record. I do not think we are, but if we were, I do not think it follows that the declaration is bad; the mines being under the plaintiff's soil, are only his property *prima facie*, and after verdict we should intend that the injury committed in the mines below was in mines which did not belong to the plaintiff. In that respect, [73] this case differs from one in which we granted a rule this term. That was a case for putting shores upon the plaintiff's close, of which it was stated he was in possession: here the mines were worked below the plaintiff's close, and may or may not have been in the plaintiff's possession; and after verdict we should intend that the mines, although under the plaintiff's close, did not belong to him. For these reasons, I think the declaration is perfectly good.

ALDERSON, B. It seems to me that the plaintiff is entitled to the judgment of the Court. I think the replication is bad, because it has rather pleaded evidence than that which would be the legal result of the evidence; and the pleas are bad, because the defendants have not averred that they have done such acts as were justified by the reservation upon which they rely. It appears that Mr. Jervoise was entitled both to the mines and the land above, and that he granted away the land above, excepting out of the grant the mines, which would otherwise have passed under the conveyance of the land, and reserving to himself also the power of entering upon the surface of the land which he had granted away, in order to do such acts as might be necessary for the purpose of getting the mines which he had excepted out of the grant, he being obliged to make compensation for entering upon the land and doing those acts. The case therefore stands thus: here are two persons, one who has the land above—one who has the mines below, with the power of getting those minerals; they are each to enjoy their right of property, and each is to act in respect of those rights of property, upon the maxim that he is to use his own property so as not to injure his neighbour. Then the question is, whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which [74] the other party is to enjoy? It appears to me that that is the reasonable construction of the exception, and the reasonable adjustment of the rights of the parties derived out of that exception. Such being the right of the defendants, in order to answer the complaint of the plaintiff, who charges them with carelessly, negligently, and improperly working the mines below, they have to shew that they have worked the mines in conformity with that exception; that is to say, in the reasonable and ordinary mode of working mines, getting all the coal they could, or to which they were entitled, in the ordinary mode. Probably the other coal remains their property, though they cannot get it. If the injury the plaintiff has sustained does not arise from their having, with the means they were entitled to avail themselves of, got the coal in a reasonable and ordinary manner, they ought to have averred that; the plea is bad for want of that averment, and the defendants probably have not made that averment because they

could not make it with truth. Then as to the objection made to the declaration, it appears to me the answer my Brother Parke has given to it is quite sufficient, viz. that though the grant of the land would be *primâ facie* a conveyance of the mines also, on this declaration, it is not necessary for us to conclude that the mines the defendants have been getting are the property of the plaintiff which passed with the land belonging to him, and therefore the declaration is *primâ facie* good: and the declaration being good, and the pleas bad, the result is, that the judgment must be for the plaintiff.

MAULE, B. I am also of opinion that the judgment must be for the plaintiff. It appears to me that the replication is bad, because it merely alleges "that the defendants could and might, and according to the usual mode of mining and getting such minerals in this county, ought to have left support for the messuages," &c. I do not think any such doctrine can be implied, provided the party had worked the [75] mines, as he might do consistently with that allegation of the custom of the country, in a reasonable and proper way; and therefore I do not think the replication is sustainable; but I think the declaration is good, and therefore the plaintiff is entitled to judgment. A question has been raised, whether the declaration ought not properly to be in trespass, in respect of a portion of the subject-matter, that is, with respect to the working of the mines that were under the land and the house in the possession of the plaintiff. The allegation in the declaration is, "That the plaintiff was lawfully possessed of a certain messuage and dwelling-house, shops, and out-houses, and certain gardens and closes of land with the appurtenances, in which he carried on the business of a butcher;" and then it states that the defendants wrongfully worked some mines under that dwelling-house and gardens." I do not think that is a mode of stating that the mines are in the plaintiff's possession. If it were necessary to allege that the mines were the property of the plaintiff, alleging that he was possessed of a house and garden above the mines, would not be a sufficient allegation that he was possessed of the mines. I think, therefore, there is no allegation of the possession of the mines in this declaration; so that case is the proper form of action, and the declaration is good. The plea I think is bad, because in it the defendants, in effect, say they are the owners of the mines, together with the liberty of going upon the surface of the ground, which belongs to the plaintiff, and doing acts necessary for getting the mines. Now it has not been very distinctly stated whether the defendants rely simply upon their right of property in the mines, and insist that what they have done was in exercise of their right of property in the mineral subtracted, or whether it was done under the right expressly reserved to them in the covenant. I think the covenant or stipulation, giving them the power to go upon the plaintiff's land, and providing [76] that they are to make compensation for it, applies merely to acts done upon the surface of the land, that is, disturbing the surface by digging, sinking shafts, and so on; all those things they are authorized to do, but not absolutely, only conditionally upon making compensation; and that liberty has nothing to do with the right of getting the mines, which may be taken to be done on this occasion without breaking the plaintiff's soil; but their right to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land; though the latter has the exercise of ownership over the whole, (for I agree that Mr. Jervoise reserved to himself the exercise of ownership over every portion of this land, and might and was the fit person to bring trespass against a third person who might do the wrongful act which the defendants here have done), yet his rights over his exclusive property are not unlimited, but are limited by the duty of so using it as not to do any damage to the property of another person. Now here the declaration alleges that the defendants did use their property in such a way as to do damage to the plaintiff. The pleas admit that they did that, and state matter for which I think there is no excuse shewn: I am of opinion, therefore, that both the pleas are bad, and that the judgment ought to be for the plaintiff.

PARKE, B., added—I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support. There is no doubt they are the proper parties to bring an action of trespass, if any body else were to come and get the coal.

Judgment for the plaintiff.

Ex. Div. VII.—2

[77] EVANS v. JONES. Exch. of Pleas. 1839.—A wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, is illegal, as being against public policy.

[S. C. 2 H. & H. 67; 8 L. J. Ex. 173; 3 Jur. 318.]

Assumpsit. The declaration stated, that before and at the time of the making of the promise of the defendant thereafter mentioned, one Thomas Williams, Esq. had gone and been taken in custody, to wit, from Carnarvon to London, and had been arraigned and indicted on a charge of having feloniously uttered a certain forged will and testament, and two forged codicils; and the said Thomas Williams was, at the time of making the said promise of the defendant, on his trial at a general Session of Oyer and Terminer of our lady the Queen, holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the city of London, and the said Thomas Williams was then also charged with and indicted for feloniously forging a certain will and testament, and also charged with and indicted for feloniously forging a certain codicil; on which last-mentioned charges and indictments the said Thomas Williams was about to be tried by the country at the said Session of Oyer and Terminer: and thereupon, to wit, on the 10th day of April, 1838, a certain discourse arose between the plaintiff and the defendant, with reference to the said Thomas Williams, and the said charges and accusations against him; and thereupon afterwards, to wit, on the day and year aforesaid, in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to pay him one shilling, if the said Thomas Williams should not ever return to Carnarvon, but should be transported, he, the defendant, promised the plaintiff to pay him 10l., if the said Thomas Williams should not be transported, and should return to Carnarvon. And the plaintiff in fact saith, that after the making of the said promise of the plaintiff and of the defendant, to wit, on the day and year [78] last aforesaid, the said Thomas Williams was, at the said Session of Oyer and Terminer, by jurors in that behalf respectively duly impanelled, returned, and sworn, found not guilty of the said matters and offences so charged upon him as aforesaid, or any of them, and was then duly acquitted and discharged of the said premises, as by the record thereof remaining in the said Central Criminal Court more fully appears: and the plaintiff saith, that the said Thomas Williams was not then or at any other time transported, or sentenced so to be, on account of the said charges or any of them, or of any other matter or cause; and that he the said Thomas Williams did, after the making of the said promise of the defendant, and before the commencement of this suit, to wit, on the 1st of May, 1838, return to Carnarvon aforesaid; of all which the defendant afterwards, to wit, on &c. had notice, and was then requested by the plaintiff to pay him the said sum of 10l., according to the said defendant's promise; and the said plaintiff saith, that although afterwards, and after the said notice and request, a reasonable time for the defendant to pay the said sum of 10l. elapsed before the commencement of this suit, yet &c. [Breach, in non-payment of that sum.]

General demurrer, and joinder in demurrer.

Cowling, in support of the demurrer. The declaration is bad, being founded on a wager which is illegal and void, as being contrary to public policy, in giving an interest to pervert the proceedings of a Court of Justice. A wager of this nature, on the conviction or acquittal of a party under trial for felony, must have an injurious tendency, since the parties to the wager might be induced to procure false testimony against or for the prisoner, or to use improper influence with the witnesses and the jury. There are several instances where wagers have been held void as [79] being contrary to public policy. Thus, in *Allen v. Hearn* (1 T. R. 56), wagers between voters at an election, as to the result of the poll, were held illegal. Lord Mansfield there says:—"A gaming contract should not be encouraged, if it has a dangerous tendency. What is so easy as in a case where a bribe is intended as to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done; but still it is a colour for bribery. It has an influence on his mind: therefore, in the case in *Cowper*, (b) if the wager had been laid with a lord of

(b) Referring to *Jones v. Randall*, *Cowper*, 729.

Parliament or a Judge, it would have been void from its tendency, without considering whether a bribe was really intended or not." Here the wager might be really a bribe; it is frequently impossible to prove the real nature of such a wager, and the difficulty of proving that should not be thrown on the defendant. So, in *Hartley v. Rice* (10 East, 22), a wager that one of the parties would not marry within a specified number of years was held to be void; and in *Gilbert v. Sykes* (16 East, 150), a wager on the duration of the life of Napoleon Bonaparte, at a time when his probable assassination was the subject of speculation, was held void as having an injurious tendency. Again, in *Da Costa v. Jones* (Cowper, 729), a wager on the sex of the Chevalier D'Eon was held to be illegal and void, after full consideration of the general law of wagers. Perhaps the case of *Jones v. Randall* (Cowper, 37) may be relied upon by the plaintiff; but it is distinguishable. That was a wager as to whether a decree of the Court of Chancery would be reversed on appeal, and was held not to be illegal: but there the facts were ascertained at the time the wager was laid, whereas here they are not. Besides, the Court saw clearly that the persons who made the [80] wager had no power to influence the decision, because they were neither peers nor judges; but how can the Court know that either of these parties might not be a material witness on the trial of the prisoner, if he thought proper, and so influence his conviction or acquittal?

Jervis, *contrâ*. Wagers discountenanced by the law are divided into two classes. There are some which a Judge may refuse to try, as unlawful and improper; as in *Thornton v. Thackeray* (2 Y. & J. 156); and others which are held illegal as being against public policy: but this belongs to neither of those classes. [Lord Abinger, C. B. The first class of cases is exploded. Parke, B. The Judge is bound to try them at some time, though he may postpone them until after cases of more importance have been tried.] It is said that the tendency of this wager was to give the parties to it an improper interest in the result of the trial, and that they might be induced to resort to improper means to influence the verdict. But the law will not presume illegal conduct in any one; and there is here no direct interest whatever. Such a wager as this would not affect the competency of either party as a witness on the trial. [Lord Abinger, C. B. Perhaps not; but it would go to his credit, which is worse.] The cases cited are not applicable. *Allen v. Hearn* was put upon the ground that the bet declared on was in truth given as a bribe to the voter,—as a distinct illegality; and the wager in *Hartley v. Rice* was in restraint of marriage, and therefore void. The case of *Waite v. Jones* (1 Bing. N. C. 656; 1 Scott, 730; affirmed on error, 5 Bing. N. C. 341) is strongly in favour of the plaintiff. There a man, in consideration of certain payments, covenanted to execute a deed of separation from his wife; and the question was, whether the instrument was valid or not. [81] All the above cases were cited, and the Court held it to be valid. It is submitted that nothing sufficient appears to make this wager void as being against public policy. The Court ought not to speculate on the indirect motives of the parties.

Cowling, in reply, was stopped by the Court.

LORD ABINGER, C. B. On the principle of the cases which have been decided since *Jones v. Randall*, the Court is not only warranted, but compelled, to say that this wager is illegal and void. No man has a right to acquire by his own act an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in the course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice, is a sufficient foundation for the illegality of such wagers. This was well established by the case of *Gilbert v. Sykes*, a case which was much discussed, and the decision in which excited considerable interest. A strong feeling at that time prevailed against Napoleon Bonaparte, who threatened an invasion of this kingdom; but it gave great satisfaction to myself, and all who took an interest in the administration of public justice, to hear the principle pronounced by Lord Ellenborough, and the first common law authorities, that a wager on the duration of his life was illegal, as being against public policy,—as having a tendency to encourage his assassination, which, even in the instance of a public enemy, should receive no encouragement from the law. This, however, is a much stronger [82] case; here a

man is on his trial on a very important charge, and a wager is made of a character which must tend to give the parties to it an interest in perverting the course of criminal justice. Our judgment, therefore, must be for the defendant.

PARKE, B. I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a wager, that it has a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge: but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way, to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged of the fair trial to which he is entitled.

MAULE, B. I entirely concur with the Lord Chief Baron and my Brother Parke. It is too late now to say that no wager can be enforced by law; but I think it would have been better if they had originally been left to the decision of the Jockey Club. This wager is clearly objectionable, as the tendency of it is to prejudice the course of public justice: and whenever a wager has such a tendency, it is against public policy, and is therefore void.

Judgment for the defendant.

[83] SELWAY v. FOGG. Exch. of Pleas. 1839.—A. engaged to convey away certain rubbish for B. at a specified sum, under a fraudulent representation by B. as to the quantity of the rubbish which was to be so conveyed:—Held, that, in an action for the value of the work actually done, A. could recover only according to the terms of the special contract; although, when he discovered the fraud, he might have repudiated the contract, and sued B. for deceit.

[S. C. 8 L. J. Ex. 199.]

Indebitatus assumpsit for work and labour. Pleas, non-assumpsit, payment, and a set-off.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Michaelmas Term, evidence was given to prove that the work was done, which consisted in carting away rubbish, and that the value of it amounted to about 20l. The defendant then gave evidence of a contract to do the work for 15l., which sum he had paid. The plaintiff insisted that that contract was obtained by a fraudulent misrepresentation as to the depth of the rubbish carted away, and that, being founded in fraud, it was no answer to the action. The Lord Chief Baron, however, was of opinion that the question of fraud was not open to the plaintiff in the present action, although it might be the subject of complaint in another action; especially as it had been shewn that the plaintiff had knowledge of the circumstance indicative of fraud before the work was finished. He however left the facts to the consideration of the jury, and they found that there was fraud in the contract, and returned a verdict in favour of the plaintiff for 5l.; but the learned Judge gave the defendant leave to move to enter a nonsuit or a verdict for the defendant. Humfrey having in last term obtained a rule accordingly,—

Erle now shewed cause. If the contract was obtained by the fraud of the defendant, he had no right to set up his own wrong; and the plaintiff, having proved the work done, was entitled to recover. The extent of fraud was not material. [Maule, B. The rule undoubtedly is, that a party shall not be allowed to set up his own fraud; he may not say, "I have cheated:" but here the charge comes from the other party, who says, "You have cheated;" [84] that is not within the rule.] There are several authorities to shew that a fraudulent contract cannot be set up by any one who is a party to the fraud. It may be said that they relate to the sale of goods, but that makes no difference. Thus, in *Biddle v. Levy* (1 Stark. N. P. C. 20), where goods were supplied to a minor upon a fraudulent misrepresentation by his father that he was about to relinquish his business in favour of the son, although the credit was given to the son,

the father having dealt with the proceeds, was held liable in assumpsit for goods sold and delivered. So, in *Hill v. Perrott* (3 Taunt. 274), it was held that indebitatus assumpsit might be maintained for goods which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had got into his own possession, for that he could not set up the sale, because his fraud had procured it, and the mere possession, unaccounted for, raised an assumpsit. [Parke, B. The principle of that case is, that the defendant could not set up the sale to the insolvent, because the insolvent, whom he attempted to set up as the real contractor, appeared to be his agent only.] In *Abbotts v. Barry* (2 Bro. & B. 369), where the defendant had fraudulently induced the plaintiff to sell goods to A., who could not pay for them, and on the nominal resale of those goods by A., the defendant, being the real party concerned, had obtained the money on such resale; it was held that the plaintiff was entitled to recover from the defendant the value of the goods unpaid for by A. [Maule, B. The principle of that case is clear. There the plaintiff's goods had been sold, and the money remained in the hands of the defendant, and was of course recoverable from him by the owner of the goods.] It is submitted that the contract being fraudulent and void, the plaintiff's waggons and horses and workmen not being there on the void contract, he is entitled to recover. The principle of [85] the cases is, that a party shall not be allowed to set up his own fraud; it is the same as if there was no contract at all. He also cited *Studdy v. Sanders* (5 B. & Cr. 628; 2 D. & R. 347), and *Lucas v. Godwin* (3 Bing. N. C. 737; 4 Scott, 502).

Humfrey and Stewart, contra. The law does not allow a person to sue, on an implied contract, another party who deals with him, and who supposes he is proceeding on the terms of a special contract. The fraud merely gives the other party a right to rescind the contract, and that right ought to be exercised as soon as the fraud is discovered, otherwise the original contract is set up, and the work is considered as done, or the goods sold, according to the terms of that contract: *Campbell v. Fleming* (1 Ad. & Ellis, 40; 3 Nev. & Man. 834). [Maule, B. referred to *Ferguson v. Carrington* (9 B. & Cr. 59).]

LORD ABINGER, C. B. I am of opinion that this rule ought to be made absolute. At the trial I was impressed with the opinion, and still remain so, that the plaintiff is not entitled to recover, and I think so on two grounds:—First, because no one can be liable upon a contract which he never made nor intended to make; the very idea of a contract being, that it is an agreement entered into by two willing parties acting with their eyes open: a party cannot be bound by an implied contract, when he has made a specific contract, which is avoided by fraud. A person is not at liberty to say, "I have made two contracts, and if one of them is avoided by its fraud, then I will set up the other;" but if he repudiate that contract on the ground of fraud, as he may do, he has a remedy by an action for deceit. Secondly, it was clear upon the evidence that the plaintiff had full knowledge of all that constituted the fraud in this case, either before or during the work, and [86] as soon as he knew it he should have discontinued the work and repudiated the contract, or he must be bound by its terms.

PARKE, B. I also think that in this case a nonsuit ought to be entered. The plaintiff sues for work and labour, and on the trial it turns out that there is a contract to do it for a specific sum. Assuming that the jury have properly found that this contract was fraudulent, in what situation is the plaintiff put? He may repudiate it, and be in the same situation as if it had no existence at all; but if he does not choose to do so, he cannot then set up another contract. This is established by two cases,—one, that of *Ferguson v. Carrington*, already cited, and the other that of *Read v. Hutchinson* (3 Camp. 351). If the plaintiff chooses to treat the defendant as a party who has contracted with him, he must be bound by the only contract made between them. The case is distinguishable from those where a third person intervenes, and where, looking at their real situation, that third person is also the agent of the party charged; at all events, no second contract is there set up, as here, which second contract is inconsistent and cannot be supported. I also think that, upon discovering the fraud, (unless he meant to proceed according to the terms of the contract), the plaintiff should immediately have declared off, and sought compensation for the by-gone time in an action for deceit; not doing this, but continuing the work as he has done, he is bound by the express terms of the contract, and if he fail to recover on that, he cannot recover at all.

ALDERSON, B. and MAULE, B., concurred.

Rule absolute.

[87] WOOD v. DUNCAN. Exch. of Pleas. 1839.—Where a cause is referred by order of Nisi Prius, and the award is afterwards set aside on the ground of the arbitrator not having adjudicated on all the matters referred, and the cause is tried again, the party ultimately succeeding is not entitled to the costs of the first trial.

[S. C. 7 Dowl. P. C. 344; 8 L. J. Ex. 224; 3 Jur. 582.]

This cause came on for trial at the York Summer Assizes, 1838, when it was referred on the usual terms to a gentleman at the bar. In last Michaelmas Term his award was set aside by this Court, on the ground that he had not adjudicated on all the issues in the cause. It was again tried at the Spring Assizes 1839, and a verdict found for the plaintiff. The Master, on taxation, having refused to allow the plaintiff the costs of the first trial, W. H. Watson obtained a rule for a review of his taxation, citing *Burchall v. Bellamy* (5 Burr. 2693), and *Poole v. Selwood* (1 Price, 310); against which,

Cowling now shewed cause. The Master has come to a right decision, in refusing to allow the plaintiff the costs of the first trial. This is similar to the case where a venire de novo is awarded, or a new trial is granted, and the rule is silent as to the costs; and there the party succeeding on the second trial is not entitled to the costs of the first; *Edwards v. Brown* (1 Cr. & J. 344), *Summers v. Formby* (1 B. & Cr. 100). The case of *Poole v. Selwood* was decided at a time when the practice of this Court differed from that of the King's Bench; besides, the facts are not clearly stated, and the case was argued on a mis-statement of the practice of the Court of King's Bench. But supposing that case to be law, the practice of all the Courts has been since assimilated by the new rule, H. T. 2 W. 4, s. 64, which provides that "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeeds on the second."

W. H. Watson, in support of the rule. Where a cause is referred, and the reference subsequently proves ineffectual, it is considered the same as if the cause had gone off on a remanet; and there the party who ultimately succeeds is entitled to the costs of all the issues found for him. In *Burchall v. Bellamy* (5 Burr. 2693), the rule that costs should abide the final event of the future trial, when the cause is made a remanet, was extended to other similar cases. Here in point of law no award at all was made, as it was altogether a nullity, and the application to this Court to set it aside was ex abundanti cautela, for nothing could have been done upon it. Suppose a case where there are seven issues, and the arbitrator awards only upon one,—it is the same as if he had made no award at all. The case of *Poole v. Selwood* (1 Price, 310), is directly in point, for it was there held that if a cause standing for trial be referred, and the arbitrator's award in favour of the plaintiff be afterwards set aside, and the cause be in consequence tried again, the plaintiff, succeeding on that second trial, will be allowed the costs of the former trial. In *Payne v. Bailey* (7 Moore, 147; 3 B. & B. 304), where the plaintiff obtained a verdict subject to a reference, and the arbitrator made a material mistake in his award, and the defendants refused to refer the matters back to him, the Court having set aside the verdict, and discharged the rule for a reference, and the plaintiff having obtained a verdict on a second trial, it was held that he was entitled to the costs of both the trials. It is true that the Court there said that they would not lay down a rule for the future, but as far as the case goes it is in favour of the plaintiff. He also cited *Davile v. Herring* (1 Stra. 300), and *Booth v. Atherton* (6 T. R. 144).

LORD ABINGER, C. B. It appears to me to be better to adhere to general rules, than to engraft exceptions upon them, which only bring the law into confusion and doubt. [89] The case is analogous to that of a venire de novo, and must be governed by the practice which has prevailed in cases of that kind. *Payne v. Bailey* is no authority at all; but if it were any, it is rather the other way, because there the Court said they did not wish their decision to be considered as a precedent, but as an exception to the general rule. The case of *Poole v. Selwood* was decided with reference to the then existing practice in this Court. The object of the new rules was to assimilate the practice of all the Courts, and this case must be decided so as to make the practice of this Court in conformity with that of the other Courts. I think, therefore, that this rule ought to be discharged.

PARKE, B., and MAULE, B. concurred.

Rule refused.

WILSON v. RIVER DUN NAVIGATION COMPANY. Exch. of Pleas. 1839.—In an action against a Navigation Company, incorporated by statute, the declaration contained several counts, charging several wrongful acts of diversion, &c. of the plaintiff's watercourse; to which the defendants pleaded not guilty, and also several special pleas. The defendants had a general verdict on the plea of not guilty. The act of incorporation contained a clause giving the Company treble costs on a verdict for them in an action for anything done in pursuance of the act, and enabling them in such case to plead the general issue, and give the act and the special matter in evidence. It appeared that the acts complained of in two of the counts of the declaration, were acts which the Company were prohibited by the statute from doing:—Held, that the defendants were not entitled to treble costs on those counts. The proper mode of taxing treble costs for a defendant, where the plaintiff succeeds on some issues, is, first to calculate the defendant's single costs, then treble them, and then deduct the plaintiff's costs from the amount so trebled.

[S. C. 7 Dowl. P. C. 369; 8 L. J. Ex. 161; 3 Jur. 343.]

This was an action on the case for the wrongful diversion, &c. of a watercourse. The declaration contained five counts. The first was for widening, deepening, and enlarging, above the works of the plaintiff, divers sluices, cuts, and watercourses, and thereby diverting the water thereof from the plaintiff's works. The second was for diverting and turning the stream away from the plaintiff's works. The third charged the defendants with omitting to repair a lock and flood-gates, and through the defects thereof suffering the water to escape. The fourth count alleged [90] an injury to the plaintiff, by the defendant's having wrongfully raised the height of a weir, and thereby penned back and obstructed the usual flow of water to the plaintiff's works. The fifth charged generally the penning back and obstructing of the water, without stating by what means. The defendants pleaded, first, not guilty to the whole declaration (under the provisions of their act of incorporation, 6 Geo. 2, c. 9, s. 29, local and personal, public,^(a)) and several special pleas.

The cause came on for trial before Patteson, J., at the last Yorkshire Assizes. An objection was taken on the part of the defendants, that the action was not brought within the period limited by the above section of the statute. The learned judge thought that upon this ground the plaintiff had no right of action on the first three counts, but that the wrongful acts charged in the 4th & 5th counts were not done in pursuance of the act, and therefore did not fall within the protection of the above clause. It was then agreed that the cause should be referred to a gentleman at the bar, the costs to abide the event. The arbitrator directed a verdict to be entered generally for the defendants on the plea of not guilty, and for the plaintiff on the other issues. The Master thereupon taxed the defendants their treble costs on the whole declaration, as follows:—

| | | | |
|---|------|----|----|
| [91] Single costs | £385 | 3 | 7 |
| Half „ | 192 | 11 | 9 |
| Half „ | 96 | 5 | 10 |
| | £674 | 1 | 2 |
| Deduct plaintiff's costs of issues found for him, . . . | 23 | 7 | 6 |
| Total to be paid by plaintiff | £650 | 13 | 8 |

W. H. Watson, in Hilary Term, obtained a rule to shew cause why the Master

(a) Which provides “that if any action shall be brought against any person or persons for anything done or to be done in pursuance of the present act, or in execution of the powers or authorities, &c. herein mentioned, in every such case the action shall be commenced within three months, and the person so sued may plead the general issue, and give this act and the special matter in evidence, and that the same was done in pursuance of this act; and if it shall appear so to be done, or that such action was brought after the time hereinbefore mentioned, then the jury shall find for the defendant; and if the plaintiff shall be nonsuited, or discontinue, &c., or if a verdict shall pass against him, the defendant shall and may recover treble costs.”

should not review his taxation, on two grounds: 1st, that the defendants were only entitled to single costs on the 4th & 5th counts of the declaration, the acts therein complained of not having been done in pursuance or in execution of the powers or authorities of the act: 2ndly, that the treble costs were computed on an erroneous principle, for that the Master ought first to have taxed the single costs of each party, then deducted the account of the plaintiff's from the defendant's single costs, and then assessed the treble costs upon the balance.

Wightman now shewed cause. Admitting that the acts charged in the 4th and 5th counts were not strictly acts done in pursuance of the act of Parliament, and that therefore, under the plea of not guilty to those counts, the statutory defence could not be given in evidence, still the defendants, having succeeded on the general issue, which is pleaded to the whole declaration, are entitled to treble costs upon the whole. The case is to be considered as if that were the only plea on the record. If this be otherwise, a plaintiff, by introducing counts charging matters wholly unconnected with the statute, and claiming to set-off his costs upon them against the defendant's treble costs, may altogether defeat the intention of this and similar acts of Parliament. The only authority bearing on the case is that [92] of *Willet v. Tydy* (Carth. 188). There the plaintiff declared in a special count against the defendant, a collector of taxes, that he distrained twenty lambs of the plaintiff for 19s. due to the King, and wrongfully sold them for an under price, keeping the overplus; and also on an indebitatus assumpsit for money received by the defendants to the plaintiff's use. The defendant pleaded, as to the first part of the declaration, not guilty, and as to the promise, non assumpsit: and after verdict for the defendant, and a certificate on the postea that the defendant's justification as to all was as collector of the royal aid, under the stat. 1 Will. & M. c. 3, it was held that the defendant was entitled to treble costs: secus, if the action had been single on the first matter only, which was neither within the letter nor intent of the statute. Here, indeed, there is no such certificate, but it appears that the action is brought against the defendants for acts done by them as the Navigation Company. All their justification is under the act which constitutes them a company.

Secondly, the mode by which the Master has calculated the amount of the treble costs is the correct one. The plaintiff's costs are properly deducted from the whole costs due to the defendants.

Watson, contra, was desired to confine himself to the latter point. The costs which the successful party in a cause is entitled to, are his costs minus those of the other party: and it is those costs of his, which are to be trebled. The more fair and simple mode is to proceed, in the first instance, as if neither party were entitled to cumulative costs; and having so ascertained the balance, then to assess the treble costs upon that balance. The 4 & 5 Anne, c. 16, ss. 4 & 5, provides, that where a defendant pleads more matters than one, and a verdict is found [93] against him on any issue, the plaintiff shall be entitled to the costs of that issue. The meaning of that must be, that though there were a general verdict for the defendant, yet the plaintiff's costs on the issue found for him must be deducted, before any cumulative costs are given to the defendant. And the rule of H. T. 2 Will. 4, s. 74, expressly provides, that no costs shall be allowed on taxation to a plaintiff on any counts or issues on which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. [Alderson, B. You are giving a fictitious meaning to the term "plaintiff's costs," viz. the balance of costs.] The argument must undoubtedly go to this extent, that if the plaintiff's costs exceeded the defendants, they would have no treble costs.

LORD ABINGER, C. B. I think the Master was wrong in allowing treble costs on the 4th and 5th counts: they were without the protection of the statute, and without the defence given by it under the general issue. As to the other point, the new rule does not affect the mode of the taxation: the costs are to be taxed as under the statute of Anne; and the plaintiff's costs are to be deducted from the defendants', after the whole calculation of costs has been made, both single and treble.

PARKE, B. I agree on both points. It seems to me clear that the defendants have no claim to treble costs on the 4th and 5th counts. Those two counts are, in effect, for heightening the weir, and thereby penning back the water. That is an act expressly prohibited by the act of Parliament; and therefore it cannot be said that what the defendants did, was either protected by the act, or done under colour of it.

It is said, however, that if, on some accounts, the defendants are entitled to treble costs, inasmuch as they have a general verdict on all, no separ[94]-ation can be made. But where some counts charge matters within the act of Parliament, and others do not, surely the treble costs ought to be distributed accordingly. It is only where the defendants could give the special matter in evidence under the act, that they are entitled to treble costs. As to the other point, viz., the mode of ascertaining the treble costs, I quite agree with my Lord, that the proper course is to deduct the plaintiff's costs from the whole amount of the defendants'.

ALDERSON, B. I am of the same opinion. In determining the question, each count must be treated as if it were a separate declaration, and the question, whether the defendants are entitled to treble costs, must be considered separately on each. Applying that rule here, it is clear the defendants are entitled to treble costs only on the three first counts, to single costs on the 4th and 5th. As to the other point, the new rules only meant that the one party should be entitled to have his costs deducted from those of the other party, when ascertained, whatever they might be. The defendants' costs, therefore, are to be first ascertained, then trebled, and then the plaintiff's are to be deducted from them.

Rule absolute on the first point.

KINGHAM AND ANOTHER, Assignees of Finlayson, a Bankrupt v. ROBINS. Exch. of Pleas. 1839.—To counts in indebitatus assumpsit, for rent and for fixtures, &c., the defendant pleaded, as to all except 12l., non assumpsit; and as to that sum, payment into court of that amount:—Held, that the plea of payment into court only admitted that something was due on a contract for fixtures; and the plaintiff having proved merely that the value of the fixtures exceeded 12l., without proving any contract entered into by the defendant to take those fixtures, that he was not entitled to recover.—A plea of payment of money into court under the general indebitatus counts, only admits a liability upon some one or more contracts to the extent of the sum paid in.

[S. C. 7 Dowl. P. C. 352; 8 L. J. Ex. 189; 3 Jur. 364. Approved, *Perren v. Monmouthshire Railway and Canal Company*, 1853, 11 C. B. 855. Followed, *Hennell v. Davies*, [1893] 1 Q. B. 367.]

Indebitatus assumpsit. The first count of the declaration stated, that the defendant was indebted to the bank[95]-rupt, before his bankruptcy, in the sum of 8l. 10s., for the use and occupation of a certain messuage and premises of the said J. F., by the defendant at his request. The second count alleged, that the defendant, before the bankruptcy of the said J. F., to wit, on &c., was indebted to the said J. F. in the sum of 50l. for the price and value of divers goods, chattels, fixtures, and effects, then bargained and sold by the said J. F. to the defendant at his request. The third count was in the sum of 60l., for money found to be due from the defendant to J. F. before the bankruptcy, upon an account stated between them.

The particulars of demand were as follows:—

| | | | |
|---|-------|----|------|
| Sept. 29, 1836— | £ | s. | d. |
| To one quarter's rent of shop in Baker Street | . | 8 | 10 0 |
| To amount of valuation of fixtures, ditto | . | 32 | 0 0 |
| To other fixtures therein | . | 15 | 0 0 |
| | <hr/> | | |
| | £55 | 10 | 0 |

The defendant pleaded, first, except as to 12l., parcel, &c., non assumpsit; secondly, except as aforesaid, a set off for monies due to the defendant from the bankrupt before his bankruptcy, for goods sold and delivered, money lent, money paid, &c.; thirdly, as to 3l. 10s., parcel, &c., payment to the bankrupt before his bankruptcy, in full satisfaction and discharge, &c.; fourthly, as to 12l., other parcel of the monies in the declaration mentioned, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of 12l., ready to be paid to the plaintiffs; and the defendant says, that the plaintiffs have not

sustained damages to a greater amount than the last-mentioned sum, in respect of the causes of action as to the said last-mentioned sum, parcel, &c.

The replication took issue on the first plea, traversed [96] the set-off and payment in the second and third pleas, and to the fourth replied damages ultra.

At the trial before Gurney, B., at the London Sittings after last Michaelmas Term, it appeared that the defendant had occupied the premises mentioned in the particulars, but there was no evidence of any contract for the purchase of the fixtures, which the defendant insisted there ought to have been, to entitle the plaintiffs to recover; and he proved his set-off to the amount of 24l. 8s. 4d. The plaintiff contended that the plea of payment of money into Court, upon a declaration containing a claim for fixtures, was an admission of the contract set up in respect of them. The jury found that there was no such contract in fact: and if the defendant might avail himself of this answer, then that, upon a balance of the whole account, he would be entitled to a verdict. If however he was precluded by his plea from denying the contract, then they found that the fixtures were of a value which, after allowing for the set-off proved, would entitle the plaintiff to recover in a small amount. The learned Judge thereupon directed that the verdict should be entered for the defendant, giving the plaintiff leave to move for a verdict for the sum found by the jury, if the Court should be of opinion that the contract for fixtures was admitted by the plea of payment into Court. Platt having in Hilary Term obtained a rule accordingly,

Kelly and Channell now shewed cause. The plaintiff contends, that in consequence of the plea of payment of money into Court, generally, upon a count containing a claim for fixtures, the defendant has precluded himself from denying that he has become the purchaser of the fixtures, but that the only question that can arise is as to the amount. Although that might be the effect of such a plea to a count upon a special contract, yet it is not so in *indebitatus assumpsit*, where the claim may be made up of several contracts. The defendant, by this plea, only [97] admits that he owes something for rent, and something for fixtures, but he does not admit any particular contract as to either. It is incumbent on the plaintiffs to prove not merely a contract for fixtures, but a contract upon which the defendant is indebted to the plaintiffs in a larger sum than the money paid into Court. It is not competent to a plaintiff to apply the admission in this plea to any contract which he may choose to set up: such a plea only admits a liability to the amount of the sum paid into Court. It is different where there is a special contract set out in the declaration: for there the plaintiff can only give evidence of that contract. *Churchill v. Day* (3 Man. & Ry. 71), and *Emmett v. Norton* (8 Car. & P. 508), are authorities to shew that a payment of money into Court upon the *indebitatus* counts admits no more than a liability upon some contract to the extent of the sum paid in. *Seaton v. Benedict* (5 Bing. 28; 2 M. & P. 66) is an express authority to the same effect. The legal effect of the plea is to admit some contract or other under which the plaintiff has sustained damages to that extent, but not any particular contract.

Platt, contra. In *Churchill v. Day*, the plaintiff declared for work and labour, and also upon an account stated; but money was paid into Court upon the latter count only, and the Court held it was no admission of a liability upon the count for work and labour. That case, therefore, does not apply. So, in *Seaton v. Benedict*, which was *assumpsit* for goods sold and delivered, the Court held that the payment of money into Court was no admission of a contract beyond the amount paid in. There the Court considered that there was an admission of a contract consistent with the count upon which the money was paid in. But here [98] the defendant wishes to go further, and contends that no contract ever existed. The plaintiff has two claims, one for rent and the other for fixtures; and money is paid into Court generally, which is an admission that something is due upon each. Besides, the money paid in exceeds the amount of the rent claimed; therefore it is clear that the defendant has admitted a claim to exist for fixtures, beyond the rent. The defendant's case now is, that there was no such contract at all; but after having paid money into Court generally, he cannot say that no contract for fixtures ever existed. Then, without direct proof of any contract, it must stand that one was entered into between the parties, and if so, the defendant is liable for the value of the fixtures so transferred under the admitted contract. If evidence be given at the trial consistent with a contract of that nature, the defendant, after paying money into Court, is precluded from saying that there was no such contract. [Alderson, B. The difficulty arises from the circumstance of the *indebi-*

tatus counts being composed of a collection of contracts; there is no difficulty where it is a special contract, or one contract only. But the plaintiff here says, "You are liable to me on some one or a variety of contracts," and the defendant says, "I am liable on one or several," but he does not admit his liability on any given definite contract.] Is he to be allowed at the trial to say that he entered into no contract at all? [Maule, B. He does not say so: he says the particular contract set up is not the contract on which he paid money into Court. Alderson, B. Suppose a party sells and delivers indigo in India, and he also sells and delivers cotton in England to the same person, on a credit which has not expired, and the defendant, knowing that he is indebted for the indigo, pays into Court the money he admits to be due for the indigo, and the plaintiff comes into Court, and goes upon the contract for the cotton, is that to be used as an admission against [99] the defendant of his liability upon the contract in England? If that be so, there ought to be some other mode of paying money into Court than at present exists.] Here there was only a single transaction with respect to fixtures, and it was at all events incumbent on the defendant to shew some other transaction to which the payment referred.

PARKE, B. This rule must be discharged. When it was moved, I certainly was under a different impression as to the effect of this plea, an impression which has continued during a part of the argument, and particularly because I suspected that this 12l. really was paid into Court to answer the demand for fixtures, and that it amounted to a confession of their value. There is moreover a reported opinion of my brother Littledale and myself, in the case of *Meager v. Smith* (4 B. & Adol. 673; 1 Nev. & M. 449), to favour this view, which is confirmed also by the decision of Tindal, C. J., in the case of *Walker v. Rawson* (1 M. & Rob. 250). But on full consideration of the case which has now come before us, it appears to me that the observations there thrown out by myself and my Brother Littledale were incorrect. In that case it was said that the payment of money into Court, under a general indebitatus count, had the same effect as a payment before action brought. There can be no doubt as to the effect of such a plea when pleaded to a special count; it then operates as a confession of the debt as alleged in the declaration; nor is there any difficulty as to its *prima facie* effect when pleaded to a general count, namely, that it amounts to an admission of some money being due, and accordingly, when pleaded in answer to an indebitatus count of this description, it operates as an admission by the defendant that he is indebted in that sum to the plaintiff, either on the entire contract as stated, or on one or more other con-[100]-tracts. One question formerly raised was, whether it was allowable to connect the bill of particulars with the declaration, in order to see on what ground the payment was made. That point has been disposed of in the negative by the case of *Meager v. Smith*, as the declaration must exist independently of the particulars, and must be taken to have some meaning as well before particulars are delivered as afterwards. Then comes the question for our decision. The new rules have introduced no alteration on this subject, which is governed by the same principle now that payment of money into Court is pleaded, as under the old system, when the practice was to strike off from the amount of damages the sum so paid in; and the case which affords the best analogy to guide us here, is that of a party suffering judgment to go by default. Suppose the defendant, having paid 12l. into Court under this count, had suffered judgment to go by default for the residue, and left the plaintiff to issue his writ of inquiry to assess damages; if the damages assessed were to exceed the amount paid into Court, the plaintiff would be entitled to a verdict; if not, it ought to be entered for the defendant. That, as it seems to me, expresses most correctly the position of the defendant in this case, after pleading this plea of payment of money into Court; he thereby admits a cause of action arising from some contract declared on, but contends that it does not exceed the amount which he has paid in. There is nothing to be found at variance with this doctrine, except the cases of *Walker v. Rawson* and *Meager v. Smith*; in the former of which the plaintiff had declared on an indebitatus count for work and labour, to which the defendant paid a sum of money into Court, but it appeared that the plaintiff had been employed to do the work jointly with another person. Tindal, C. J., said, the only question was whether the contract was made with the plaintiff alone or with the plaintiff and the other person jointly; and as [101] the defendant, on being sued by the plaintiff alone, paid money into court, he thereby admitted that the plaintiff was entitled to treat the contract as made with himself only. Now, on consideration, I think that decision is incorrect: as is also

what fell from my Brother Littledale and myself in the latter case. I do not think that the payment of money into court can be fairly assimilated to a payment before action brought, inasmuch as the latter must always be attended by some circumstances which may be laid before the jury, as evidence to expound the intention of the parties and the nature of the transaction; but the payment of money into Court is a mere naked fact, which could not be left to the jury in that way. If it were, all that could be done in the present case would be to tell the jury that the defendant meant to pay this money on account of the fixtures, and leave it to them to say whether more was due on that account or not. Such a direction would, perhaps, entitle the defendant to a new trial; but that is not the question now before us. On judgment by default, in a case of this kind, although *prima facie* the plaintiff would be entitled to nominal damages, probably to nominal damages on each of the items claimed in the declaration, still that is all he could recover, unless he were to succeed in shewing either a specific contract to pay for fixtures, or proving facts which would entitle him to recover on a quantum meruit; in short, he should prove before the jury not merely the fact that there were fixtures in the house, but some contract, either express or implied, on the part of the defendant to take them, failing in which he would be entitled only to nominal damages. Now that is precisely the position of the defendant in the present case: and it would be productive of great inconvenience if the onus were thrown on him of shewing that the money was paid into court on account of some other contract than that relied on by the plaintiff. The effect of this plea, therefore, is only to admit some liability on some contract, and as the plain-[102]-tiff has been unable to prove more than 12l. due to him, the verdict for the defendant is right.

ALDERSON, B. I entirely concur in the principles laid down by my brother Parke. We should try this question as if we were called on to pronounce judgment on the whole declaration. What would the plaintiff be required to prove, in order to recover on it? Suppose he gave at the trial the same evidence as is before us to-day, the amount of his damages would be the amount of the rent only, viz. 8l. 10s.; and as 12l. has been paid into Court by the defendant, the plaintiff, to entitle himself to a verdict, should prove more than the sum paid in. I cannot admit that this plea amounts to any acknowledgment whatever by the defendant beyond this, that by force of some contract he is bound to pay the plaintiff something on the count for fixtures and goods sold. But the plaintiff cannot apply that admission to any particular contract which he may please to select, any more than the defendant. The latter says in substance, "Can you, under this count, prove any contract against me? if you cannot, I have done an unnecessary act in paying this money into Court, which is more than sufficient to cover the nominal damages to which you are entitled." As to *Walker v. Rawson*, with all deference to the learned Chief Justice, I think his decision there is bad law; and as to *Meager v. Smith*, it was not at all necessary to the determination of that case that my Brothers Parke and Littledale should have expressed themselves as they did on this subject. If a contrary doctrine to that which we are now laying down were to be established, defendants would expose themselves to the greatest danger and inconvenience by paying money into Court at all, for the plaintiff might notwithstanding proceed in the action on the implied contract, and thus virtually say to the defendant, "It is utterly useless for you to shew that no such contract ever existed, for you are [103] estopped by your plea from disputing any I choose to set up." The injustice of such a proceeding would be gross.

GURNEY, B., concurred.

MAULE, B. I entirely concur with the rest of the Court. It seems to me that there could be no doubt, under the old practice and authorities, as to the effect of this plea. The doubt has arisen from the expression of Tindal, C. J., in *Walker v. Rawson*, and the observations of my brothers Parke and Littledale in *Meager v. Smith*. We should cast great difficulty upon defendants, if we were to hold that a payment of money into Court admitted any contract which the plaintiff might suggest. It is contended that the plea admits some transaction between the parties: but what is a transaction? The word "transaction" is a loose expression, which it is difficult to define, unless referred to something known. It is preposterous to say, that if a plaintiff proves some transaction, the payment of money into Court admits a contract. There is some analogy between payment of money into Court, and payment before action brought. Suppose a witness came and said that the defendant paid money to him,—would he be competent to infer upon what account the money was paid? So

here, the payment into Court is only an admission of a liability upon some one or more contracts, which the plaintiff is bound to prove.

Rule discharged.

[104] BICKNELL v. HOOD. Exch. of Pleas. 1839.—By an instrument dated December 13th, 1834, A., in consideration of the rents, covenants, and agreements thereafter mentioned, agreed to grant a lease to B., his executors, &c., of certain premises, to hold the same for the term of two years and three-quarters, wanting seven days, from the 25th day of December instant, yielding and paying a certain rent, payable quarterly, the first payment to be made on the 25th of March then next; which said indenture should contain covenants on the part of B. to pay the rent, &c., and all such other covenants as were contained in a lease therein referred to; and B. agreed that he would, if and when requested so to do by A., accept such lease; and that until such lease should have been granted as aforesaid, it should be lawful for A., his executors, &c., to distrain for all or any part of the rent which might become due from B., for or in respect of the premises thereby agreed to be demised, at any time after the execution of that agreement:—Held, that the instrument operated as an agreement only, and not as an actual demise; and consequently, that an agreement stamp was sufficient for it.

[S. C. 2 H. & H. 86; 8 L. J. Ex. 193; 3 Jur. 774.]

This was an action of assumpsit upon an instrument dated 13th of December, 1834, and stamped as an agreement, of which the following is a copy:—"Wm. L. Bicknell, in consideration of the rents, covenants, and agreements hereinafter mentioned, doth hereby agree to grant a lease unto W. C. Hood, his executors or administrators, at the expense of the said W. C. Hood, his executors or administrators, of all that piece or parcel of ground, with the messuage thereon erected &c., situate &c., (together with the use of the several fixtures, articles, and things enumerated in the schedule underwritten), to hold the same, with the appurtenances, unto the said W. C. Hood, his executors, administrators, and assigns, for the term of two years and three-quarters, wanting seven days, from the 25th day of December instant: yielding and paying therefor yearly and every year during the said term, unto the said W. L. Bicknell, his executors, administrators, or assigns, the yearly rent or sum of 140l., the said rent to be paid and payable quarterly, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly payment to be made on the 25th day of March which will be in the year 1835. And which said indenture of lease shall contain covenants by and on the part of the said W. C. Hood, his heirs, executors and administrators, to pay the said yearly rent on or at the days or times above mentioned, and also all taxes, parliamentary and parochial, payable in respect of the said messuage or tenement and premises, and to keep the said fixtures, articles, and things, [105] in the same state in which they now are, and to deliver them up, except as after-mentioned, at the end of the term hereby agreed to be granted: reasonable use and wear only excepted: and all such other similar covenants, charges, conditions, and agreements, as are contained in a certain indenture of lease dated the 16th day of October, 1823, and made between John McGill, builder, of the one part, and the said W. L. Bicknell of the other part, other than and except the covenant for the payment of rent by him the said W. L. Bicknell to the said John McGill, which he the said W. L. Bicknell hereby agrees to pay. And the said W. C. Hood, for himself, his heirs, executors, and administrators, hereby covenants and agrees, with the said W. L. Bicknell, his executors, administrators, and assigns, that he the said W. C. Hood, his executors or administrators, shall and will, if and when requested so to do by the said W. L. Bicknell, his executors or administrators, accept such lease as aforesaid upon the terms and conditions above specified or referred to, and execute a counterpart, and pay the expense of such lease and counterpart: and that until such lease shall have been granted as aforesaid, it shall be lawful for the said W. L. Bicknell, his executors, administrators, and assigns, to distrain for all or any part of the rent which may become due from the said W. C. Hood, his executors, administrators, or assigns, for or in respect of the said messuage or tenement and premises

hereby agreed to be demised, at any time after the execution of this agreement: and lastly, that he the said W. C. Hood, his executors, administrators, or assigns, shall and will, in the event of taking a further lease of the said messuage, tenement, and premises, from the 29th day of September which will be in the year 1837, purchase and take of and from the said W. L. Bicknell, his executors or administrators, all the said fixtures, articles after specified, at a valuation in the usual way. In witness, &c."

[106] At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Michaelmas Term, it was objected on the part of the defendant, that this instrument operated as a demise, and therefore ought to have had a lease stamp, without which it was inadmissible. The learned judge, however, overruled the objection, and the plaintiff obtained a verdict, liberty being reserved to the defendant to move to enter a nonsuit. J. Henderson having in Hilary Term obtained a rule accordingly,

Crowder now shewed cause. By the express terms of this instrument, it appears that a further and more complete one was to be prepared and executed, under which the defendant was to hold, and there is nothing in it to shew that he was to have an immediate occupation as tenant under this instrument. The clause enabling the landlord to distrain, was a provision depending upon the contingency of the defendant's occupying the premises before the lease was ready; and the habendum is from a period subsequent.

J. Henderson, contra. The question is, whether it can be collected from the whole instrument that the lessor is bound to give possession; and it was not necessary that the possession should be immediate. It may be that the parties contemplated a lease in futuro. It is sufficient that the terms to hold before the lease is granted, are contained in the instrument: and here the defendant is to hold specifically from the 25th of December, whereas there is no time fixed for the execution of the lease. Undoubtedly, in the commencement of the instrument, there is an agreement that a future lease shall be executed; but that is not sufficient to constitute it a mere agreement. The Court ought to adopt such a construction, if possible, as will give effect to every clause in the instrument; but no effect whatever would be given to the stipulation as to the power of dis- [107]-tress, unless the relation of landlord and tenant were held to subsist. It would be quite incongruous if the plaintiff were at the same time to have the option of treating the defendant as a trespasser. That clause could have no operation unless an interest was intended to pass; it must therefore be implied that a tenancy was to subsist at all events. [Lord Abinger, C. B. Would you have the Court to draw an inference from a particular clause, contrary to the whole tenor of the instrument?] It is submitted that there is an express recognition of the subsistence of the relation of landlord and tenant, without which there could be no power of distress. [Parke, B. There must be an agreement binding on the plaintiff, that the defendant is to have possession, to constitute such a relation.] The agreement does contemplate that the defendant is to have possession before the lease is executed, viz. from the 25th of December, at a certain rent, payable quarterly, the first payment to begin on the 25th of March then next; and then it provides, that "until such lease shall have been executed," the plaintiff shall have power to distrain—that implies that the one is to be landlord, and the other tenant.

LORD ABINGER, C. B. This case created, originally, considerable doubt in my mind. I agree to the principle, that if there be an agreement which clearly professes to transfer the possession to one party, and gives a power of distress for the rent to the other party, it will, as a general rule, amount to a contract of demise: and if this agreement could receive no other construction, we ought, undoubtedly, to hold it to be a demise. But I think the stipulation upon which the question turns in the present instance, has not necessarily this effect, but that it may be consistent with applying it to a future lease. The contract is to grant a lease, to commence on the 25th of December; but as, by possibility, the parties might not be ready with the lease at that time, and yet might desire [108] that the premises should be occupied, it is provided by the stipulation, that the landlord shall have power of distraining for any quarter's occupation that may become due prior to the granting of the lease. That construction is consistent with the rest of the agreement; and therefore the rule ought to be discharged.

PARKE, B. When this rule was moved for, I entertained some doubt, and I am not quite free from doubt now; but I think, upon the whole, that we may reasonably construe this instrument as an agreement only. The general rule is, that if there are

any words shewing a present intention that one is to give and the other to have possession, a tenancy is created; and the question is, whether in this case there appear sufficient words of positive agreement, that the defendant shall have possession at all events. I think it will be found, on examination, that there is nothing to bind the lessor to give possession in any event, unless a lease is executed; and I think the true construction of the instrument is, that the lessor agrees to grant a future lease, and the lessee agrees that if before it is granted he is permitted to occupy, and does occupy, then the lessor is to have power to distrain. But for such a stipulation, the lessor might not have been enabled to distrain until some rent had been paid, without a fresh agreement to shew that the terms of the tenancy were settled. This stipulation was calculated to supply the place of such fresh agreement, and to give a power of distraining, although the lessor would not be compellable to allow the party to enter, and there was nothing to create the relation of tenancy from year to year.

GURNEY, B. I think the fair construction of the instrument is, that it does not amount to a lease.

MAULE, B. There would be no doubt in this case, if it were not for the clause relating to the power of [109] distress. But if the intention of the whole instrument were that it should operate as a present demise, that clause would be idle, because the lessor would have had power to distrain without it. I think, therefore, the very clause appealed to confirms the view taken by the Court, that this is not a lease, but an agreement only.

Rule discharged.

TUCK v. TUCK. Exch. of Pleas. 1839.—When a defendant, under a plea of set-off to the whole declaration, proves a sum of money owing to him from the plaintiff, less than the amount of the claim which the plaintiff has established, the defendant is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for the plaintiff: unless where the defendant, by all his pleas, taken together, covers the whole cause of action.

[S. C. 7 Dowl. P. C. 373; 2 H. & H. 71; 8 L. J. Ex. 165; 3 Jur. 680.

See *Rodgers v. Maw*, 1846, 15 M. & W. 444.]

Debt on an account stated. The defendant pleaded non assumpsit, and a set-off to the whole declaration. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Michaelmas Term, the plaintiff having proved his case, (upon an I. O. U. for 30l.), the defendant gave evidence in support of his plea of set-off, and proved a cross demand to the amount of 9l. 10s. A verdict was taken for the plaintiff for 20l. 10s., the learned Judge given the defendant leave to move to enter a verdict on the plea of set-off, for the amount which he had proved. A rule nisi having been obtained accordingly,

Jervis (Mansel with him) shewed cause. The defendant, not having succeeded in proving a set-off equal to the amount proved by the plaintiff, is not entitled to have the issue on the plea of set-off found in his favour as to the part which he proved: *Moore v. Butlin* (7 Adol. & E. 595; 2 Nev. & P. 436), where it was expressly held that a plea of set-off is not divisible. The defendant could only be so entitled, where the sum proved under the set-off answers all that is not met by the other pleas: *Cousins v. Paddon* (2 C. M. & R. 547). [He was then stopped by the Court.]

[110] Peacock, contrâ. In *Cousins v. Paddon* (2 C. M. & R. 547), it is laid down that the plea of set-off is a divisible plea; and if so, it must be divisible for every purpose and in every case. The defendant has here succeeded in part upon that issue, and so far he was entitled to the costs of it. [Parke, B. In *Cousins v. Paddon*, the plaintiff's demand was entirely covered, partly by a plea of payment and partly by a set-off. As to the plea of set-off being divisible generally, the opinion of the Court of Queen's Bench in *Moore v. Butlin* is expressly to the contrary.] The plaintiff should not have denied the set-off altogether, but should have admitted so much of it as he owed the defendant. [Lord Abinger, C. B. No, it is the other way: the defendant should have pleaded the set-off only as to so much as he could prove.] The defendant is entitled to be allowed the costs of the witnesses who proved the set-off. If he were not entitled to have the verdict entered in this way, great inconvenience might

arise, for a defendant might in truth have an answer to the whole cause of action under this plea, but might fail in proving an inconsiderable part, and then it would appear, on this finding, that he had never been allowed the set-off. [Lord Abinger, C. B. The old rule of pleading was, that if the defendant pleaded falsely as to part, the issue was found against him as to the whole. If you had claimed less in the plea of set-off, perhaps the plaintiff would have admitted it. It was your own fault in not confining it to the sum you were capable of proving.]

LORD ABINGER, C. B. It appears to me that on principle this case must be decided against the defendant. This was an action of debt; and according to the modern decisions, the actions of indebitatus assumpsit and debt stand in the same situation, as to the amount which parties are required to prove, in support of the allegations contained in the pleadings. In former times, the Courts were more strict in actions of debt, and required the plaintiff to prove the exact amount claimed in his declaration, and the defendant to prove the exact amount alleged by him in his plea to have been paid. The defendant, in a case of set-off, has now the same privilege that he always had: if he chooses to plead that he has paid, or has a cross claim to the amount of, a certain specified sum, he may do so, and entitle himself to a verdict on the plea, if he can prove the fact to be as pleaded. It is an advantage for him to be allowed to plead generally, that a greater sum is due to him than the amount of the plaintiff's demand; but then he has no right to take an unfair advantage of the plaintiff by pleading to the whole, and thus taking the chance of proving as much as he can, and then claim to be allowed a verdict for so much as he has proved, when he has not proved any set-off equal to that which he has pleaded, or to the debt which the plaintiff has established. The general rule must apply, that if a party plead a special plea, and fail in proving any part, he fails in proving the whole; and this holds, whether the form of action be debt or assumpsit. Here the defendant begins by stating that the plaintiff owes him a larger sum than he owes the plaintiff, and that he is willing to set off so much of it as will equal the plaintiff's demand. If, indeed, a defendant prove portions of several pleas, none of which by itself covers the whole debt, but which taken together will do so, he is entitled to have the verdict entered for him: for instance, it might turn out that there was a good answer by matter of accord and satisfaction to part of the demand, and a valid set-off to the residue. It is an indulgence to the defendant to allow him to plead several pleas, each going to the whole cause of action: but I think the additional advantage now claimed ought not to be allowed, and to refuse it is quite consistent with the decision in the case of *Cousins v. Paddon*.

[112] PARKE, B. I am also of opinion that the rule ought to be discharged. The defendant, having shewn that a sum of 9l. 10s. was due to him from the plaintiff, contends that he is entitled to set off that sum against the larger one proved against him by the plaintiff, and have a verdict entered for him to that amount. This is an action of debt, not assumpsit,—but that is not material;—and I think the defendant is not so entitled. It is quite consistent with the case of *Cousins v. Paddon* so to rule. The result of that case is to shew that the effect of a plea of set-off is the same in actions of assumpsit and debt on simple contract, and that it is no longer necessary, in the latter form of action, to consider the plaintiff's demand as a precise sum, which is admitted by the defendant's pleading to be due in the first instance; and consequently, that a defendant is in the same condition as to pleas of set-off, the statute of limitations, &c., in the one form of action as in the other. That case decided also that the pleas of payment and set-off are divisible, and that if the defendant, by means of a plea of set-off, taken together with the other pleas on the record, covers the whole of the plaintiff's demand, he is entitled on that plea to have the verdict entered in his favour for the amount proved. The effect, then, of the judgment in that case being, that the two forms of action rest on the same footing, the question that remains for us to determine is, what is the construction of a plea of set-off by itself? Unless a liberal construction be put upon it, and it be considered divisible when requisite for the defence that it should be so taken, great inconvenience would ensue. In actions of indebitatus assumpsit, previously to the case of *Cousins v. Paddon*, it was held that the defendant was entitled to judgment on the record, whenever he answered the plaintiff's entire case by pleas of bankruptcy, insolvency, statute of limitation, set-off, &c. Or if any one part of the plaintiff's demand were answered by the plea of non assumpsit, and the rest by a [113] set-off, he would equally be entitled to a verdict

on all the issues. And although that rule has not been adopted in the action of debt, still there would be a great inconvenience, and a defendant, in many cases, could not relieve himself completely from the claims against him, unless some latitude were allowed in the construction of this plea of set-off; and that is obtained by construing it to amount to an allegation, that the plaintiff is indebted to the defendant in a greater sum than is due by the defendant, in respect of the matters claimed against him on the whole record. So that if, after taking off so much of those claims as is answered by the other pleas, the defendant can, in the form of a set-off, shew that a greater amount remains due to him than he shall be found indebted in to the plaintiff, he is entitled to have the general verdict entered for him. That is the reasonable and fair construction of the plea, and that which is essential to the ends of justice should be put upon it. But here a different construction is contended for, and the defendant claims a right to have a verdict entered for him for so much of a set-off as he has proved, in a case where he has given no answer to the whole of the plaintiff's demand. I do not see how we can, consistently with the words of the plea, put any such construction upon it. The plea must mean that the plaintiff is indebted to the defendant in a sum greater than that claimed in the declaration, so that, according to the strict mode of construction, (putting out of consideration now the enlarged sense which we have shewn it is necessary sometimes to put upon it), the plea would amount to an admission, in an action of debt, of the whole demand being originally due, and in assumpsit, of a liability to the amount claimed by the plaintiff; and whatever that might be, the plaintiff would be entitled to judgment, in default of the plea not having been proved.

The latitude alluded to has, however, been introduced [114] in the cases above mentioned; the plea of set-off has been construed, under peculiar circumstances, as entitling the defendant to prove due to himself as much as he can, which may be taken in connexion with the other pleas as an answer to the plaintiff's case. But I cannot accede to the proposition, that where a defendant is unable to shew that the plaintiff is indebted to him in a greater sum than he is to the plaintiff on the whole record, he is to be allowed to enter a verdict for as much as he has proved. And this is quite consistent with the judgment of the Court of Queen's Bench in the case of *Moore v. Bullin*, (with which I perfectly agree), and the reasons there given for not dividing the plea of set-off, except in cases where the other part of the plaintiff's claim is covered by other pleas.

GURNEY, B., and MAULE, B., concurred.

Rule discharged.

BRYANT v. FLIGHT. Exch. of Pleas. 1839.—A. agreed to enter into the service of B., and wrote to him a letter as follows:—"I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive I leave entirely to you." A. served B. in that capacity for six weeks:—Held, (Parke, B., dissentiente), that the contract implied that A. was to be paid something at all events for the services performed; and that the jury in an action on a quantum meruit, might ascertain what B., acting bonâ fide, would or ought to have awarded.

[S. C. 2 H. & H. 84; 8 L. J. Ex. 189; 3 Jur. 681. Referred to, *Broome v. Spratt*, [1903] 1 Ch. 599.]

Indebitatus assumpsit for salary and wages. Plea, non assumpsit. At the trial before Alderson, B., at the Middlesex Sittings after Michaelmas Term, it appeared that the plaintiff claimed the sum of 32l. on a quantum meruit for six weeks' services performed by him in pursuance of an agreement contained in a letter from him to the defendant, of which the following is a copy:—"I hereby agree to enter your service as a weekly manager, commencing next Monday, and the amount of payment I am to receive I leave entirely for you to determine." [115] On this evidence, Andrews, Serjt., for the defendant, contended that no action to recover compensation would lie, and that the plaintiff ought to be nonsuited; citing *Taylor v. Brewer* (1 Mau. & Selw. 290). The learned Judge left it to the jury to say what was a reasonable remuneration for the services actually performed by the plaintiff, and they found 20l., for which amount the learned Judge directed that the verdict should be entered for the

plaintiff, giving the defendant leave to move to enter a nonsuit. A rule having been obtained accordingly,

Kelly shewed cause in this term. The services having been proved to have been performed, and to have been of value to the defendant, the plaintiff is entitled to recover a reasonable compensation for them; for although no amount was fixed, the law will presume that he is to receive a reasonable sum. When a party has performed valuable services for another at his request, the law will presume that he is to pay for them that which is just and reasonable. The case of *Taylor v. Brewer* has no application to the present. There the plaintiff sought to maintain an action for wages on the following resolution of a committee:—"Resolved, that any services to be rendered by W. shall, after the third lottery, be taken into consideration, and such remuneration made as shall be deemed right." That resolution might mean that the party should have some remuneration to be fixed by the committee; but not necessarily so. The judgment there proceeded on the ground that the committee were to decide whether he was to have anything or not. But it is not possible to put the same construction on this contract. The plaintiff does not say he will leave it to the defendant to say whether he is to be paid anything or nothing: it is quite clear, from the terms of the letter, that he was to receive some remuneration, and the only thing left open was the amount. The [116] law presumes, when services are performed, that a remuneration shall be paid for them; and a party is not held to be disentitled, unless he clearly agrees to enter into the service, either for no remuneration at all, or leaving it to the other party to decide whether he shall receive any remuneration or not. [Alderson, B. In *Peacock v. Peacock* (2 Camp. 45), where a man said to his son—"You shall have 15s. a week till October, and you shall then have a share; we need not talk of the share till October comes, we shall settle it then;" and the son remained several years in the business, no settlement ever having been made, it was held that an action lay by him to recover a reasonable compensation for his labour. Lord Ellenborough, in *Taylor v. Brewer*, distinguishes that case, by saying that there the plaintiff was to have a share at all events. So here, it appears that the plaintiff was to have some wages at all events.]

Andrews, Serjt., and Hoggins, contra. This engagement was in the nature of an experiment, the value of the plaintiff's services being altogether unknown to the defendant; and therefore, it was reasonable for the plaintiff to leave it to the defendant to say, after a trial of his services, how much he was entitled to, or whether his services were of any value at all. And the defendant not having determined that he was entitled to anything, he cannot be entitled to recover in this action. The case is the same as if the parties had agreed that a third party should fix the amount of wages to be paid, in which case it is clear that the action would not lie until the third party had fixed the amount, as that would be in the nature of a condition precedent: *Morgan v. Birnie* (9 Bing. 672; 3 M. & Scott, 76).

Cur. adv. vult.

On a subsequent day,—

PARKE, B., said—In this case the plaintiff had entered into a contract with the defendant to serve him in the capacity of weekly manager; and the question is, whether, on the construction of the agreement between them, the plaintiff is entitled to recover in this action any remuneration for his services? My Brothers Alderson, Gurney, and Maule, who heard the argument, think that, according to the true construction of the plaintiff's letter, the defendant is bound to pay the plaintiff something for his trouble; and that it does not enable the defendant to say, "nothing at all is due to you," but that he is bound to award the plaintiff something in consideration of his services. I own my impression is, that it amounts to a mere honorary obligation on the part of the defendant; and I cannot distinguish this case from that of *Taylor v. Brewer*. As the majority of the Court, however, are of a contrary opinion, this rule must be discharged.

ALDERSON, B. It appears to us, that the nature of the contract between the parties is to be deduced from the paper itself, and that a contract to pay something is to be inferred from it, and the jury were to ascertain how much the defendant, acting bonâ fide, would or ought to have awarded.

LORD ABINGER, C. B., added,—As the amount was reserved, it would seem to imply that some amount was to be paid. I agree, therefore, with the majority of the Court.

Rule discharged.

BROWNING AND ANOTHER v. PARIS AND ANOTHER, Executors of Reid. Exch. of Pleas. 1839.—The Insolvent Act, 52 Geo. 3, c. 165, s. 54, by which a right is reserved to creditors to obtain payment out of the future effects of the insolvent, does not prevent the operation of the Statute of Limitations.

[S. C. 7 Dowl. P. C. 398 ; 2 H. & H. 65 ; 8 L. J. Ex. 222.]

Assumpsit for work and labour, goods sold, and on an account stated, the premises being laid by the defendant's [118] testator. Plea, action non accrevit infra sex annos. Replication, that after the making of the promises in the declaration mentioned, the insolvent, Reid, was actually a prisoner in the custody of the Marshal &c., at the suit of the plaintiffs and other creditors, on the 5th of June, 1812, mentioned in the Act for the relief of Insolvent Debtors, passed in the 52nd year of the reign of Geo. 3, entitled "An Act for the Relief of certain Insolvent Debtors in England ;" and afterwards, at the Quarter Sessions for the County of Surrey, applied to be discharged under the said act, and the Justices at such Sessions did adjudge the said Reid to be entitled to the benefit of the said act, and did order the Marshal to set at liberty the said Reid : that afterwards, and after the death of Reid, and within six years next before the commencement of this suit, to wit, on &c., divers goods and chattels of great value, to wit, of the value of the damages sustained by the plaintiffs by reason of the nonperformance of the promises in the said declaration mentioned, the said goods and chattels not being or having been part of the necessary apparel, &c. of Reid, but which said goods were and are part of the future estate and assets of the said Reid, within the meaning of the statute aforesaid, came to the hands of the defendants, as executors as aforesaid, to be administered, and which said goods and chattels were and are the first and only part of the future estate of the said Reid which ever came to the hands of the defendants, as executors as aforesaid, to be administered, within the meaning of the aforesaid statute. Verification.

Special demurrer, assigning for causes, that the replication confesses the plea, but does not avoid it ; that it does not allege that Reid in his lifetime, and after he took the benefit of the act, had not any future estate and effects ; and that the said statute did not save the causes of action in the declaration mentioned from the operation of the Statute of Limitations.

[119] Martin, in support of the demurrer. By the Insolvent Debtors' Act, 52 Geo. 3, c. 165, s. 54, a right is reserved to the creditors to obtain payment out of the future assets of the insolvent ; but this provision does not interfere with the operation of the Statute of Limitations. That defect is remedied by the 57th section of the late Insolvent Act, 7 Geo. 4, c. 57, by which it is provided, that such proceedings may be had upon the judgment entered up against the prisoner in the name of the assignee, as may seem fit to the discretion of the Court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained, shall be fully satisfied ; and that no scire facias shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon, by virtue of the order of the Court. The case of *Barton v. Tattersall* (1 Russ. & Mylne, 237), which may be relied on, does not apply to the present, for that proceeded on the established rule in equity, that the Statute of Limitations does not take effect where there is a trust fund. There, the discharge was in the year 1812, under the former Insolvent Act, 51 Geo. 3, c. 125, the effect of which statute was, that in consideration of a prisoner's giving up his effects, he was to be discharged from all debts. Therefore the replication is bad in substance.

Jervis, contra. The Statute of Limitations did not run against the claim of the plaintiffs ; and the effect of the statute 52 Geo. 3, c. 165, although it protected the person of the debtor, was to make his future property liable to answer the demands of his creditors. The replication alleges, and it is admitted, that such property came to the hands of his executors, who are therefore bound to satisfy the plaintiff's debt. In *Higgins v. Scott* (2 B. & Adol. 413), it was held that the Statute of Limitations bars the remedy only and not the debt, and therefore as the 52 Geo. 3, [120] c. 165, makes the insolvent's future property liable, a new promise arose to the plaintiffs from the executors, on the goods coming into their hands.

PARKE, B. The replication is no answer to the Statute of limitations. But even if it were so, and it could be maintained that a new promise arose under the circum-

stances, still that would be a promise by the executors, and not, as here alleged, by the testator.

Judgment for the defendant.

ATTORNEY-GENERAL v. MANGLES AND OTHERS. Exch. of Pleas. 1839.—A testator, by his will, after giving certain legacies, gave, devised, and bequeathed unto his executors, their heirs, executors, and administrators, all the rest and residue of his estate, real and personal, upon trust, at such times as they might think fit, to sell, convey, or otherwise convert into money the same, or any part thereof; and the testator directed that all the residue of his estate should be invested as it should be realized, and should be divided amongst all his children, in such shares and proportions that his son then born should take four shares, any other son or sons which he might have should take three shares each, and his daughters should take two shares each; but if his son then born should die before twenty-one and without leaving issue, the testator directed that his next son should take four shares, or, if he should have no other son, then that his eldest daughter should take three shares; and he directed that in the event of any of his children dying under twenty-one and without issue, his or her legacy or share should be considered as having lapsed; and that in case any of his daughters should marry under twenty-one, his trustees should settle her fortune upon such trusts &c. as were specified in the will of his the testator's father with respect to certain bequests of personal property to the sisters of the said testator therein contained; and the testator directed that his trustees should have full power, in making such sales as in the said will were directed, to resort to either public or private sale, and to buy in and re-sell, and to defer any sale so long as they might think fit, and of causing any part or parts of his the said testator's real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children at the amount of the valuation, as a part of his or her proportion of his residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared respecting such proportions of residuary estate.—The testator, at the time of his death, had one son and four daughters. The trustees, after the testator's death, sold a large part of the real and personal estate, amounting to 180,000l., and caused the remaining part of the residue, which consisted of real estate, to be valued, and the same was valued at 90,000l., which was the son's share of the residue; and the sums of 45,000l. each, amounting to 180,000l., were the shares of the daughters. The trustees allotted the estate which had been so valued at 90,000l., to the testator's son, at the amount of the valuation, and retained the sum of 180,000l., the proceeds of the part which had been sold, for the benefit of the four daughters:—Held, that legacy duty was payable upon the amount of the part which was actually sold, but not upon the part which the trustees had allotted to the testator's son, under the discretionary power contained in the will.

[S. C. 2 H. & H. 74; 3 Jur. 981. Applied, *Attorney-General v. Simcox*, 1848, 1 Ex. 749 Explained, *Attorney-General v. Marquis of Ailesbury*, 1885, 14 Q. B. D. 903: reversed, 16 Q. B. D. 408: restored, 12 A. C. 672.]

Information for legacy duties. The information stated, that theretofore, and after the 31st of August, 1815, [121] to wit, on the 7th of July, 1831, in the county aforesaid, one John Christie made his last will and testament in writing, duly executed and attested according to the form of the statute in that case made and provided, for the passing of real estates, and thereby appointed Caroline Christie, his wife, C. J. Falconar, Robert Mangles, H. Boldero, T. Edgar, P. Christie, and T. Treacher, to be executors and trustees of his said will; and the said J. Christie, by his said will, after giving certain legacies and making certain bequests as therein particularly mentioned, gave, devised, and bequeathed unto his said executors therein named, their heirs, executors, and administrators, all the rest and residue of his estates, real and personal, upon the following trusts:—viz., upon trust, at such times as they his said executors might think expedient, to sell, convey, or otherwise convert into money the same, or any part thereof, for which purpose the said testator by his said will declared that the receipts of his said executors should be sufficient discharges to all purchasers,

who should not be bound to see to the application of their purchase-monies. And the said testator by his said will directed, that the clear proceeds of his estates, and all other his property not specifically bequeathed, should be applied and disposed of as follows; viz., the sum of 20,000*l.* should be paid or invested upon the trusts of his marriage settlement, directed by the Court of Chancery, in the suit instituted relating thereto; and that his trustees should invest, in their own names, the sum of 30,000*l.*, and pay the interest or dividends thereof to his wife during her life, if she should not re-marry: and upon her death or re-marriage, that the said 30,000*l.* should sink into the residue of his estate. And the said testator by his said will directed, that all the residue of his estate should be invested as it should be realized, and should be divided amongst all his the said testator's children, in such shares and proportions, that his the said testator's son, then [122] born, should take four shares, any other son or sons which he the said testator might have should take three shares each, and his the said testator's daughters should take two shares each; but if his the said testator's son, then born, should die before attaining the age of twenty-one years, and without leaving issue, the said testator by his said will directed that his the said testator's next son should take four shares; or if he the said testator should have no other son, then that his the said testator's eldest daughter should take three shares. And the said testator by his said will directed, that in the event of any of his the said testator's children dying under the age of twenty-one years and without issue, his or her legacy or share should be considered as having lapsed. And it was further directed by the said will, that in case any of his the said testator's daughters should marry under the age of twenty-one years, his the said testator's trustees should settle her fortune upon such trusts, for the benefit of herself and her issue, and with the like trusts and remainders over, in favour of his the said testator's other children, as were specified in the will of the said testator's father, with respect to certain bequests of personal property to the sisters of the said testator therein contained. And the said testator by his said will directed, that the said trustees should have the discretion, during the minorities of the said respective children, of applying any part of the income of their respective fortunes for their maintenance and education, and that in such way and by such hands as they his said trustees should think fit, and also of advancing any part not exceeding one half of the capital of the respective fortunes of his the said testator's children, for establishing the said children in marriage or otherwise in life. And the said testator by her said will further directed, that his trustees should have full power, in making such sales as in the said will were directed, to resort to either public or private sale, and to buy in at public sale and re-sell, and [123] should also have the discretion to defer any sale so long as they might think fit, and of causing any part or parts of his the said testator's real or personal estates to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children at the amount of the valuation, as a part of his or her proportion of his the said testator's residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared respecting such proportions of residuary estate. And in case of any such allotments, his the said testator's trustees should have discretionary powers of leasing and managing such respective allotments during the minorities of his the said testator's children, and the like powers as to all his the said testator's freehold and leasehold properties, until the same should be sold.

The information then went on to allege, that on the 10th of July, 1831, the said J. Christie died, without altering or revoking his said will; that he had one brother and two sisters, who, together with the said John Christie, were severally named in the will of the said John Christie's father; and it then set out his father's will before referred to (which did not appear to be sufficiently material to the present case to require insertion). The information then alleged, that the testator, at the time of the making of his will, and thence until and at the time of his death, was seised and possessed of divers freehold and copyhold estates of great value, to wit, freehold estates of the value of 200,000*l.*, and copyhold estates of the value of 100,000*l.*, and was also, before and at the time of his death, possessed of certain leasehold and personal property of great value, to wit, leasehold property of the value of 100,000*l.*, and personal property of the value of 100,000*l.*: That the said J. Christie, at the time of his death, had one son and four daughters, viz., William John Christie, Caroline Christie the younger, Charlotte Christie, Anna Christie, and Mary Christie; and [124] that the said testator died, leaving his said several children and also

the said Robert Mangles, H. Boklero, T. Edgar, and P. Christie, respectively him surviving: That the said Robert Mangles &c., after the decease of the testator, to wit, on &c., took upon themselves the burthen of the execution of the said will, and then and there paid and satisfied the funeral expenses, and also the just debts of the testator, and also the said legacies and bequests given by the said will of the said J. Christie, save and except the said residue so devised and bequeathed as aforesaid. That the residue of the real and personal estate and effects of the testator, remaining after the payment of the funeral expenses, debts, legacies, and bequests so paid and satisfied as aforesaid, then and there was of great value, to wit, of the value of 320,000l., and that the same then and there remained and was in the possession of the said R. Mangles &c., as such executors as aforesaid, who then and there were seised and possessed thereof respectively, upon the trusts and for the purposes in the said will in that behalf specified and thereinbefore set forth; and it then and there became and was the duty of the said R. Mangles, &c. to sell, convey, or otherwise convert into money the said residue of the real and personal estate of the said testator, and to apply and dispose of the proceeds thereof in the manner and for the purposes in the said will mentioned, or, if they thought fit to cause any part or parts of the said residue to be valued instead of being sold, to allot such part or parts to any or either of the said children of the said testator at the amount of the valuation, as a part of his or her proportion of the said residuary estate, but to be considered as personal estate, and subject to the trusts in the will respecting such proportions of the said residuary estate: That the said R. Mangles &c., after the decease of the said testator, to wit, on &c., in &c., sold and converted into money certain real estates, being a large [125] part of the said residue of the real and personal estate of the testator, to wit, the amount of 180,000l., and also then and there caused to be valued certain other real estates, being the remaining part of the said residue of the real and personal estate of the said testator, which consisted of real estate, and the same was then and there valued at a large sum of money, to wit, 90,000l. The information then proceeded to allege, that after deducting from the sum of 320,000l., being the total amount of the residue, the two sums of 20,000l. and 30,000l. directed to be applied for the purposes of the marriage settlement and the benefit of the wife of the testator, the remaining part of the residue, being of large amount, to wit, to the amount of 270,000l., then and there became and was divisible amongst the said one son and four daughters of the testator, in the manner and in such shares and proportions as in the said will in that behalf directed, viz. the sum of 90,000l., being four shares or parts of the said sum of 270,000l., the whole into twelve shares being divided, then and there became and was the share and proportion of the said W. J. Christie, as being the only son of the said testator, and four sums of 45,000l. each, such sums being each of them two parts or shares of the said sum of 270,000l., then and there became and were respectively the shares and proportions of each of the said daughters of the said testator: that the duty which ought to have been paid for and in respect of the said bequest of the said shares of the said residue to the children of the testator, according to the provisions of the statute in that behalf made then and there, amounted to a large sum of money, to wit, the sum of 2700l.: that the said R. Mangles, &c., after the decease of the testator, and after they had so taken upon themselves the burthen &c., and after the said valuation &c., to wit, on &c., allotted unto the said W. J. Christie, then and there being the only son of the said testator, the said real estates, being the said portion of the said residue of the real and personal estate [126] of the said testator which had been so valued at 90,000l., at the amount of that valuation, as and for his share and proportion of the said residue, under and by virtue of the will, and then and there required for the benefit of the said W. J. Christie, the said portion of the said residue so valued as aforesaid, and being of the said amount, without having first paid the duty, to wit, the sum of 900l., then and there chargeable for, &c., in respect of the said bequest to the said W. J. Christie. There was a similar allegation as to the 180,000l., the proceeds of the sale of the estate retained for the benefit of the four daughters.

To both these breaches there was a general demurrer, and joinder in demurrer.

The points marked for argument on the part of the defendants were:—1st, The defendants contend that under the act of 55 Geo. 3, c. 184, schedule part 3, title "Legacies," no duty is payable in respect of the land allotted by virtue of the power to allot contained in the will of John Christie. 2ndly, That under the same act no

duty is payable in respect of the land sold, as mentioned in the first count of the information.

The points marked on the part of the Attorney-General were as follows:—The Attorney-General claims the payment of the legacy duty, under the 45th Geo. 3, c. 28, ss. 1 & 4, and 55 Geo. 3, c. 184, schedule part 3, title "Legacies," in respect of the share allotted to W. J. Christie in real estate, and valued at 90,000l.; and also in respect of the said sum of 180,000l., being the proceeds of that part of the residue of the testator's estate, being real estate, which had been sold and converted into money pursuant to the directions in the said will. And the Attorney-General will argue that such duty is due and payable, because, by the will, a direction is given to the executors to sell the real estate devised: and further, that the effect of such direction is not controlled by the discretionary power given to the trustees to allot portions of the real [127] estates, for it is expressly provided by the testator, that any portion allotted shall be considered as personal estate, and shall be taken as such by the allottee at the amount at which it has been valued; such allotment, therefore, being but a sale of the allotted portion to the allottee.

Wightman, in support of the demurrer. By the provisions of this will, the executors are vested with an absolute discretion, not depending on the will of the object of the bounty, but depending wholly on the exercise of their own discretion, whether they will sell or not. If they please, they are at perfect liberty, instead of selling, to convey the real estate, or a portion of it, to the objects of the bounty in *solido*, as real estate, merely putting a value upon it that they may ascertain the proportions. The question, therefore, will turn on the construction to be given to the words of the 55th Geo. 3, c. 184, sched. 3, tit. "Legacies," which are, "For the clear residue, when given to one person, and for every share of the clear residue when given to two or more persons, of the monies to arise from the sale, mortgage, or other disposition of every real or heritable estate directed to be sold," &c. The fund, therefore, which is hereby made chargeable, must be a legacy arising either from personal property or from land directed by the will to be sold: but it is also admitted, on the part of the defendants, that in case the land should be directed to be sold, and it is not sold, but the land is taken by the object of the bounty as a substitute, then the legacy duty attaches; because, as far as the will is concerned, the land is positively and absolutely directed to be sold. *The Attorney-General v. Holford* (1 Price, 426) is a direct authority to that effect. There Thompson, C. B., says, "This is not a bequest of the property in question, directing it to be sold with a view solely to the payment [128] of the debts, but it is directed to be sold at all events, and to be turned into money." There the land was not sold, but the legatee was content to take the land instead of the money, and therefore waived the sale and took it; but that was under a will under which the land was directed to be sold at all events, and therefore it was considered for that purpose as if it had been sold, and that the legacy duty attached. [Parke, B. There is no doubt upon the second question raised for argument, as to the money raised by the sale of the land,—that which was actually sold,—the legacy duty is clearly payable on that. Lord Abinger, C. B. The question now is, whether the testator did or did not give to the trustees an option whether they would sell or not? That is the only point.] The trustees, by the discretionary power contained in this will, are not bound to sell, but they may, if they please, avoid a sale altogether. The words are, "And the said testator by his said will farther directed, that his trustees should have full power, in making such sales as in the said will are directed, to resort to either public or private sale, and to buy in at public sale and re-sell, and should also have the discretion to defer any sale so long as they might think fit, and of causing any part or parts of his the said testator's real or personal estates to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children at the amount of the valuation, as a part of his or her proportion of his the said testator's residuary estate, but to be considered as personal estate." Now first, as to the words "to be considered as personal estate." Those words can have no effect whatever here, unless in legal construction it be personal estate; the testator's directing that it shall be the same as personal estate will have no weight; for if we take the converse of the proposition, and suppose that he had directed that personal property should be considered as real estate, the Court would not so treat it. [Lord Abinger, C. B. He could [129] not withdraw it from liability to legacy duty by saying it should be considered as real estate; and therefore he cannot say it shall be

liable, by saying it shall be considered as personal—that is your argument.] He cannot render it less liable by saying it shall be considered as real estate, nor will he make it more liable by saying it shall be considered as personal estate. The case which is most in point on this question is that of *In re Evans* (2 C. M. & R. 206). There a testator devised real estates to trustees for the benefit of several parties for life, and after their deaths to be distributed amongst their children, &c.: and the will contained a power by which the testator directed that it should be lawful for the trustees to sell the same or any part thereof, “as shall appear most expedient to my trustee or trustees for the time being, towards the management of my property and affairs.” Some portion was sold shortly after the testator’s death, because, being suitable for building, it was advantageous to the estate to sell it: and the remainder, after being subject to the trusts for ten years, was sold under an order of a Court of Equity; and it was held, that the money arising from such sale was subject to legacy duty. That may be considered as the converse of the case of *The Attorney-General v. Holford*. In the latter case, although the land was directed to be sold, it was not actually sold, and in the case *In re Evans*, although there was a discretion which was to be exercised by the trustees, it was actually sold. There it was held that the duty did not attach; because, by the will, the land was not to be sold at all events, but only in case the trustees should think it most beneficial for the interest of the parties that it should be sold. In that case the Court took time to consider, Lord Lyndhurst, C. B., saying that, according to his then opinion, it was not necessary, to bring a case within the words of [130] the act of Parliament, that the word “directed” should be found in the will, but it was sufficient if it was the object of the will, and the obvious intention of the testator, that a sale should be effected; that was the principle of the two cases cited in the argument (*The Attorney-General v. Holford*, and the case of *The Advocate-General v. Ramsay’s Trustees*,^(a) which occurred in the Courts of Scotland). Lord Lyndhurst then goes on to say, that the question in that case, *In re Evans*, was, “whether there was such an obvious intention and such a necessity for a sale to effect the purposes of the will, as that a sale could be said to be directed,” and he added, that no case had hitherto gone so far as to say that the duty was payable, when there was not either an express direction to sell, or a manifestation in the will of the intention of the testator that there should be a sale. The present case is within the rule there laid down. There is here neither a direction to sell, nor does it appear, taking the whole will together, that there was a necessity for selling. It is true, that at the commencement of the will the estates real and personal are conveyed to the trustees, upon trust at such times as they might think expedient, to sell, convey, or otherwise convert into money, the same or any part thereof; and it may be admitted, that if that had been the only direction relating to the sale, it might be well said there was an express direction to the trustees to sell,—in short, that they would be bound to sell; and therefore, that, although by an arrangement afterwards concurred in by the legatees, they might have been content to have taken certain land at a valuation, still the legacy duty would have attached, according to the decision in *The Attorney-General v. Holford*. But if the subsequent part of this will be looked at, it will be found that, so far from there being any positive direction to sell, there is the largest and [131] widest discretion on that matter given to the trustees; not only as to the time of sale, but whether they should sell at all; and it does not appear from any other parts of the will that there was any necessity, for the purpose of effecting the intention of the testator, that the real estate should be sold; but, on the contrary, that it was sufficient for the trustees to make a valuation and an allotment, and they have done so. [Lord Abinger, C. B. We will hear the Crown on the subject. You give up the point as to the property which is actually sold?] Wightman assented, saying he would not argue against the opinion of the Court.

The Solicitor-General, *contra*. The legacy duty is payable upon the whole of this property, because the whole of the real estate, as it is submitted, is irrevocably directed to be sold within the meaning of the act of Parliament. The question is, whether, upon the whole contract of the will, the trustees were bound to sell; and if there be such a direction to be ascertained from the whole context of the will, that is sufficient; there need not be in express words a direction to sell. By this will, the testator gave to his executors all his real and personal estate, upon trust at

(a) Stated in a note at the end of the case *In re Evans*, 2 C. M. & R. 224.

such times as they might think expedient to sell, convey, or otherwise convert into money the same or any part thereof; up to that point there is an absolute direction to sell. The testator then, after the directions as to the two sums of 20,000*l.* and 30,000*l.*—which are not material to the present inquiry,—directed that all the residue of his estate should be invested as it should be realized, and should be divided amongst all his children, in such shares and proportions, that his son then born should take four shares, and (applying the direction to the facts which did happen) that his, the said testator's daughters, should take two shares each; that is, that it should be divided into twelve parts, four of which were to go to the son, and two to each of the four daughters. Now this is an express direction to convert into personalty, [132] for the purpose of a distribution; it is a disposition of the fund absolutely inconsistent with anything but converting the whole into money. And then there is this important direction—"That in the event of any of his, the said testator's children, dying under the age of twenty-one years, and without issue, his or her legacy or share should be considered as having lapsed." There is the expression "legacy or share," all pointing to personal estate. And then there is the further direction, which is also extremely important,—“That in case any of his the said testator's daughters should marry under the age of twenty-one years, his trustees should settle her fortune upon such trusts, for the benefit of herself and her issue, and with the like trusts and remainders over for his the said testator's other children, as were specified in the will of his the said testator's father, with respect to certain bequests of personal property to the sisters of the said testator therein contained.” The case then proceeds,—“And the said testator by his said will directed, that the said trustees should have the discretion, during the minorities of his the said testator's respective children, of applying any part of the income of their respective fortunes for their maintenance and education, and that in such way and by such hands as they his said trustees should think fit; and also of advancing any parts not exceeding one-half of the capital of the respective fortunes of his the said testator's children, for establishing the said children in marriage or otherwise in life.” That is a disposition which, unless there is some provision made afterwards to control it, never can be carried into effect until the estate has been converted into money; because no one can tell what the child's fortune is, nor consequently what half a child's fortune is, until the whole property has been converted into money. Then comes that passage of the will, which is supposed to have totally altered that which before was quite clear—namely, the power of allotment; but it is submitted that the allotment [133] there intended was a mere temporary allotment for convenience, and was not intended to interfere with the direction eventually to sell. The will directs, that the trustees shall have power, in making such sales, to resort either to public or private sale, and to defer any sale so long as they might think fit,—“and of causing any part or parts of his the testator's real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children, at the amount of the valuation, as a part of his or her proportion of his the said testator's residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared, respecting such proportions of residuary estate.” It is said that it is not competent to a party, by saying that real estate shall be considered as personal, to give it that nature. It is true you cannot impress on real estate the character of descendibility according to the rules applicable to personal estate; but it is done in effect every day in settlements and wills, by directing the real estate to be sold, and the proceeds paid over; it then becomes impressed with the character of personalty, and though the person who is entitled to the absolute interest may say he will take it in its present state, the character of personalty attaches to it: that is the meaning of this will, and the Court will give effect to the intention of the testator. Having before laboriously directed that all his estate, both real and personal, should be turned into money, the testator says, “You may defer the sale as long as you please, and, instead of selling it all at once, you may allot Black Acre as of the value of 10,000*l.*, and that will conclusively fix the party to whom it is allotted, whether it will produce 10,000*l.*, or 20,000*l.*; but it is still to be taken as personal estate,” which must mean that it shall all eventually be sold. The testator had said previously, that in the event of any of his children dying under twenty-one and without issue, their legacies or shares should be considered as having lapsed. Now, sup-[134]-pose his son had married at the age of nineteen, and had issue two sons, did the testator intend that the trustees should have the option of saying whether a second son, if he

left one, should be a beggar, or be worth 45,000l.? That consequence must follow, by adopting the construction contended for on the other side. There never was an instance in which a power was given to a trustee, and certainly not any in which a power was given by implication, to say whether or not property should be invested with the character of realty or personalty, thereby affecting the rights of the children of the party creating the trusts. Moreover, it is to be observed, that the shares of the daughters are directed to be settled in the same mode in which the shares of the testator's sisters' property were settled under the will of their father. And, by that will, the fortune of each daughter was to be settled, so that each daughter took it for her life, remainder to the husband for his life, in case she married, and afterwards to the children of the marriage. Now suppose, under such a settlement, a child had died in the lifetime of its parent, leaving issue; the share of a child so dying would have gone amongst all the issue as personal estate. How could that be done, if this is to be taken as real estate? It could only be done by directing it to be sold, as it is here originally done. Besides, what estate did any party take in this property which was to be allotted? Would they take a fee-simple, or what estate? As to that, there is no direction what estate the parties to whom it may be conveyed are to take. In the case *In re Evans*, this difficulty did not arise; because there the will directed the property to be divided into three shares for three parties, who were each to take for life, and after their death, it was to be amongst all their children as tenants in common, and their respective heirs, executors, administrators, and assigns. It must be borne in mind, that up to the clause of allotment, the trusts of the will were to convert the whole [135] estate, both real and personal, into money, and to divide it into certain proportions amongst his five children; but then the testator says, that may be inconvenient, as the children are under age, and it will be necessary to settle what some particular party is to have before that can be done; and then he obviates any difficulty by saying, that the trustees may allot one or more of the estates of the shares of each party, but still to be considered as personal estate, and subject to the trusts declared as to the residuary estate. Unless the Court hold this to be a direction that the estate is to be turned into money, they must strike out of the will the words "to be considered as personal estate, and subject to the trusts in the will declared, respecting the residuary estate." If there be something in a will which can have no meaning, then, undoubtedly, it may be struck out; but here these words may have a very rational meaning, if it be considered as a direction that the estate shall be converted into money. [Parke, B. In the other point of view, you must strike out the words "and of causing any part or parts of the testator's real or personal estate to be valued instead of being sold."] That would not be necessary. Instead of being sold, they are to cause it to be valued at the time of allotting it, which otherwise they would have no right to do. [Alderson, B. What do you say to this clause—"And in case of any such allotment, then they shall have the power of leasing and managing such respective allotments during the minorities of his the testator's children;" that is, during the minority of the child to whom it is allotted.] After the allotment, the trust would be entirely altered; and, during the minority, the will gives an express power of leasing and managing the estate. [Lord Abinger, C. B. The power of allotting the estate, and of managing it, and of granting leases after it is allotted, is inconsistent with saying it shall be considered as personal estate.] It [136] is submitted that it is not; that that only confers the power of managing and leasing, and so on, until a final division is made. By the terms, "to be considered as personal estate," the testator intends that it shall be so considered for the purposes of the descendible quality of personal estate. [Lord Abinger, C. B. Which he cannot do.] He could do so by directing it to be converted into personalty. [Parke, B. But he says it is not to be sold if the trustees choose to have it valued and allotted. Then you have two contradictory directions.] All the testator means is, that it is not to be sold at the time of the allotment. He expressly says, in the former part of the will, that the whole shall be converted into money, and that the money shall be divided into certain proportions amongst his children; and then he says, it may be necessary to ascertain what the share of each child is before it has been all converted into money, and that the trustees may allot a portion of the estate; but still it is to be considered as personal estate. To give a different construction, it would be necessary to imagine that the testator intended to give to the trustees the extraordinary power of deciding as to the rights of the

unborn issue of his children ; because it is quite clear that upon any of them marrying and dying under twenty-one and leaving issue, the rights of that issue would entirely depend on the discretion which the trustees might exercise. According to such a construction, the trustees might have the right of saying, that the eldest son should take 90,000l., and the second son, if there were one, should take not a farthing, or that they should take it equally between them, which never could have been the intention of the testator. He never could have intended to confer such a power. That seems to be one of the best clues to guide the Court in construing this will ; and which will lead to the conclusion, that the whole was to be considered as allotted to be sold, whatever [137] might be the intermediate division which, for the convenience of the parties, might be made of it.

Wightman, in reply, was stopped by the Court.

LORD AINGER, C. B. It is admitted on all hands that for that portion of the estate which was sold under the direction of the will, the legacy duty is payable. The question as to the remainder appears to me to turn upon a very narrow ground, which is, whether the trustees had a discretion or not. Now the argument of the Solicitor General amounts to this, that certain cases may occur in which it would be extremely difficult to exercise that discretion : but I think we are not to judge by that very nice disquisition of cases which may possibly occur. The trustees certainly have a discretion which they may exercise, and exercise within the intention of the testator, in many cases. It appears to me that that discretion distinguishes this from the case decided, where there was no such discretion.(a) Cases may equally be put where it would be highly probable that they would exercise a discretion not to sell. Having that discretion, I think we cannot consider that before they had exercised a discretion to sell, and so to convert the estate into personalty, the legacy duty attached. I think, therefore, the judgment must be against the Crown.

PARKE, B. The Crown is clearly entitled to the legacy duty on the part of the estate which is sold ; the remaining question is whether, taking all the will together, this is a direction to the trustees to convert the estate into money ; or whether it is really left in their discretion, not to convert it into money, but to leave it as land ? According to the authority of *The Advocate General v. Ramsay's Trustees*, the words of discretion may be so controlled as to shew they are [138] directory. If they are directory, the legacy duty would attach under the act. The question here is, whether they are directory or not ? It seems to me that a discretion is clearly given to the trustees not to sell in certain cases : the will provides that they may have full power of making such sale, and to resort to a public or private sale ; it gives them a power of re-selling, or of deferring any sale : and of causing any part of the testator's real or personal estate to be valued, not before sold, but instead of being sold. I admit there may be some difficulty in what follows, that it shall be treated as personal estate, and subject to all the trusts in the will ; that may make it difficult in some cases for the trustees to comply with the directions given in this part of the will ; at the same time, I cannot think that that affects their discretion in certain cases to sell or not to sell, as they think fit ; and if they think fit not to sell, inasmuch as they have a discretion to sell or not, the legacy duty does not attach.

ALDERSON, B. It is clear, according to the case of *The Advocate General v. Ramsay's Trustees*, that if there be words of discretion, they may be controlled by the other words of the will, so as to shew that they are only in semblance words of discretion, and in reality words of direction. But it does not appear that the words of this will are of the latter description. In the simple and plain sense they are words of discretion ; and although, as the Solicitor General argues, it would be difficult to carry that discretion into effect in certain ingenious cases which he has put, to which I agree, yet it is possible to conceive that those ingenious cases may never occur at all. The testator might mean to give a discretion, for the purpose of enabling the trustees, in case they saw the probability of such a case arising, to sell in order to get rid of the difficulty ; but in case the circumstances and time were such as were not likely to raise that difficulty, then to take the other branch of the alternative, and allot [139] the real estate. Unless you can shew that at all events the discretion is taken away, it does not come within the authority of *The Advocate General v. Ramsay's Trustees*. It seems to me that many cases might be put, in which it would be obviously

(a) Probably referring to *The Attorney General v. Holford*.

the duty of the trustees, in the exercise of a sound discretion, to allot this as land. If that be so, the words of the will are to have their natural import and effect ; that is to say, the words of discretion shall mean that the trustees have a discretionary power. Then it is quite clear the legacy duty is not to attach.

Judgment for the Crown for the amount of the proceeds of the real estate actually sold, and for the defendants as to the amount of duty claimed for the part which had been allotted.

ISAAC v. BELCHER AND OTHERS. Exch. of Pleas. 1839.—In an action of trover, the plea, that the plaintiff was not possessed, puts in issue the right of the plaintiff to the possession of the goods, as against the defendant, at the time of the conversion.—Therefore, in an action of trover against assignees of a bankrupt, such a plea lets in evidence that the goods, at the time of the bankruptcy, were within the order and disposition of the bankrupt, as reputed owner, (according to the 6 Geo. 4, c. 16, s. 72), and that the defendants thereupon, as assignees, sold the goods.

[S. C. 7 Dowl. P. C. 516 : at Nisi Prius, 8 C. & P. 714.]

Trover against the defendants, who were and who defended as assignees of a bankrupt. Pleas, first, not guilty : 2ndly, a denial of the plaintiff's property in the goods ; upon which issues were joined. Upon the trial before Lord Abinger, C. B., at the London Sittings after last Michaelmas Term, the plaintiff having proved a conversion by the defendants, and that the goods were his property, the defendants' counsel opened a case shewing that the goods in question had been for a considerable time before and at the time of the bankruptcy, in the possession, order, and disposition of the bankrupt as reputed owner, with the plaintiff's consent ; and that thereupon the defendants, as assignees of the bankrupt, had sold the goods under the authority of the 6 Geo. 4, c. 16, s. 72. The plaintiff's counsel contended that this defence was not admissible on these pleadings, but that it ought to have been specially pleaded in confession and avoidance, and the Lord Chief Baron being of this opinion, excluded the evidence, and the plaintiff had a verdict. In Hilary Term, Kelly [140] obtained a rule to set aside this verdict, and for a new trial, on the authority of the cases of *Owen v. Knight* (4 Bing. N. C. 54 ; 5 Scott, 307), and *Butler v. Hobson* (4 Bing. N. C. 290 ; 5 Scott, 798).

Barstow now shewed cause. The proposed defence was consistent with the plaintiff's right of property in the goods, although, if established in fact, it supplied a legal answer to the action. Being consistent with the plaintiff's right of property, the defence was a justification of the conversion, and therefore comes under the description, in pleading, of a confession and avoidance. It is usual to plead such a defence : at least the form of such a plea is to be found in the books of precedents. But although it has been usual to plead it, if the effect of the Bankrupt Act, 6 Geo. 4, c. 16, s. 72, was to divest the property of the owner of the goods, and vest it in the assignees, it must be conceded that a plea, denying the plaintiff's right of property in the goods, would let in the proposed defence. But it will be seen that the act only gives a power of sale ; and that until that power has been exercised, the property of the owner of the goods is never divested : and when divested, it passes, not to the assignees themselves, but to the purchaser of the goods. The 72nd section provides, "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission ;" so that the assignees, by this section, have a power like that of the Commissioners. The property itself never vested in the Commissioners. It was passed by them to, and remained in, the [141] provisional assignee, in cases before the 1 & 2 Will. 4, c. 56, when it was assigned to the creditor's assignees ; and in cases since that statute, the property passes by the mere appointment of the assignees. But these instruments only pass, and only could pass, the property of the bankrupt himself. Section 72 of the 6 Geo. 4, c. 16, gives the power of sale to the Commissioners in cases of reputed ownership, and no doubt that power passes to the assignees ; but still the right of

property does not vest in them. They are for this purpose like a person to whom a power is given, although the legal estate is not vested in him. Such a person may exercise the power, and so divest that out of one into another, which never passes immediately through himself. The case of *Owen v. Knight* is distinguishable from the present, as there the defendant claimed under one who derived title from the plaintiff himself. In *Butler v. Hobson*, the objection does not appear to have been taken on the form of the pleading.

Kelly and Whateley, *contrà*, were stopped by the Court.

LORD ABINGER, C. B. I think, upon the authority of the case in the Common Pleas, that I was wrong in excluding this defence.

PARKE, B. The plea, that the plaintiff was not possessed, in this form of action, puts in issue the right of the plaintiff to the possession of the goods, as against the defendant, at the time of the conversion. The proposed defence went to shew that as against the assignees, the plaintiff was not entitled to the possession.

The other Barons concurred.

Rule absolute.

[142] WALLIS v. HARRISON. Exch. of Pleas. 1839.—Lands were demised to A. and B. his wife for twenty-one years. A. afterwards granted a lease of them to C. for nine years:—Held, in an action brought by A. alone, for an injury to his reversionary interest, that the allegation that the reversion belonged to him, was well supported, and that the wife need not be joined in the action; but that even if she ought, the objection should have been taken by plea in abatement.

[S. C. 7 Dowl. P. C. 395; 2 H. & H. 65; 8 L. J. Ex. 188.]

Case for an injury to the plaintiff's reversionary interest in a close of land in the occupation of his tenant. The defendant pleaded (amongst other things) that the reversion in the said close or parcel of land, with the appurtenances, did not at the said time when &c., and still does not, belong to the said plaintiff, *modo et formâ*. At the trial before Alderson, B., at the last assizes for the county of Durham, it was proved that the land in question had been demised by the dean and chapter of Durham to the plaintiff and his wife for twenty-one years, renewable every seven years on payment of a fine for such renewal. The plaintiff had granted a lease for the term of nine years to the tenant in possession. It was objected at the trial that the action was improperly brought by the plaintiff alone, without joining the wife, and that the defendant was entitled to a verdict upon the above issue. The learned Judge overruled the objection, and the jury found for the plaintiff; his Lordship giving the defendant leave to move to enter a nonsuit, if the Court should be of opinion that the wife ought to have been joined in the action.

Alexander now moved accordingly. The question is, whether, where an estate is granted to a man and his wife, and he brings an action for an injury to the reversion, he ought to join the wife: and it is submitted that he ought. He cited Roper on the Law of Husband and Wife, vol. 1, p. 173, as to the interest of the husband in respect of the chattels real of the wife; and Co. Lit. 46 b., where it is said,—“If a man be possessed of a term of forty years in right of his wife, and makes a lease for twenty years, reserving rent, and dies, the wife shall have the residue of the term, but the executors of the husband shall have the rent, for that [143] it was not incident to the reversion, for that the wife was not a party to the lease.” [Lord Abinger, C. B. The husband is seised, though another person is seised with him.] The injury is done to that in which they have both an interest; and therefore they ought to sue jointly.

Cur. adv. vult.

The opinion of the Court was afterwards delivered by

LORD ABINGER, C. B. We have considered this case, and have come to the conclusion that there is no ground for the objection, that the wife ought to have been joined in the action; and we are also of opinion, that if the objection were a valid one, it should have been taken by plea in abatement.

Rule refused.

WEETON AND OTHERS v. WOODCOCK AND OTHERS. Exch. of Pleas. 1839.—The first count of a declaration in case set forth certain deeds whereby the plaintiffs were entitled to a factory, with the steam-engine and boiler, and complained that the defendants had disannexed and removed the boiler from the premises, and converted and disposed of it to their own use, to the injury of the plaintiff's reversion. The second count was in trover for the same boiler. Quære, whether the allowance of these two counts was in violation of the rule of H. T. 4 Will. 4?

[S. C. 7 Dowl. P. C. 143; 2 H. & H. 63; 8 L. J. Ex. 168. See p. 587, post, and 7 M. & W. 14.]

Cowling had obtained a rule to shew cause why an order of Maule, B., for striking out one of two counts in the declaration in this cause, should not be rescinded. The declaration was in case, and the first count stated, that by a certain indenture (stating the parties and date) made in the lifetime of one Philip Newton, the plaintiffs and Newton demised to one J. F. Taylor, his executors and administrators, a certain building or factory, situate &c., then used as a cotton factory, and then in the possession and occupation of the said J. F. Taylor, and the warehouse, counting-house, engine and engine-house, &c. &c., implements, tackle, furniture, and machinery, then the property of the plaintiffs and Newton, to the said factory [144] and steam-engine belonging, and therewith then used and enjoyed, &c. &c.; to hold the same to the said J. F. Taylor, from the 12th day of May then next, for the term of seven years. The declaration then set out covenants by J. F. Taylor, to repair the premises, to keep up a good steam-engine, with a boiler of beaten iron of certain dimensions, and at the end of the term to leave and deliver up possession of the premises and all the things therein in good repair, or pay the lessors the value of such as were not so left; and a proviso for re-entry, in case of the bankruptcy of Taylor, or non-performance of the covenants. It then alleged the entry of Taylor, and that he continued in possession of the premises until the term was determined by the plaintiffs, after the death of Newton, by reason and in consequence of the bankruptcy of Taylor, and the non-performance of the covenants. Averment, that before and at the time of the said determination of the said term, a certain steam-engine boiler, theretofore annexed to, set up, and placed on, the said demised premises by the said J. F. Taylor, remained and continued so annexed and set up and placed, after the making of the said indenture, and during the said term, and was used for working the said demised steam-engine, and was proper and necessary for the working of the same, and at the time of the determination of the said term, was the only boiler on the demised premises capable of supplying the engine with steam; and by reason of the premises, the plaintiffs had become entitled to the said steam-engine boiler, and the same ought to have remained, and been continued and left on the demised premises, and not to have been disannexed and removed therefrom without the licence and consent of the plaintiffs. Breach, that the defendants, intending to injure the plaintiffs, and to deteriorate their estate and interest in the premises, and to diminish the value of the said factory and steam-engine, and to deprive the plaintiffs of the value and benefit of the said steam-engine boiler, wrongfully, and without the licence or consent of the plaintiffs, and against [145] their will, disannexed and removed the said steam-engine boiler from the said demised premises, and converted and disposed thereof to their own use, whereby the estate and interest of the plaintiffs in the said factory, with the appurtenances, was then greatly injured and deteriorated.

The second count was in trover for steam-engine boilers.

Crompton shewed cause. These counts ought not to be allowed together. The object of the first count is to shew, by deducing a long title through deeds, &c., to the steam-engine, that the boiler became the property of the plaintiffs, and that the defendants disannexed and converted it. That is in substance the same as the count in trover, only expanded into a long statement of title. It may as well be said that two counts in trespass, one for removing fixtures, and the other *de bonis asportatis* in respect of the same fixtures, might be joined. This is not in fact an action for any injury to the reversionary estate of the plaintiffs, although the first count alleges a prejudice to the reversion: it is for removing and disposing of the boiler to the defendant's own use. The injury is in the removal; the rest is only special damage. [Alderson, B. The whole cause of action in the second count may be given in evidence

under the first, and something more.] Possibly something more, which is introduced only for the purpose of having the two counts, but which in fact is only special damage resulting from the trespass. [Parke, B. There ought undoubtedly to be a distinct subject-matter of complaint applicable to each count. But if the plaintiff will undertake to say that he goes also for the subsequent conversion of the boiler when severed—in respect of which he would recover a different measure of damages—he may have both counts.] The Court then called on

Cowling in support of the rule. These counts are not in apparent violation of the new rule. The question is [146] not whether the boiler mentioned in the two counts is the same, or the transaction complained of the same; but whether the plaintiff may not shape his grievance in two different modes, though it respects the same chattel and the same transaction. Mr. Tidd says (Tidd's New Pr. 218)—“Although there has been but one transaction between the parties, yet there may have been several causes of action arising out of it, which may be made the subject of several counts. Thus, in an action on the case against the sheriff, one count may be inserted in the declaration, for not taking the defendant when he had an opportunity, and another for suffering him to escape; for there might have been a time when the sheriff might have made the arrest, and had not done so, or he might have arrested the party, and afterwards suffered him to escape.” [Alderson, B. The question is, whether it is not the same subject-matter of complaint.] That question depends upon the meaning to be assigned to that phrase in the rule. The restriction to one count was introduced, as appears from the preamble, in consequence of the increased power of amendment given to the Judges by the 3 & 4 Will. 4, c. 42, s. 23 (see *Jenkins v. Trelour*, 1 M. & W. 15). Now suppose this declaration had contained one of these counts only, could the Judge, at the trial, have amended from the one to the other? No case has yet gone to such an extent. In *Hitchman v. Walton* (4 M. & W. 409), the first count was for removing certain fixtures and destroying them, and the second count was in trover for fixtures; and the plaintiff retained his verdict on both counts. [Maule, B. It does not appear that the counts were objected to, nor that the fixtures were the same.] The case shews the practice to be to introduce two such counts together. So, also, two counts in trover by assignees, one on the possession of the bankrupt, the other on the possession of the [147] assignees, have been allowed at chambers, although the goods were the same, and the conversion was laid in both counts after the bankruptcy. There the only difference was, that the first count contained a history of the goods up to the bankruptcy, which was altogether superfluous. Here there are distinct matters of complaint: in the second count for the conversion of the boiler,—in the first for the removal of the same boiler, thereby prejudicing the plaintiff's property in the factory. [Parke, B. Why not, then, strike out the latter part of the breach in the first count, which alleges a conversion, and keep the count in trover, which will get rid of the whole difficulty?]

Cowling assented, and the rule was, on these terms, made absolute on payment of costs.

JACKMAN AND ANOTHER v. COTHER. Exch. of Pleas. 1839.—Where a Court of Requests Act provided, that if any person should commence any action in any of the superior Courts, against any person residing within the jurisdiction of the Court of Requests, for any debt &c., which, upon the trial, should be found not to amount to 40s., no judgment should be entered on the verdict, and if it were entered, should be void, and the defendant should have costs:—Held, that a defendant could not take advantage of the act by suggestion on the roll, but was bound to plead it in bar of the action.

[S. C. 7 Dowl. P. C. 805; 8 L. J. Ex. 223.]

This was an action to recover the sum of 11. 15s. 3d. for damages done to a roller of the plaintiffs by using it improperly, and 75l. 5s. for the hire of the same roller. The defendant pleaded,—first, that the roller was not improperly used, and to the other counts non assumpsit, except as to the sum of 11. for the hire of the roller, which the defendant paid into Court. The plaintiffs took it out and taxed their costs, from which were deducted the costs of the other issues.

Wordsworth now moved for a rule to shew cause why a suggestion should not be

entered on the roll to entitle the defendant to costs under the Gloucester Court of Requests [148] Act, 1 Will. & Mary (a), on an affidavit that at the time of the commencement of the action, and when the cause of action arose, the defendant resided and still resides within the city and county of the city of Gloucester, and within the jurisdiction of the said Court of Requests. It is to be presumed that the sum taken out of Court by the plaintiffs was the sum really to be recovered in the action. This was a mode of trial adopted between the parties; the act does not say that there shall be a trial before a jury; any mode of trial whereby the mutual rights of the parties are ascertained, is sufficient to satisfy it.

PARKE, B. The cases of suggestion are where the verdict is not altered: but here the plaintiff is not to recover at all if he sues in the superior Court for a debt under 40s.; therefore the objection should come by way of plea. But independently of this, the act, though it is obscurely worded, certainly applies to a trial on which a verdict is had. This rule cannot, therefore, be granted.

ALDERSON, B. I am of the same opinion. This is a penalty for going to trial for a sum under the amount limited by the statute; the defendant ought therefore to plead the act, and then all the provisions of the act will [149] have their full force; there will be a trial and verdict, and then it will be seen whether any judgment ought to be entered upon it.

MAULE, B. The act says distinctly that no judgment shall be entered on the verdict; therefore there must be a trial and verdict.

Rule refused.

ROBINSON AND ANOTHER v. YEWENS. Exch. of Pleas. 1839.—S., a sheriff's officer, arrested the defendant, not then having any warrant, and took him to a lock-up house. At that time there was a warrant in the sheriff's office, directed to another officer, to arrest the defendant at the suit of the plaintiff. S. went to the sheriff's office, and representing that he had an opportunity of arresting the defendant, got his own name inserted in that warrant. It appeared that this was in accordance with the practice of the office, and it was sworn that the sheriff was ignorant that the defendant had at that time been already arrested. S. took the warrant, and arrested the defendant at the suit of the plaintiff:—Held, that the defendant was not entitled to be discharged.

[S. C. 7 Dowl. P. C. 377; 2 H. & H. 38; 8 L. J. Ex. 166; 3 Jur. 776.]

In this case Humfrey had obtained a rule, calling on the plaintiff and the sheriff of Middlesex to shew cause why the defendant should not be discharged out of the custody of the Warden of the Fleet Prison, and why the plaintiff, or the sheriff, or one Sloman, one of his officers, should not pay the costs of the arrest and of this application. The following facts appeared upon the affidavits.

A warrant to arrest the defendant on a ca. sa. at the suit of the plaintiffs, dated the 8th of October, 1838, had been delivered to one Nathan, an officer of the sheriff of Middlesex, for execution, the name of Nathan only being inserted in it. On the 3rd of April, 1839, (the warrant being then unexecuted), Sloman, another officer of the sheriff, happening to meet the defendant in a banking-house, told him he should arrest him, which he did, although the defendant demanded his warrant, and he

(a) Which enacts, (inter alia), that if any person or persons shall commence and prosecute any action in any of his Majesty's Courts at Westminster, or in any other Court, against any person inhabiting or residing within the city and county of the city of Bristol, or the city and county of the city of Gloucester, for any debt or sum of money due upon contract, promise, specialty, or otherwise, which, upon the trial, shall be found not to amount to the full sum or value of 40s., over and above costs, no judgment shall be entered upon record upon any such verdict; and if any judgment shall be entered thereon, then such judgment shall be and is hereby declared null and void; and also the defendant in every such action shall have his costs in the said suit, to be taxed by the said Court, or their proper officer, where such action shall be tried, and paid him by such plaintiff in the said cause; any law or custom to the contrary in anywise notwithstanding.

produced none, having at that time none against him, although he had before had one from the late sheriff, at the suit of one McLaren. Sloman took the defendant to a look-up house in Cursitor Street, and detained him there for some time; but, in the meantime, went to the sheriff's office, and applied to have his name inserted in the war-[150]-rant against the defendant which had been delivered to Nathan, at the suit of the plaintiffs. The books at the office were searched, and it being found that the warrant was unexecuted, the clerk of the under-sheriff added to it Sloman's name, and he thereupon went with it and arrested the defendant at the plaintiff's suit. The affidavit of the under-sheriff stated, that it is the practice at the sheriff's office to insert the name of every defendant against whom a warrant has issued, in a book, and as soon as the arrest is made, an entry of the fact is made against the name. As long as it appears from the book that the warrant is unexecuted, it is a very common practice to insert in the original warrant the name of another officer, a blank being left for that purpose, on application by him at the sheriff's office, if it appear that he is likely to have an opportunity of effecting the arrest. The affidavits positively denied any knowledge on the part of the under-sheriff or his clerk, that the defendant had been arrested, or was in the custody of Sloman, when his name was inserted in the warrant: and stated that, in the insertion of his name, the usual course of the office had been in no respect departed from. At the time of the defendant's arrest in the banking-house, there were several detainers against him in the sheriff's office at the suit of other plaintiffs; and amongst them, one at the suit of one Pearson, in an action in the Court of Common Pleas; in which he was detained after his arrest by Sloman at the plaintiff's suit. After an unsuccessful application in that case to a Judge at chambers for his discharge, the defendant got himself removed by habeas corpus to the Fleet Prison, and, a few days before the present rule was moved, obtained a rule in the Court of Common Pleas for his discharge from custody, which, after argument, was made absolute (see *Pearson v. Yewens*, 5 Bing. N. C. 489). In this Court, neither the habeas corpus, nor the return of the sheriff [151] thereto, was before the Court, and the case was determined on the affidavits only.

Kennedy shewed cause for the sheriff. The defendant is not entitled to be discharged, no collusion being shewn between the sheriff and the officer. It is said the sheriff is connected with the illegal act of the officer, by reason of his having afterwards detained him on that illegal taking. But in every case where there is an illegal arrest, and the sheriff detains the party on a subsequent regular writ, he adopts the act of the officer for the purpose of detaining him. In order to entitle the party to be discharged, the sheriff must be connected with the officer in the particular case, which is not done here. There is a great difference between a collusive adoption of the illegal arrest, and an adoption of it for the mere purpose of detention under a regular writ. The case is, on this ground, quite distinguishable from *Barratt v. Price* (9 Bing. 566; 2 M. & Scott, 634), which proceeded altogether on the ground that the sheriff was a party to the first illegal arrest. Here it is clearly shewn, that, until the warrant has been executed, it is the usual course of the sheriff's office to introduce the name of any officer, and that Sloman's name was introduced in this case without any knowledge that the defendant had then been arrested. *Hawson v. Walker* (2 W. Bla. 823) is expressly in point to shew that a defendant in custody at the suit of one plaintiff is not privileged from detainer at the suit of another, unless collusion be shewn, although the prior custody be illegal. In the case of *Pearson v. Yewens* (5 Bing. N. C. 489), in which the Court of Common Pleas have held this defendant entitled to his discharge, no affidavit was produced to negative collusion, as there is in the present case.

W. H. Watson, for the plaintiff, only objected to his [152] being called upon to pay any part of the costs of the officer's illegality—the only pretence for which was, that the judgment was above a year old, and had not been revived by sci. fa.; but the answer was, that the defendant had given a cognovit, by which it was expressly stipulated that this should not be necessary.

Humfrey, for the defendant. The defendant does not call upon the plaintiff to pay the costs, but only to shew cause why he or some other party should not pay the costs of the application. If the rule had not called upon him to appear, the Court would have said he might have good grounds to shew why the defendant should not be discharged. It is submitted, that upon the facts appearing on the affidavits, the defendant is entitled to his discharge. A warrant against the defendant in another

action having been directed to Sloman, he was an authorized officer of the sheriff to arrest the defendant. [Parke, B. That was a warrant from the late sheriff.] The under-sheriff is the same. This case cannot be distinguished from *Barratt v. Price*. It must be admitted, that in *Pearson v. Yewens* there was no affidavit denying collusion; but it cannot be doubted that the sheriff was privy to the whole of this transaction.

PARKE, B. I am of opinion that this rule must be discharged. The old rule was, that if the sheriff had several writs against the same party, and arrested him on one of them, he was to be considered as in custody on all. The case of *Barratt v. Price* introduced this very proper and reasonable distinction, that in order that that consequence should follow, the first arrest must not have been illegal by the wrongful act of the sheriff. The question therefore is, whether, in the present case, it is sufficiently shewn that the first arrest was illegal in that sense? The defendant was not first wrongfully arrested by the sheriff, unless he did some subsequent act to adopt the original illegal act of [153] Sloman. And the question is, whether, under the circumstances, the alteration of the name in the warrant operates as a recognition of the arrest by Sloman, as an act done by the authority of the sheriff? If it does, the case falls within the decision in *Barratt v. Price*. Now, looking at the judgment of the Court of Common Pleas in *Pearson v. Yewens*, which has been communicated to us, it is clear that that decision was founded on the ground that the sheriff was guilty of collusion, and adopted the illegal act of the officer. Tindal, C. J., says,—“It (the insertion of Sloman’s name) must, we think, be considered as a collusive act, intended to give a false colour of legality to the original caption of the defendant by Sloman, and as having, in effect, made the sheriff a party to the original illegality committed by Sloman, so far at least as to prevent the detainers from attaching.” The Court, therefore, thought the insertion of the name sufficient evidence of the sheriff’s intention to ratify the original act: and, no doubt, the fact of so introducing the officer’s name is apparently irregular, and is strong evidence that the sheriff intended to ratify the original act—but it is evidence only: and now we have, in answer to it, an affidavit which completely displaces this as an act of ratification. [His Lordship stated the substance of the affidavit.] It is impossible that the sheriff, who is represented by the under-sheriff, could have intended to ratify an act of which he knew nothing. We have then the simple case of an arrest made by a perfect stranger, who takes the party to his home, and is then authorized by the sheriff to detain him on a legal warrant. That is a legal arrest by the sheriff, and the case, therefore, does not fall within *Barratt v. Price*, in which case the officer who arrested the defendant had a warrant against him from the sheriff, and so, for that purpose, was identical with the sheriff. I am of opinion, therefore, that the defendant ought not to be discharged. As to the costs, he has brought the plaintiff here, neces-[154]-sarily, perhaps, but the plaintiff has shewn good cause, and must therefore have his costs; and the sheriff having been in no fault, he also is entitled to his costs.

ALDERSON, B. I am of the same opinion. The original law was, that if the sheriff arrested the defendant in one action, he arrested him in all actions in which he had writs against him in the office. *Barratt v. Price* limited the law thus far, that if the defendants were arrested illegally by the sheriff, that illegality pervaded all the writs in his hands; and if the arrest was illegal in one action, it was illegal in all. Here we are called upon to go a step farther, and to say, that where the arrest is first made by a stranger, and the same party afterwards detains the defendant on a regular warrant subsequently granted, that detainer also is illegal. The case, therefore, is not like *Barratt v. Price*, but falls more within that of *Howson v. Walker*. It appears that the Court of Common Pleas thought, that as the sheriff appeared to have gone out of his way to do an unusual act, in the insertion of Sloman’s name in the warrant, that shewed that he intended to adopt and cover Sloman’s original illegal act. But now we have an affidavit expressly negating collusion, and shewing that the course of the office is to introduce into the warrant the name of any officer who represents that he has the means of arresting the party. The introduction of Sloman’s name, therefore, was, or might be, in the ordinary and regular course of the sheriff’s duty. It is sworn, also, that he had no knowledge of the illegal act: and that brings the case wholly within *Howson v. Walker*. The defendant, therefore, is legally detained at the suit of the plaintiffs.

MAULE, B. This case resolves itself into a question of fact, whether the sheriff did or did not illegally arrest the defendant in the first instance. The Court of Common

Pleas, on one state of facts, came to the conclusion that he [155] did, and applied the authority of *Barratt v. Price*. This Court, on another state of facts, and more evidence, comes to a contrary conclusion, which shews that *Barratt v. Price* does not apply, and that the rule ought to be discharged.

Rule discharged with costs.

JACQUOT v. BOURA. Exch. of Pleas. 1839.—In an action of indebitatus assumpsit for wages, the damages claimed in each count were 100l. The particulars claimed 7l. 19s. for wages, &c., “and also such further sum, by way of damages, as the jury might think proper to give for the wrongful dismissal of the plaintiff without notice.” The amount indorsed on the writ was 12l. 19s. It appeared that the plaintiff had been engaged at a salary of 60l. per annum, and dismissed without any notice; and he had a verdict for 15l. 19s.:—Held, that the case was not triable before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17.

[S. C. 7 Dowl. P. C. 331; 2 H. & H. 36; 8 L. J. Ex. 175; 3 Jur. 461. And see, as to second count, 7 Dowl. P. C. 348; 3 Jur. 776.]

Assumpsit. The first count of the declaration was indebitatus assumpsit in 100l. for the salary and wages of the plaintiff and his wife: the second was a special count, stating an agreement with the defendant for their services at 60l. a-year, and a wrongful dismissal of them within the year. The damages were laid at 100l. The defendant pleaded, 1st, non assumpsit; 2ndly, payment; 3rdly, that the plaintiff and his wife obstinately refused to work, wherefore the defendant dismissed them (to which there was a demurrer). The particulars claimed the sum of 5l. 19s. for arrears of wages up to the 29th of September, 1838; 2l. for travelling expenses; “And also such further sum, by way of damages, as the jury might think proper to give for the wrongful discharge of the plaintiff and his wife without due notice.” The amount indorsed on the writ was 12l. 19s. The plaintiff obtained an order for trial before the sheriff of Middlesex, and the cause was accordingly tried before him, when the plaintiff obtained a verdict for 15l. 19s. It appeared that the plaintiff and his wife had been discharged without notice, after having served about three months.

Corrie having obtained a rule to shew cause why the writ of trial and subsequent proceedings should not be set aside, on the ground that the action was for unliquidated damages, and therefore not within the Writ of Trial Act, 3 & 4 Will. 4, c. 42, s. 17.

[156] C. Jones shewed cause. This is the case of “a debt or demand, in which the sum sought to be recovered, and indorsed on the writ, does not exceed 20l.,” and therefore is within the act. The test of the plaintiff’s claim is the amount indorsed on the writ. [Alderson, B. No—else why does the act say “the sum sought to be recovered, and indorsed on the writ?” You may recover more than you have indorsed. The only effect of the indorsement is, that the defendant may stay the proceedings by paying that amount within four days: it does not limit the plaintiff, except for that purpose.] If the plaintiff recovers more than 20l., he may remit the difference. The plaintiff here, in fact, sought to recover the sum of 12l. 19s.—consisting of 5l. 19s. for arrears of wages, 2l. for travelling expenses, and 5l. for a month’s wages, on the ground of the discharge without notice. *Price v. Morgan* (2 M. & W. 53), and *Allen v. Pink* (4 M. & W. 140), are authorities in favour of the plaintiff. The order for the writ of trial was made after hearing both parties, and the objection should then have been made that it was not a case within the act. The defendant had no right to take the chance of a verdict at the trial, and afterwards come to the Court: *Price v. Morgan*. He referred also to *Edge v. Shaw* (2 C. M. & R. 415; 4 Dowl. P. C. 189), and *Frodsham v. Round* (4 Dowl. P. C. 569).

Corrie, contra. In order to bring the case within the statute, two things must concur; first, the sum sought to be recovered must not exceed 20l.; and secondly, the sum indorsed must not be greater. But the plaintiff is not bound by the indorsement, as to the amount to be recovered. The only question therefore is, whether it appears here that this was an action in which the plaintiff did not seek to recover more than 20l. Now in his declaration he [157] claims 100l.: there is nothing either in the declaration or the particulars to shew that the amount

sought (beyond the 7l. 19s.) was limited to a month's wages: and in fact the plaintiff has recovered more. The special count proceeds on the ground that the hiring was for a year, and states nothing from which it is to be inferred that it was a menial service, determinable by a month's notice. There is nothing to shew that the plaintiff might not have recovered for the whole year. In *Allen v. Pink*, it appeared both by the particulars and the declaration that the demand was limited to 20l., and the judgment of the Court proceeded on that ground. This is a demand for unliquidated damages for a breach of contract. *Smith v. Brown* (2 M. & W. 851), is in point for the defendant.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

PARKE, B. The question in this case was, whether it was one which could be sent to the sheriff for trial under the 3 & 4 Will. 4, c. 42, s. 17. On considering the clause, we are of opinion that no case can be sent for trial before the sheriff, unless it be for a debt or demand of such a nature as could be indorsed on the writ within the true meaning of the rule of Court of H. T. 2 Will. 4. Here the amount to be recovered might be limited to 20l.: but, on the other hand, it might not; it would depend on the circumstances proved in the case: therefore it is a claim for unliquidated damages, and not within the act. It might as well be said that an action against a carrier for negligence was within the act, where the damages are under 20l., because they could not be more. The probable limit of the damages on one side does not prevent its being a [158] claim for unliquidated damages. We are of opinion, therefore, that this was not a case within the statute, and the rule must be absolute.

Rule absolute.

LOVEWELL v. CURTIS. Exch. of Pleas. 1839.—An order for the admission of a plaintiff to sue in formâ pauperis, made after the commencement of the suit, is irregular, and the plaintiff will, in such case, be dispaupered, or compelled to find security for costs.

[S. C. 7 Dowl. P. C. 795.]

Jervis had obtained a rule to shew cause why the plaintiff in this cause should not be dispaupered, or why the proceedings should not be stayed until payment by the plaintiff of the costs of two several notices of trial given by him, and until he should find security for costs. It appeared that issue was joined in the action on the 30th of November last, but that the order to sue in formâ pauperis was not obtained until the 17th of January. The plaintiff subsequently gave notice of trial before the Secondary, but on the day of trial withdrew the record in consequence of the absence of a material witness. On that occasion the order to sue in formâ pauperis was left with the Secondary. On application to him for it, for the purpose of re-entering the cause for trial, it appeared that it had been destroyed, and it not being produced to the marshal, he refused to enter the cause. The plaintiff obtained another order, and gave a fresh notice of trial, which was stayed by this application.

Thomas shewed cause, and urged that, under the circumstances, the plaintiff had not been guilty of any default.

Jervis, contrâ. The order to sue in formâ pauperis was irregular, having been obtained after the commencement of the suit: *Foss v. Racine* (4 M. & W. 610). The words of the statute 23 Hen. 8, c. 15, s. 2, are express.

[159] Per Curiam. The order is clearly irregular, and the plaintiff must either elect to be dispaupered, or to find security for costs.

Thomas elected to be dispaupered.

Rule absolute accordingly. (a)

WALLEN v. SMITH. Exch. of Pleas. 1839.—Where a cause is referred at Nisi Prius, care should be taken to give the arbitrator the same power of certifying that it was a fit cause to be tried before a Judge, as the Judge at Nisi Prius

(a) See *Blood v. Lee*, 3 Wils. 24.

would have had ; since otherwise, if he award to the plaintiff a sum under 20l., the Master will not be warranted in taxing the costs, either as between party and party, or as between attorney and client, except according to the reduced scale given in the "Directions to Taxing Officers," H. T. 4 Will. 4.

[S. C. 2 H. & H. 1 ; 8 L. J. Ex. 164 ; 3 Jur. 752.]

This was an action of assumpsit on a special agreement, to recover the sum of 40l., with counts for work and labour, money paid, and on an account stated : to which were pleaded non assumpsit, and a set-off. The cause having been referred to arbitration at Nisi Prius, without any verdict being taken, the arbitrator found in favour of the plaintiff for a balance under 20l. The alleged amount of the set-off was upwards of 300l. The order of reference contained a term, that the party in whose favour the award should be made should be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained : but no power was given to the arbitrator to certify that it was a fit cause to be tried at the Assizes. The Master taxed the costs, as between party and party, on the higher scale applicable to causes for debts above 20l. ; but the Court, on motion for a review of the taxation, held that they ought to have been taxed according to the reduced scale directed by the "Directions to Taxing Officers," H. T. 4 Will. 4. The Master having afterwards also taxed the plaintiff's costs, as between attorney and client, upon the same reduced scale,

[160] Biggs Andrews moved for a review of the taxation, stating that the plaintiff had since become bankrupt, and that the application was made in order to enable the attorney to prove against the estate, the assignees offering no opposition to the motion. This is different from the case of the costs as between party and party. The attorney could not know how much the set-off would amount to ; that would be altogether within the knowledge of the party. [Alderson, B. The directions, in terms, apply only as between party and party ; but the question is, whether it was not incidentally the duty of the attorney not to burthen the client with greater costs, or else to take care that the arbitrator should have a power given him to certify like the Judge.] That does not seem to be the attorney's province.

PARKE, B. I think the case should be referred back to the Master, to tax the costs according to his discretion. He appears to have considered himself bound to tax according to the lower scale of costs in the "Directions to Taxing Officers." In terms, that applies only as between party and party : but as between attorney and client also, the costs ought to be taxed with reference to that scale, because it is the duty of the attorney to have so conducted the cause as to impose as small an amount of costs on the client as possible. In such a case as the present, the attorney ought to take the requisite steps to enable the party to have his costs taxed on the higher scale, either by obtaining a certificate from the Judge that it is a fit cause to be tried before him, or, if the cause be referred, by giving the arbitrator power, by the rule of reference, so to certify : and in future, it will be very difficult for an attorney to recover costs, except on the lower scale, if he have neglected to take such steps. However, it would be hard to deprive the attorney here of his fair costs, if they can be allowed, this being the first time the difficulty has occurred with [161] respect to an award ; and therefore that the Master in this case may exercise a discretion.

ALDERSON, B. I am of the same opinion : the Master must exercise his discretion, and I think in this case it may be exercised more liberally. In future, the rule in such cases having been promulgated, parties will know what it is ; at present, they may have been misled ; but it is certainly the duty of the attorney so to conduct the action, that the client may be put to as little extra costs as possible.

GURNEY, B., and MAULE, B., concurred.

A rule nisi was granted accordingly, to be served on the assignees ; which subsequently made itself absolute, no cause being shewn against it.

COOKE v. HUNT. Exch. of Pleas. 1839.—Where the defendant, just before the Assizes, in order to save the expenses of the trial, agreed to withdraw his pleas, and that the plaintiff should be at liberty to sign judgment for 11l. 12s., and that, on payment of that sum, with costs to be taxed, the proceedings should be

stayed :—Held, that the costs must be taxed on the reduced scale applicable to a verdict under 20l.

[S. C. 7 Dowl. P. C. 397 ; 2 H. & H. 37 ; 8 L. J. Ex. 216 ; 3 Jur. 753.]

This was an action for a breach of contract, in not returning to the plaintiff certain empty casks in which the plaintiff had supplied cider to the defendant. The action was commenced on the 8th of February, 1838, by writ of summons, the indorsement on the writ being, "The plaintiff claims unliquidated damages." The particulars stated, that the plaintiff sought to recover the value of ten casks supplied to the defendant, and which the defendant had agreed to return to the plaintiff. The only plea was non assumpsit. The plaintiff took out a summons to try the cause before the sheriff, which was resisted by the defendant, and dismissed, on the ground that the claim was for unliquidated damages ; and the plaintiff gave notice of trial [162] for the Herefordshire Spring Assizes. On the 22nd of March, the defendant took out a summons to stay the proceedings on payment of debt and costs, which, however, was dismissed, the defendant declining to give the plaintiff final judgment. On the 28th (the 29th being the commission day) the defendant acceded to those terms, and agreed "that he would take an order upon any terms, so that the fees to counsel, and other heavy expenses, which would be incurred on the trial, might be saved." An order was accordingly drawn up by consent in the following terms :—that the defendant should withdraw his plea, and the plaintiff should be at liberty to sign judgment forthwith for the sum of 11l. 12s., the value of the casks, and that upon payment of that sum, together with costs to be taxed, within ten days, all further proceedings in the cause should be stayed. The Master, on taxation, allowed costs on the higher scale, thinking that, under the circumstances, the defendant having refused to try before the sheriff, the Judge at Nisi Prius, if the cause had gone on to trial, would have certified that it was a fit cause to be tried at the Assizes.

Gunning having obtained a rule to shew cause why the Master should not review his taxation, and allow costs on the reduced scale only (citing *Wallen v. Smith* (6 Dowl 103)).

Peacock shewed cause, and contended that the Master had exercised a right discretion, under the circumstances of the case, the agreement between the parties being evidently intended to give the plaintiff the full benefit which he would have had at Nisi Prius, on the defendant being saved the expense of the trial.

LORD ABINGER, C. B. The agreement is to take 11l. 12s. with costs—that means costs according to the scale appli-[163]-cable to that amount. There is no statement of any agreement that the costs should be taxed on the higher scale. The rule must be absolute.

PARKE, B. The plaintiff ought to have introduced into the order a stipulation that the costs should be taxed on a higher scale.

Rule absolute.

ANGEL v. IHLER. Exch. of Pleas. 1839.—An affidavit by "A. B., of &c., the plaintiff (or defendant) in this cause," is sufficient, without any further addition.—An affidavit, commencing in these terms, "R. J., late of the city of W., victualler, but now of &c.," without any further addition, held sufficient.

[S. C. 7 Dowl. P. C. 846.]

In this case a rule had been obtained for a new trial on affidavits, on the ground of surprise.

Kelly and J. Henderson, on shewing cause, objected to two of the affidavits, that they did not sufficiently state the addition of the deponents. One was the affidavit of the plaintiff, which began—"J. A., of &c., the plaintiff in this cause, maketh oath," &c. They cited *Lawson v. Case* (1 C. & M. 481 ; 2 Dowl. P. C. 40) as an authority that this was insufficient without a further description of the party. [Parke, B. I believe that is a solitary case. There are many subsequent cases which decide that the rule does not apply to the parties in the cause.(b)] The other affidavit began

(b) See *Pool v. Pembrey*, 1 Dowl. P. C. 693 ; *Jackson v. Chard*, 2 Dowl. P. C. 468 ; *Brooks v. Farlar*, 5 Dowl. P. C. 361 ; *Sharp v. Johnson*, 2 Bing. N. C. 246.

in these terms:—"R. I. I., late of the city of Worcester, victualler, but now of Belle Sauvage Yard, London." It did not appear from this what was his present occupation.

PARKE, B. It is quite sufficient by a slight transposition of the words. Suppose it were "A. B., late of &c., esquire, but now of" &c., would not that be sufficient?

Cause was then shewn on the merits, and the rule was made absolute.

[164] PUGH v. KERR, ESQ. Exch. of Pleas. 1839.—Where a rule was made absolute for changing the venue from Middlesex to the country, on payment of the costs of the application, "and of all costs reasonably and bonâ fide incurred and rendered useless by the rule;" and, after taxation of the costs, the defendant's attorneys gave notice to the plaintiff's attorneys that they abandoned the rule:—Held, (Maule, B., dissentiente) that the rule was conditional only, and that the defendant was not bound to abide by it, although the plaintiff had, in the meantime, incurred the costs of his witnesses, who were on their way to town before the rule was made absolute.

[See further, 6 M. & W. 17.]

This was an action against the sheriff of Merionethshire, for a false return to the writ of ca. sa. The venue was laid in Middlesex, and on the 17th of January, notice of trial was given for the Sittings after Hilary Term, which commenced on the 1st of February. On the 23rd, the defendant obtained a rule nisi for changing the venue to Merionethshire, to shew cause on the 28th. The plaintiff's attorney in the country had notice of this application on the evening of the 25th; but he had previously subpoenaed the witnesses to attend at Westminster on the 1st of February, and for that purpose it became necessary that they should start for London on the 29th of January. Cause was not shewn against the rule until the 30th of January, when it was ordered,—and the rule was so drawn up,—that the venue should be changed to the county of Montgomery, on payment of the costs of the application, "and of all costs reasonably and bonâ fide incurred and rendered useless by that rule." On the 31st of January, the defendant's agents served a notice of taxation for the following day; the taxation was, however, postponed until after the plaintiff's witnesses, who had then arrived in town, should have returned into the country. On the 8th of February, the taxation was attended by both parties, when the costs were taxed by the Master, under the above rule, at the sum of 209l. 11s. On the 11th of February, the defendant's agents gave notice to the plaintiff's agents that they abandoned the rule of the 30th of January; and that the plaintiff must take what course he thought proper: and they refused to pay the costs taxed. On the 6th of March the plaintiff's agent's obtained a judge's order for changing the venue from Middlesex to Chester, but it was not acted upon. The cause next before this in the paper was not actually reached until the 5th of February.

On a former day in this term, Jervis obtained a rule, call-[165]-ing upon the defendant to shew cause why he should not within four days pay to the plaintiff the said sum of 209l. 11s. taxed by the Master, together with the costs of this application.

Cresswell and Peacock shewed cause. This was a mere conditional order to change the venue, if the defendant should pay the costs mentioned in the rule; but there was no absolute order upon, or undertaking by, the defendant to pay them; and the rule being only conditional, the defendant had a right to waive the benefit of it, if he did not choose to comply with the condition; as, upon a rule for a new trial on payment of costs, the party may abandon it altogether if he pleases. In *Fricker v. Eastman* (11 East, 319), a Judge's order, "that, upon payment of costs by a certain day, all proceeding should be stayed," was held to be only conditional on the defendant, and that he might abandon it in toto. *Reese v. Fenn* (2 Dowl. P. C. 182) is an authority to the same effect. Here the plaintiff might have kept her witnesses in town, and if the defendant did not take the rule, she might have proceeded to try the cause, and the defendant would have been liable to the costs occasioned thereby. [Parke, B. It seems to be a question as to the construction of the rule. What are ordinarily words of conditions may be made words of contract and obligation. I have some doubt whether this rule did not operate as an immediate stay of proceedings and change of the venue; and in support of that view may be called in aid the concluding words of the rule, by which it appears as if the whole was decided by the rule itself. Lord Abinger, C. B. Would not the rule justify the plaintiff in sending away her

witnesses immediately?] That does not decide the question whether the rule is conditional or not. It means, that the defendant shall have a change of the venue, on the condition of the payment by [166] him of all such costs as became useless by the operation of the rule. The costs of the witnesses did not become useless, unless the cause could not have been tried at Middlesex. The plaintiff's subsequent application to change the venue to Chester, shewed her understanding that it still remained in Middlesex, and therefore that the rule was not absolute in its operation.

Jervis and Welsby, *contra*. The question is, whether the defendant has adopted the rule; if he has, he is bound to abide by it. It was obtained at his instance, and drawn up by him; and he must be taken to have agreed thereby to pay the costs which were incurred in consequence of the plaintiff's acting upon it. The notice of taxation given by the defendant for the 1st of February, the day when the cause would have been in the paper, shews that he considered it was no longer to be tried in Middlesex. In *King v. Clifton* (5 T. R. 257), where the defendant in a penal action obtained a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, that was held to be an undertaking by the defendant to pay that sum, and for the non-payment of which the Court would grant an attachment, since it was to be taken that the plaintiff would not have consented to the rule, except on the defendant's engaging to comply with the condition of payment.

LORD ABINGER, C. B. I have entertained some doubt in this case, but am now satisfied that this was not an unconditional change of the venue; since, if the witnesses had remained in town, and the defendant had refused to pay the costs, the plaintiff might have tried the cause. Our decision must be the same as if this were an application for an attachment. The plaintiff has certainly been hardly [167] used; but there is no doubt these will be costs in the cause.

PARKE, B. I have had considerable doubt during the argument. The words used in the rule no doubt ordinarily import a condition only; but if I were satisfied that it was meant here that the venue was immediately to be changed, I should have thought they were matter of contract, and that their grammatical construction should be limited; and then we might call in aid the concluding words of the rule. There can be little doubt that such was the understanding of the parties; but I cannot see my way so clearly as to say the rule must be so construed.

ALDERSON, B. I concur. The test seems to be, would it have been an erroneous proceeding on the plaintiff's part to try the cause here? It seems to be conceded that it would not: therefore it was a conditional change of venue only. I am disposed to construe rules of this kind as simply as may be, because, if we refine on mere verbal distinctions, it introduces great uncertainty into the administration of the law.

MAULE, B. I think the rule ought to be absolute. According to the case of *King v. Clifton*, the words here used are capable of being construed as terms of contract: and the rule provides for the costs occasioned, not by the change of venue, but by the rule itself. It was clear that a considerable amount of costs would be rendered useless by pronouncing the rule itself, and it was fair and just that the defendant should pay them, on having the option given by the rule. The words "yielding and paying" are in terms conditional, but in the instruments in which they occur are considered as terms of contract: and I think the terms of this rule ought also to be so construed.

Rule discharged, without costs.

[168] *HOLT v. MIERS* Exch. of Pleas. 1839.—A. agreed with B. to lend him 200l. at the rate of 1s. in the pound per month (60l. per cent. per annum), to be secured as follows: viz. whenever any portion of the money should be advanced, the borrower was to give a promissory note, payable one month after date, to be renewed as often as it should fall due; and for each renewal, 1s. in the pound was to be paid by way of discount:—Held, that the promissory notes so given were within the protection of the 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4 & 1 Vict. c. 80.

[S. C. 2 H. & H. 80; 8 L. J. Ex. 233; 3 Jur. 1000: at Nisi Prius, 9 C. & P. 191.]

Assumpsit by the payee against the maker of a promissory note for 21l. 10s., dated the 4th of September, payable one month after date. There was also a count upon an account stated.

The defendant pleaded, as to the first count, that before the making of the said promissory note, to wit, on the 20th day of April, 1838, it was corruptly, and against the form of the statute in that case made and provided, agreed by and between the defendant and one Thomas Whitmarsh, that the said Thomas Whitmarsh should advance and lend to the defendant the sum of 200l., and that the same should be a continuing loan so long as the defendant should pay the usurious interest for the said loan as is next hereinafter mentioned, or for such portion thereof as he the said T. Whitmarsh should advance and lend to the defendant; and that it was then and there further corruptly agreed &c., that he should pay the said T. Whitmarsh 1s. in the pound for each month, for forbearing and giving day of payment for such sums as the said T. Whitmarsh should advance and lend to the defendant; which said 1s. per pound per month amounts to more than 5l. per cent. per annum, to wit, to the sum of 60l. per cent. per annum; and that it was further agreed, in order to evade the said statute, and by way of cunning shifts and device, that, at the time he the said T. Whitmarsh should advance and lend to the defendant any portion of the said sum of 200l., the defendant should make and deliver to the said T. Whitmarsh his promissory note, payable at one month after date, and that the said note or notes should be respectively renewed at the several times when the same should respectively fall due, for one month, and that on each of such renewals the said T. Whitmarsh should receive from the defendant the sum of [169] 1s. in the pound by way of discount for the same, &c. The plea went on to aver, that, in pursuance of such corrupt bargain and agreement, the said T. Whitmarsh, on the 20th of April, 1838, did advance and lend to the defendant the sum of 30l., for which the defendant then and there made and delivered his promissory note for 30l., payable at one month, to the said T. Whitmarsh; and the said T. Whitmarsh did then, in pursuance of the said corrupt bargain and agreement, take and receive from the defendant the sum of 30l. as and by way of discount on the same; and the said note, when it fell due, was successively renewed on the 22nd of May, 25th of June, 26th of July, 26th of August, and 28th of December; upon each of which several renewals the said T. Whitmarsh took and received, in pursuance of the said corrupt bargain &c., the several sums of 30s. for each renewal by way of discount; that, in further pursuance of the said corrupt bargain, the said T. W. on the 4th of August, 1838, advanced and lent to the defendant the further sum of 21l. on the defendant's note, bearing date the said 4th of August, payable one month after date, and did then take and receive of the defendant 1l. 10s. by way of discount, and the said note, when it became due, was renewed on the 4th of September, which said last-mentioned note is the note mentioned in the first count of the declaration, and was made payable to the plaintiff, as attorney to and trustee for the said T. W.: which said several sums of money amount to a larger sum than 5l. per cent. &c. against the form of the statute in such case made and provided. The replication denied the agreement stated in the plea.

At the trial before Gurney, B., at the sittings after last Michaelmas Term, the defendant obtained a verdict, having proved the facts alleged in the plea. In Hilary Term, Erle obtained a rule to shew cause why judgment should not be entered for the plaintiff non obstante veredicto, on the [170] ground, that since the statute 3 & 4 Will. 4, c. 18, s. 4, and 7 Will. 4 & 1 Vict. c. 80, the facts stated in the plea were no answer to the action. Against which rule

Curwood and Carrington now shewed cause. The question in this case turns upon the construction to be given to the statute 3 & 4 Will. 4, c. 98, s. 7, by which it is enacted, "That no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture." The 7 Will. 4 & 1 Vict. c. 80, extends the period limited by the above act to twelve months instead of three months, but is in all other respects similar to the former statute. The words in the second portion of the above section,

"Nor shall the liability of any party to any bill of exchange or promissory note, be affected by reason of any statute or law against usury," ought to be read and understood as if the legislature had used the words "any such bill," and as referring to the preceding part of the clause, which exempts from the penalties of usury any bills or notes which have not a longer period to run than three months. If this construction be not adopted, it would have the effect of repealing the usury laws with respect to all bills and notes whatever, which [171] never could have been the intention of the legislature; for that is clearly shewn by the passing of the stat. 7 Will. 4 & 1 Vict. c. 80, which extends the provisions of the former statute to such bills as had twelve months to run. The second statute would have been unnecessary, if the former extended to all bills. The cases which have been determined on the construction of this statute are few in number, but their effect, in general, has been rather to restrict than to extend the operation of it. Lord Denman, in a late case in the Court of Queen's Bench, of *Fallance v. Siddell* (6 Adol. & Ellis, 932; 2 Nev. & Per. 78), after remarking that the words "any bill" are accurately copied in the printed editions of the statutes from the Parliament Roll which he had inspected, says, that probably some restriction would be found inevitable when they were required to be applied in a Court of Justice. In the case of *Berrington v. Collis* (5 Bing. N. C. 332), it was held that a loan of money at more than 5l. per cent. upon the security of the deposit of a lease, a warrant of attorney, and a promissory note, was not protected by the statute 3 & 4 Will. 4, c. 98, s. 7. In that case there was this difference, that there was not only a promissory note but a lease deposited, and a warrant of attorney given as a security. Upon this record, there is an express admission of an agreement to avoid the statutes against usury, and upon that circumstance the judgment of the Court turned. And Tindal, C. J., there says, "We think such a transaction as was contended for is not brought within the words of the stat. 3 & 4 Will. 4, c. 98, s. 7, or the 7 Will. 4 & 1 Vict. c. 80, those acts contemplating the case of interest taken upon or secured by a bill of exchange or promissory note, as the real and bonâ fide ground of the debt, and not extending to a bill of exchange or promissory note, given in addition to a security of another nature, not protected by the statute upon which the debt was really contracted; for if the latter case should be held [172] to be comprised within the act, it would, in effect, nearly operate as a general repeal of the statute of usury, by enabling persons who had lent money upon mortgage at usurious interest, to sue for and recover principal and interest upon a bill or note, though the mortgage security might be void." But there was a direct decision upon this very point in the Court of Bankruptcy, a few days ago, in the case of *Ex parte Terrewest; In re Poynter* (Mont. & C. 351; 4 Deac. 144). There a party advanced to another the sum of 1600l., at the usurious interest of 10l. 10s. per cent., and for the avowed purpose of evading the statutes of usury, took only a promissory note payable three months after date, and renewable at the option of the borrower, at periods not to exceed eighteen months; and four renewals having been made accordingly, the payee put in a claim for a balance of principal and interest on the whole transaction against the estate of the maker who had become bankrupt. Both the Judges of that Court, Sir John Cross and Sir George Rose, were of opinion that the transaction was not within the protection of the statute 3 & 4 Will. 4, c. 98, s. 7, which was only meant to apply to bills or notes actually existing at the time when the contract for discounting or negotiating them should be made, and the money was specifically advanced on the security of the bill itself, and did not apply to a case like the present, where the note was drawn in consideration of a pre-existing debt; but that independently of that, the whole transaction being merely colourable, and entered into with a view of evading the statutes against usury, it could not be deemed valid. So here, assuming that the case would primâ facie fall within the words of the statute, still it is not a bonâ fide transaction, and ought not to be protected by it. [Parke, B. That can have nothing to do with the question, if the words of the statute are imperative.]

[173] Erle and Wordsworth, contra, were stopped by the Court.

LORD ABINGER, C. B. The question in this case is, whether this promissory note comes within the words of the statute, 3 & 4 Will. 4, c. 98, s. 7, "that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall by reason of any interest taken thereon or secured thereby," be void? Here a promissory note is given, the object of which is to secure interest that would otherwise have been unlawful; how

can it, therefore, in opposition to the express words of the statute, which says that such note shall not be void, be contended that it is so by force of the statute of Anne, or any other antecedent statute? The note would not be void at common law, for usury is a matter altogether regulated by statutes; the rate of interest as fixed by them being originally 10l. per cent., until it was ultimately reduced to its present standard. This rule must therefore be made absolute.

PARKE, B. I must own that on the mere view of the 7th sect. of the 3 & 4 Will. 4, c. 98, I should have felt no doubt on this subject, were it not for the decision which has been come to by both the Judges of the Court of Bankruptcy, in the case which has been cited. Notwithstanding that decision, however, I think this bill is rendered a valid security by the statute. The act ought to be construed according to its plain words, and not by resorting to any supposed intention of the legislature, unless there be something in the other parts of it to point to some other construction. The words are, "No bill of exchange or promissory note, made payable within three months (here is a promissory note made payable within three months) shall by reason of any interest taken thereon, or secured thereby, be void;" and here is a case, where one of the objects of [174] the promissory note was to secure the payment of interest; although it was also intended thereby to secure payment of a portion of the principal too. Had these been the only words in the act, however, there might have been room for some doubt; but there is another part of this section where the legislature makes use of words so general that no doubt can exist, where it says, "That the liability of any party to any bill of exchange or promissory note, shall not be affected by reason of any statute or law for the prevention of usury." Those words are as large and comprehensive as words can be, and, although the original cause of giving a bill or note be the loan of money, still the statute has the effect of saying, that if the bill be sued on, it shall be exempted from the laws for the prevention of usury. No words can be more general. This plea, therefore, disposes of no defence to the action on the ground of the statute of usury. As to the cases which have been referred to, of *Fallance v. Siddell*, in the Queen's Bench, and *Berrington v. Collis*, in the Common Pleas, they are beside the present question. According to the former, if the warrant of attorney had been taken as a security for the debt, it would have been void, but if taken *bonâ fide* to secure the bill of exchange, or if the latter were given as the original security for the usurious interest, it would have been good. Then *Berrington v. Collis* turned entirely on the question of fact, whether the security for the original loan were the lease or the bill of exchange; and the Court considered it to be the former, and consequently the transaction was not at all protected or made valid by the 3 & 4 Will. 4, c. 98, s. 7. Those cases, therefore, are quite consistent, both with our present decision and with each other. Then, as to the case in the Court of Bankruptcy, I think the Judges have given too narrow a construction to this act of Parliament. Possibly it may have been the intention of the legislature to confine the repeal of the statute of usury to those cases only where bills already [175] given are negotiated at usurious interest, but they have used such limited words that it is impossible to put that construction upon them, and carry such intention into effect.

GURNEY, B., and MAULE, B., concurred.(a)

(a) Subsequently to the decision in this case, the statute 2 & 3 Viet. c. 37, was passed, by which it is enacted, "That no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10l. sterling, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void; nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing, or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland, respectively, for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture."

SHEEN AND ANOTHER, Assignees of Thomas, an Insolvent Debtor v. RICKIE, MOORE, THWAITES, AND BROWN. Exch. of Pleas. 1839.—In trover against four defendants by the assignees of an insolvent, the first count alleged that the insolvent before his insolvency, was possessed of certain goods, &c.; that the same afterwards, and before the insolvency, came to the possession of two of the defendants by finding; that these two defendants would not deliver them; and that the said defendants, after the insolvency, converted them. The second count was on the possession of the assignees, and alleged a conversion by the said defendants:—Held, after verdict, that the declaration alleged in each count a sufficient breach as against the four defendants.—On a declaration in trover for goods, chattels, and fixtures (enumerating, among other merely movable articles, stoves, shelves, closets, cupboards, &c.):—Held, after verdict (general damages having been assessed on the whole declaration), that the word “fixtures” would not necessarily be taken to mean things affixed to the freehold, and therefore the judgment ought not to be arrested.

[S. C. 7 Dowl. P. C. 335; 8 L. J. Ex. 217; 3 Jur. 607.]

Trover. The first count of the declaration stated, that the insolvent, before his imprisonment, &c., was lawfully possessed as of his own property of certain goods, chat-[176]-tels, and fixtures, to wit, fifty beds, fifty bedsteads, &c., &c., [enumerating many articles of furniture and household goods, amongst which were stoves, ranges, shelves, grates, closets, cupboards, and ovens], and being so possessed thereof, afterwards, and before he subscribed his petition, &c., to wit, on &c., casually lost the said goods, chattels, and fixtures out of his possession; and the same afterwards, and before, &c., came to the possession of the said defendants, A. Rickie and J. G. Thwaites, by finding: yet the said defendants A. Rickie and J. G. Thwaites, well knowing the said goods, chattels and fixtures to be the property of the said R. Thomas before &c., and of right to belong and appertain to him, did not nor would deliver the same, or any part thereof, to the said R. Thomas before he subscribed his said petition, but wholly neglected and refused so to do; and the plaintiffs, assignees as aforesaid, in fact say, that the said defendants, afterwards, and after the said R. Thomas subscribed his said petition, and before the commencement of this suit, to wit, on &c., wrongfully sold and disposed of the said goods, chattels, and fixtures, and converted and disposed of the same to their own use. The second count was in trover for goods, chattels, and fixtures, on the possession of the assignees, and alleging a conversion by the said defendants after the insolvency.

Plea—first, not guilty: secondly, to the first count, that the said R. Thomas was not lawfully possessed of his own property of the said fixtures, goods, and chattels in this first count mentioned, or of any of them, modo et formâ: thirdly, a similar plea to the second count; on which issues were joined.

At the trial before Gurney, B., at the Middlesex sittings in last Michaelmas Term, a verdict was found for the plaintiffs on the whole declaration, with general damages. In the same term,

Kelly obtained a rule nisi to arrest the judgment, on two [177] grounds; first, that the first count alleged a cause of action against two of the defendants only, the second count against all, and there was therefore a misjoinder; secondly, that it appeared on the face of the record that the action was brought for fixtures, for which trover could not be maintained.

M. D. Hill and Hoggins now shewed cause. With regard to the first objection, it is not fatal after verdict. The averment of finding in the declaration is mere form: the only necessary averment, after verdict, is that of the conversion; 2 Saund. 47 m.; *Maynard v. Basset* (Moore, 691); a conversion is here alleged against the said defendants, which, in order to sustain the verdict, will be taken to mean all the four defendants, whose names were enumerated in the commencement of the count. There is nothing inconsistent in two finding and four converting. [Parke, B. The first count appears to be a sort of special count in trover, in which the pleader professes to give a real history of the transaction; that two got possession of the goods before the insolvency, and the four sold them after the insolvency. The question is, whether that count is good.] The words “said defendants” may be ambiguous, but that ambiguity should have been made the subject of special demurrer. In *Spyer v. Thelwell*

(2 C. M. & R. 692), the declaration, on a bill of exchange against the acceptor, stated that N., the drawer, required the defendant to pay to his order the amount of the bill; and it was contended that it was ambiguous whether his order meant the order of N. or of the defendant, and that it ought rather to be referred to the last antecedent. But the Court said, that by calling in aid a little common sense, they could see clearly that the word his referred to the drawer, and held the count good on demurrer. But how can the defendants be admitted to say that they did not under-[178]-stand that the said defendants meant all the four, when all the four have pleaded to the count by a joint plea denying the conversion as alleged? If it were to be construed as they now contend, two of them had nothing to plead to. They clearly, therefore, took it to mean all the four.

Secondly, assuming that trover will not lie in any case for fixtures properly so called, that is, things affixed to the freehold, it does not appear here that any of the articles enumerated were parcel of the freehold. The words will be so understood, after verdict, as to support the verdict if possible. In *Gardiner v. Williams* (2 C. M. & R. 78), which was an action for the following libellous words written of the plaintiff, a gardener—"I have reason to believe that many of the flowers of which I have been robbed, are now growing in your garden,"—innuendo, that the plaintiff had been guilty of larceny, and had stolen certain plants, roots, and flowers; this Court held that, after verdict, it might be intended either that the plaintiff had taken growing flowers before, and so that the libel charged a second offence, which would be larceny; or that the flowers were not growing in the soil at the time of the taking. So here, the fixtures, as they are termed, might have been at the time of the conversion detached from the freehold. They may have been ovens, grates, &c., in an iron-monger's shop. Besides, there are other things specified besides fixtures, even supposing these to be strictly such: and the Court will presume that the verdict passed in respect of those others, and that the judge admitted no evidence in respect of the fixtures, according to the rule laid down in *Stennet v. Hogg* (1 Saund. 227, n. (1)).

Kelly and Channell, in support of the rule. The count being for goods, chattels, and fixtures, part is bad, and the verdict being entire, the judgment must be arrested. The [179] words must be read according to their natural and proper meaning. Where the word "fixtures" is introduced into a declaration in company with other words denoting mere moveable chattels, it must import that the articles which appear, on the description of them in the declaration, to be fixtures, were fixed to realty, and so contradistinguished from goods and chattels. Here "stoves, ranges, grates, shelves, closets, cupboards, ovens," would naturally import things annexed to the freehold. The proper interpretation is to construe the words *reddendo singula singulis*, giving effect thereby to all the words used. There is no authority to shew that trover has been maintained, where the declaration has demanded fixtures *eo nomine*. If this count be good now, it would be good if it demanded fixtures only. In *Colegrave v. Dias Santos* (2 B. & Cr. 76; 3 D. & R. 255), the plaintiff sought to recover effects, which turned out to be fixtures, and it was held that he could not recover. It might as well be contended, if the declaration were for goods, chattels, houses, and fixtures, that the word houses meant toy-houses. [Parke, B. Suppose a count in trover for goods and chattels, and an acre of land: is the judgment to be arrested, or the verdict to be taken as having been given for the things that might be recovered in trover?] It is submitted that in such a case the judgment must be arrested. It is like the case of two counts in slander, one for actionable and the other for non-actionable words. [Maule, B. Have you ever known the judgment arrested where the question arose on one count, stating something actionable and something not?] Where the matter complained of consists partly of an allusion to the plaintiff, and partly of mere general matter, which the plaintiff chooses to apply to himself, the verdict would be supported: *Prudhomme v. Fraser* (4 N. & M. 512; 2 Ad. & Ell. 645). But if a count in slander contained words requiring an innuendo so as to be actionable, and also [180] other words actionable without an innuendo, the judgment would be arrested, on the ground that it would be impossible to tell whether the jury might not have found some part of the damages for the non-actionable matter. So here, there is nothing to shew that this verdict may not have been altogether given for fixtures. Where, indeed, all the words are part of a single conversation, they must all be set forth, although not all actionable, because the latter may qualify the rest; therefore the judgment cannot in such case be arrested because they were not all

actionable; the jury give damages for the whole matter taken together. But it is different where different colloquia are stated, whether in one count or several. The meaning of the term "fixtures" is clearly defined in *Hallen v. Runder* (1 C. M. & R. 267) and *Minshall v. Lloyd* (2 M. & W. 451), and the definition there given is recognised in *Mackintosh v. Trotter* (3 M. & W. 184). [They did not press the other point.]

PARKE, B. I am of opinion that this rule must be discharged. Two objections have been taken on the part of the defendants; first, that the damages have been assessed generally on both counts against all the four defendants, whereas the first count contains a breach against two of the defendants only. This objection, however, fails on looking at the declaration: for it appears that the first is a special count in trover, alleging the property on the goods to have been in the insolvent before his insolvency, and that after the insolvency they came to the possession of two of the defendants by finding, and that the said defendants converted them to their own use. The word "said" may possibly be ambiguous, since it may refer either to the four defendants named in the commencement of the count, or to the two afterwards mentioned; but, [181] at all events, that should have been made the subject of a special demurrer: and the second count is the ordinary one upon a conversion by all the defendants in the time of the assignees. It seems to me, therefore, that this objection is not available after verdict. The second objection is, that, the damages having been assessed generally on the whole record, the judgment ought to be arrested, on the ground that a part of the subject-matter of the action, viz. the fixtures, was such as could not be made the subject of an action of trover. If it distinctly appeared on the face of the declaration that part of the cause of action was such as could not be recovered in trover, I should be strongly disposed to agree in the objection. The case would be easily distinguishable from that which has been put, of an action for words, some of which are not actionable; there the Court would presume that the non-actionable words were not intended to constitute the cause of action, but were used merely as matter of aggravation or of explanation: although, where the words were spoken at different times, and some of them were not actionable, the judgment would be arrested. The law is so laid down in the case of *Penson v. Gooday* (Cro. Car. 327). If, therefore, it were clear that this declaration contained two distinct causes of action, for one of which trover could not be maintained, then, as general damages have been assessed upon the whole declaration, there must be either an arrest of a judgment or a venire de novo; which of the two, it is not necessary now to determine. The whole case, therefore, resolves itself into this question,—is there on the face of this declaration, a complaint in respect of a cause of action for which trover will not lie? If it had clearly appeared that the plaintiff meant to sue in respect of fixtures properly so called—things affixed to the freehold—the declaration would be bad after this assessment of general damages; but after [182] verdict, we ought to make every reasonable intendment in favour of the declaration; and it does not necessarily follow, that the word "fixtures" must import things affixed to the freehold, nor has the word necessarily acquired that legal sense. It is a very modern word, and is generally understood to comprehend any article which a tenant has a power of removing, as appears from the case of *Colegrave v. Dios Santos* (2 B. & Cr. 76; 3 D. & R. 255); but even this is not its necessary meaning; it only means something fixed to another; and every article enumerated in this declaration may be a purely moveable chattel, and the fit subject of an action of trover. For instance, they might be affixed to a barn or other structure, so supported as that it might itself be the subject of this form of action. The word may therefore be understood in a sense different from that which the defendant seeks to impose upon it; and if that be such a sense as will support the declaration, it ought so to be understood by the Court. It must be presumed that the Judge would not have directed the jury to find, and that the jury would not have found, damages for the articles claimed under the name of fixtures, if it was improper that damages should be given in respect of them; and the verdict having been found generally, we must intend them to have been fixtures attached to other things which were in themselves moveable.

ALDERSON, GURNEY, and MAULE, Bs., concurred.

Rule discharged.

[183] HUGHES v. LENNY AND CROFT. Exch. of Pleas. 1839.—Where A. contracts to do work on materials supplied to him by B., (as where he contracts to survey a parish, and to set down the results of such survey in a map, upon paper furnished to him by B.), his right to sue for work and labour is complete as soon as he has finished the work, and has given B. a reasonable opportunity of ascertaining its correctness; and if (there being no contract for a specific price) he demand more for the work than a reasonable price, and refuse to deliver it except upon payment of such larger price, that does not preclude him from suing for and recovering a reasonable price.

[S. C. 2 H. & H. 13; 8 L. J. Ex. 177.]

Assumpsit for work, labour, and materials, done and provided, and journeys performed for the defendant, for money paid, and on an account stated. Pleas, first, non assumpsit; secondly, as to 42l., parcel of the monies in the declaration mentioned, payment. The plaintiff joined issue on the first plea, and entered a nolle prosequi as to the 42l. At the trial before Littledale, J., at the last Summer Assizes for Suffolk, the following facts appeared:—

In the year 1838, an act of Parliament was passed for inclosing the common lands within the parish of Gazeley, in Suffolk, under which the defendants, who resided at Bury St. Edmunds, were appointed the surveyors for carrying the act into execution; and they contracted with the Commissioners appointed by the act to complete a survey of the parish by the 30th of July, 1838. On the 23rd of March, the defendants entered into a verbal agreement with the plaintiff, a surveyor residing at Brixton, Surrey, that he should survey the parish, and make a map or plan of it for the defendants, to be laid before the Commissioners. The defendants supplied in the first instance the paper on which the map was to be traced, and also certain field books necessary for the work. The plaintiff began the work in March, and finished it about the end of June. The measurements and calculations made during the survey were entered by him in the field books, which, on the completion of the work, he took with him to his office at Brixton, and there prepared the map from them. On the 3rd of July, the defendants wrote to the plaintiff as follows:—"We will thank you to send us the Gazeley plan and field books, presuming that the former is now completed. We informed you in our last, dated the 25th ult., that we should compute the quantities ourselves; therefore no delay need arise on that point." On the 7th of July, [184] the map being completed, the plaintiff's attorney wrote to the defendants as follows:—"On the other side I send you the particulars of the account of Samuel D. Hughes; and as the plan is ready, I am instructed to deliver the same to you or your order, on being paid the amount of the account as now furnished." This account amounted to 204l. 4s. 4d., being after the rate of two guineas a-day, besides expenses. On the 17th of July, the defendants' attorney called at the office of the plaintiff's attorney in London on the subject, and demanded the plan and field books. The plan was produced at this interview by the plaintiff's attorney, but he refused to deliver it up except on payment of the amount claimed as above. There was conflicting evidence at the trial as to whether the field books also were then produced, and offered to be delivered up on payment, or not. The plaintiff's attorney stated that they were produced, and that he made a proposal, which was declined by the defendants' attorney, that the plaintiff should go down to Gazeley and meet the defendants there, in order to test the accuracy of the measurements, &c., in the field books. The defendants' attorney refused to pay the amount claimed, upon which the plaintiff's attorney suggested that he should make a tender of some sum; but this he declined to do. The plaintiff's attorney, on the other hand, refused to give up the plan or the field books; and on the following day this action was commenced. There was contradictory evidence as to the mode and rate according to which the plaintiff was to be paid for the work, the plaintiff claiming payment at the rate of two guineas a-day, besides his expenses, the defendants contending that the contract was to pay him at the rate of 4d. per acre for part of the parish, and 6d. for the remainder.

It was contended for the defendants, on this state of facts, that the plaintiff ought to be nonsuited, having brought his action too soon; for that, having undertaken [185] an entire work, viz. the making of the survey and map, he was bound to complete and deliver the map before he could maintain any action; and that the offer to deliver it,

being conditional only, was not sufficient. The cases of *Goodall v. Skelton* (2 H. Bl. 316), and *Sinclair v. Bowles* (9 B. & Cr. 92; 4 Man. & R. 1), were cited. The learned Judge declined to nonsuit, and in summing up, left it to the jury to say, whether the field books as well as the plan were produced at the interview of the 17th July, and told them, that if upon the evidence they could not see that any precise contract had been entered into at a fixed rate, they were to consider what would be a fair remuneration to the plaintiff for his time and labour. His Lordship also stated his opinion to be, that the plaintiff was not bound to deliver the work without being paid for it; and that if he demanded too much, the defendants ought to have tendered him some reasonable sum. On this point, however, he gave leave to the defendants to move to enter a nonsuit. The jury found a verdict for the plaintiff, and that the payment was to be made by acreage, and not by time, and gave 7d. an acre throughout the parish, the plaintiff's claim amounting, at this rate of payment, to 115l. A verdict was entered for him for 73l., the balance after deducting the 42l. paid on account.

In Michaelmas Term, B. Andrews obtained a rule nisi to enter a non-suit, pursuant to the leave reserved: against which

Kelly and Gunning now shewed cause. The objections taken in the present case appear to be of a very novel kind, and amount in effect to this: first, that a man who does work for another is bound to deliver the article without payment; and secondly, that if he asks somewhat too much for it, he is not to recover any thing. This was a work of a kind requiring great labour and skill on the part [186] of the plaintiff. Down to the time of action brought, it does not distinctly appear that any specific terms were agreed on between the parties. Then the plaintiff does the work, receives payment on account, finishes it, and, as the jury have found, is ready to deliver both the map and the field books, on payment of the amount of his demand. The objection on which leave was granted for entering a nonsuit, viz. that the map was not actually delivered, so as to give the defendants the opportunity of inspecting it, which they had a right to do, was rightly overruled. The work having been done by the plaintiff, unless there had been an express contract that it should be delivered without payment, there is no authority that he was bound to deliver it. It is like the building of a carriage or the painting of a portrait: the plaintiff completes his contract by the performance of the work; and unless the parties have contracted expressly, or by necessary implication, that the work is to be delivered without payment of the price, the law casts no such obligation upon him. The case of *Goodall v. Skelton* (2 H. Bl. 316), which was cited at the trial, is wholly inapplicable; the question there was, what amounted to actual delivery. *Sinclair v. Bowles* (9 B. & Cr. 92; 4 Man. & R. 1), which will also be relied upon, is equally distinguishable. No doubt, where a party contracts to do a specific work, by one entire contract, he must complete it in order to recover upon the contract, and cannot claim for a mere part performance on a quantum meruit. But here the plaintiff has fully completed the work for which he was employed, and on what principle he is to be paid has also been determined by the finding of the jury. This, therefore, is not the case of a contract only part performed, as if the plaintiff had left any essential portion of the district unmapped: he was ready to deliver the complete map on certain terms. The jury, therefore, were rightly directed that the plaintiff was not bound actually [187] to deliver it until payment of a reasonable remuneration, and that if he asked too much, it was the duty of the defendants to make a tender of the reasonable amount. [Alderson, B. Surely the parties must have an opportunity of ascertaining whether the work is of any value to them. Parke, B. Is not a tailor bound to give his customer an opportunity of trying on the coat,—in his presence indeed, so as to secure his lien?] Whether the parties have had a reasonable opportunity of inspecting the work or not, was a question for the jury: there was ample evidence in this case that they had, but it was not required that that question should be left to the jury, and the point was not put, except in support of the larger proposition, that the defendants were not suable until the plan was delivered. [Parke, B. Whose property is this plan at present? If it still belongs to the plaintiff, his proper remedy is by an action founded on his special employment, stating that the defendants undertook to pay him on a quantum meruit, in which the measure of damages would be the value of his work independently of the plan: *Atkinson v. Bell* (8 B. & Cr. 277; 2 Man. & R. 292).] No point was made at the trial as to the specific appropriation of the plan to the defendants; but if it had, there clearly was such specific appropriation in this case: the defendants

had actually supplied the paper on which the plan was made. The only remaining question therefore is, whether the plaintiff's having demanded too much, disentitles him altogether to recover. If so, the plaintiff ought to have been nonsuited. But it is clearly for the jury to say how much is actually due; the complaint, therefore, if any, must be of the direction of the learned judge. But the point is in either view altogether untenable. Where delivery and payment are to be concurrent, the party must no doubt shew that the work is completed, and also that he is ready and willing to deliver it on payment of a reasonable price; but he is not [188] bound to make any tender; if the other party objects that he claims too much, it is for him to tender the reasonable price. If it were otherwise, a plaintiff might be liable to have a verdict against him, on the ground that he had made a slight mistake in figures. But in fact there was no proof of any thing like a final demand, by way of condition, of the 2041. On this point they referred to *Roberts v. Havelock* (3 B. & Adol. 404).

Biggs Andrews, and Byles, contra. The argument on the other side proceeds upon the fallacy of supposing that this case is to be determined as if it were an action by the defendants for the plan, or for a breach of the plaintiff's contract. The question is, not whether the defendants have done all they were strictly bound to do, but whether the plaintiff has qualified himself to bring the action he has brought. He ought to have shewn that he was ready to deliver the plan, on receiving at that time the amount which he was reasonably entitled to for it. The survey which the plaintiff was employed to make, meant the measuring and the mapping: the measurement was worth nothing till the plan was made; and the whole labour was valueless to the defendants till the map was delivered to them. It was, as in *Sinclair v. Bowles*, one entire contract, in respect of which the plaintiff was not entitled to recover at all until he had completed it, and given the defendants the benefit of it. This is more like the case of goods sold than work done: it is not like a case where the work is valuable as it goes on: here the whole value of the work was incorporated in the field books and map. It is not necessary for the defendants to maintain that they were absolutely entitled to the map as their own; but they were certainly entitled to have the means of testing its accuracy and use, before paying for it: the plaintiff ought there-[189]-fore to have tendered the map for inspection, that they might ascertain whether it was of any value: and he had no right to impose the terms that they should have that opportunity only on payment of the expense of bringing it down to Bury. The accuracy of the map was to be tested through the accuracy of the field books; and until it was so tested, it could not be seen whether it was of any value: therefore it must be delivered for that purpose.

Secondly, even if the plaintiff was not bound to deliver the map before he demanded the price, these are concurrent obligations, and he was bound to deliver it on receiving the amount to which he was fairly and reasonably entitled for the work. If the defendants had tendered a sum, it must have been at the peril of the jury finding a higher rate of payment; because the plaintiff would have a lien on the work for the amount to which he was reasonably entitled. It may be likened to the case of goods bargained and sold, where the seller must shew a readiness to deliver on payment of the price to which he is entitled. If a party sells goods at a reasonable price, can he refuse to give them up, except upon payment of a larger price? This is in substance the case of a vendor of a map and field books—and he must shew a readiness to deliver on payment of the contract price. Suppose the plaintiff had brought a special action on the contract, he must have alleged his performance of it—viz. that he had made the plan, and was ready to deliver it on payment of the contract price. [Parke, B. The question is, what is the contract? Is it not this—that in consideration that the plaintiff would survey the parish, and put down the results of his survey on the defendants' paper, and would give them a reasonable opportunity of comparing the plan with the books, and both of them with the land, they agree to give him a reasonable remuneration for his labour? Is it not like the case of a coat made by a tailor out of his customer's cloth?—if he give the customer a reasonable op-[190]-portunity of trying it on, although he may refuse to deliver it, cannot he sue for the price?—because he has a right of lien, which does not preclude him from bringing his action in the meantime.] If the defendants were suing, they must shew that they had tendered the price; but as the plaintiff is suing, he must shew that he has done every thing to entitle him to sue—and therefore that he was ready to deliver on payment of the reasonable price. [Parke, B. They say on the other side that there

was evidence for the jury, both that you had a reasonable opportunity of inspecting the work, and also of the readiness to deliver on payment of the reasonable price.]

But further, this is not a case in which *indebitatus assumpsit* will lie at all. *Goodall v. Skelton* is the only case in which the question has been raised, whether the seller of goods can insist on a lien, and bring *indebitatus assumpsit* in the meantime. [Alderson, B. I do not understand that the plaintiff claims a lien. Parke, B. The question is, how much is to be done by him before there is a debt due? When is there a debt due for the tailor's bill, where you have delivered him cloth to be made into a coat?—as soon as he has done the work, and given you an opportunity of trying it on.] There is a ground of action, but not such a debt as is recoverable in *indebitatus assumpsit*. It cannot be ascertained whether the work is done on the buyer's materials, until the special contract is looked at: and if it becomes necessary to look at the special contract in order to ascertain the rights of the parties, in that case *indebitatus assumpsit* will not lie.

PARKE, B. I am of opinion that the plaintiff is entitled to recover, and that the rule ought to be discharged. There is certainly some nicety in the case, but when it comes to be fully understood, I think there is no great difficulty in it. The question is, whether any debt is due from the defendants to the plaintiff, for which he can main-[191]-tain an action of *indebitatus assumpsit* for work and labour and materials. The best method of ascertaining that is to see what was the contract between the parties. Now the true state of the contract appears to me to be this: the defendants employ the plaintiff to survey a parish, and then to put down the results of his survey, first on books provided for him by the defendants, and afterwards on paper to be provided by them for him, in the shape of a map or plan: and incidental to that employment, it may be a condition that the plaintiff should give the defendants a reasonable opportunity of comparing the map with the books, and both of them with the lands surveyed, in order to ascertain their accuracy. It is said that it is a part of the same contract, that the plaintiff should be ready and willing to deliver the books and map to the defendants; but I do not think that is any part of the contract, although there may be an independent contract that the plaintiff should return the materials supplied by them on request: as in the case of the delivery of goods to a warehouseman to keep, or, which is perhaps a closer analogy, of cloth to a tailor to be wrought into a coat; but that is altogether independent of the right of the tailor to sue for the debt due to him; for as soon as he has worked the cloth, and given his employer an opportunity of ascertaining whether it is made to fit, he has a right to send in his bill for the work. There may be a contract on the plaintiff's part to return the materials on payment of a reasonable price; but if so, the defendants are not entitled to sue in respect of that contract because they have not tendered that price. But the contract in respect of which the plaintiff sues, is no more than this; to perform the work satisfactorily, and to give the defendants a reasonable opportunity of inspecting it and ascertaining its correctness: as soon as he has done that, he may maintain an action for the debt, retaining his lien notwithstanding. The ques-[192]-tion therefore is, whether there was evidence to go to the jury, from which they might reasonably find that those things were done which would entitle the plaintiff to sue for a debt. Now, the main struggle to-day has been, whether there was evidence that a reasonable opportunity was afforded to the defendants of ascertaining whether the work was correctly done: and on that point, I think there clearly was evidence for the jury. It appears that the defendants were informed on the 7th of July that the work was completed, and there was an interval until the 17th, in which they might have had the map and books sent down into the country, and compared with the land surveyed. There was therefore a reasonable time for that purpose if the defendants had asked for it; but they did not, and they never put their case upon that ground. The plaintiff, therefore, is entitled to recover as for a debt, and we need not inquire whether he was ready to deliver the plan on payment of a reasonable price, or not; because, as I have already said, we do not consider that that was necessary to enable him to sue for the debt; but, if it were, it seems to me that on that point also there was evidence for the jury, on the statement of the plaintiff's attorney. I think, however, that the plaintiff is entitled to recover for work, labour, and materials, on proof of the performance of the work to the satisfaction of the jury, and of the defendants' having had a reasonable opportunity of ascertaining its correctness.

ALDERSON, B. I am of the same opinion: I think that my brother Parke has

stated the real contract between the parties correctly ; and with regard to the evidence, I think there was abundant evidence from which the jury might find, that the defendants had a reasonable opportunity of seeing whether the plan was correct. It could not be necessary for that purpose to re-survey the whole parish, but only to compare particular parts of it : the [193] defendants might have taken certain standard points, measured them in the country, and compared them with the plan in London : and they had from the 7th to 17th of July for the purpose of doing so. There was abundant evidence, therefore, for the jury that they had a reasonable opportunity of inspecting the plan and ascertaining its accuracy. If so, the plaintiff has done all that he was required by the contract to do : he has done the work ; he has done it, as the jury have found, in a satisfactory manner ; he has afforded the defendants a reasonable opportunity of inspection, and he has then a right to claim a reasonable compensation for his labour. If he has done wrong in refusing to deliver the plan, the defendants might have contested that by tendering the reasonable amount, and bringing their action of trover ; but that does not affect the plaintiff's right of suing for the debt due to him.

MAULE, B. I am also of opinion that this rule ought to be discharged. This is an action of indebitatus assumpsit, in which the plaintiff declares that the defendants are indebted to him for work, labour, and materials ; and the question is, whether there was evidence to go to the jury of the existence of such a debt. Where a party undertakes to work up the materials of another, I think his right of action, at the latest, arises when he has done the work satisfactorily, and has given the other party a reasonable opportunity of ascertaining whether it has been properly done. It struck me at one time that it was doubtful whether this latter term was imported as a condition into the contract ; but I now think that it has been properly conceded in point of law that it was. Then I think there was ample evidence for the jury that such opportunity was afforded in this case. Notice was given to the defendants on the 7th of July that the work was completed, and they had until the 17th to make such inspection. As to the [194] plaintiff being bound to name a sum, and saying that he was ready to deliver the work on payment of that sum, no principle or authority has been cited to shew that that is necessary ; and it seems to me that it would be strange that the defendants, having made no tender of any sum, should be in as good a situation as if they had tendered it, and it had been refused, and they had then paid it into Court, and the plaintiff had taken it out. There may be a contract on the part of the plaintiff to re-deliver the goods, not arising out of the contract of work and labour, but resulting merely from the delivery to him of the defendants' materials, which would equally have arisen whether he had made them more valuable by the work done by him upon them, or had injured or spoiled them altogether ; but that in no degree qualifies the right of action on this contract, which is a contract for work and labour. I think, therefore, the plaintiff has done all which he was bound to do, to entitle him to recover in this action.

Rule discharged.

COLLINS v. ROSE. Exch. of Pleas. 1839.—Under the 53 Geo. 3, c. 127, s. 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months after the fact committed, an action of trespass for seizing, taking, and carrying away, and distraining and selling the plaintiff's goods, under a warrant of distress for arrears of a church-rate, may be brought within three calendar months after the sale. Where a demand for the perusal and copy of a magistrate's warrant, in pursuance of the 24 Geo. 2, c. 44, s. 6, required the perusal and copy to be given within three days :—Held, that this was a sufficient demand to entitle the party to sue, although the statute says that no action shall be brought until the perusal and copy shall have been refused for six days after demand.

[S. C. 7 Dowl. P. C. 796 ; 8 L. J. Ex. 273.]

Trespass for breaking and entering the plaintiff's house, and seizing, taking, and carrying away, and distraining and selling his goods. Plea, not guilty. At the trial before Littledale, J., at the Buckinghamshire Summer Assizes, 1838, it appeared that the goods were distrained by the defendant, a constable, under a warrant of distress

for nonpayment of the sum of 113d., arrears of a church-rate, in the county of Buckingham, on the 27th of October, [195] 1837; that they were carried by the defendant, on the 30th, into Oxfordshire, and afterwards brought back into Buckinghamshire, and there sold to satisfy the arrears of the rate and the costs, on the 1st and 2nd of November. The writ in this action was sued out on the 30th of January, 1838. It was admitted, for the defendant, that there was an irregularity in the warrant under which he levied; but it was contended that the plaintiff was precluded from recovering, on two grounds; first, because there was not a sufficient demand of a perusal and copy of the warrant to satisfy the statute 24 Geo. 2, c. 44, s. 6, the written demand served on the defendant having required the perusal and copy to be granted within three days, whereas the statute provides that no action shall be brought against a constable &c. for anything done in obedience to a warrant of a justice, until the perusal and copy of the warrant have been refused or neglected for the space of six days after demand; and secondly, that the action was not brought within sufficient time, for that it ought, under the 53 Geo. 3, c. 127, s. 12, to have been commenced within three calendar months "after the fact committed," which in this case was the original seizure of the goods. For the plaintiff it was insisted, that either he might treat the removal into Oxfordshire as a distinct trespass, in which case the action was in time; or that he had a right to sue within three calendar months after the sale, which constituted the real grievance, the seizure being merely a part of the entire act of trespass which was carried into effect by the sale. The learned Judge reserved both points, and the plaintiff had a verdict, the defendant having leave to move to enter a nonsuit if the Court should be of opinion that either of the objections was fatal to the action.

Kelly moved accordingly in last Michaelmas Term. First, the demand of the perusal and copy of the warrant [196] was insufficient. The object of the statute is to give the constable a full period of six days, in which to obtain and deliver the copy: but by this demand he would be misled into supposing he must give it within three days. The demand may be general; but if the party chooses to specify a time, it ought to be that mentioned in the statute. [Parke, B. I think there is not much in this point; the constable must be supposed to know the law, and must therefore know that the mention of three days meant nothing, and that he would not be bound to deliver the copy within a less time than the six days.]

Secondly, the action was not brought in time, the "fact committed" being the original seizure of the goods. On this point a rule nisi was granted, the cases of *Saunders v. Saunders* (2 East, 254), *Godin v. Ferris* (2 H. Bl. 14), and *Smith v. Wiltshire* (5 Moore, 322; 2 Brod. & B. 619) having been cited. At the sittings after Hilary Term,

Biggs Andrews and Byles shewed cause. The action was in time. In the first place, the plaintiff has a right to treat the removal into Oxfordshire as a new trespass, on which he may sue within three months after the commission of it. It may be assimilated to the case of a larceny committed in one county, where the goods are afterwards removed by the felon into another county; he is triable in the latter county, on the ground that, in contemplation of law, the taking and carrying away constitutes the offence of larceny in every place through which the goods are carried: 1 Hawk. Pl. Cr. c. 33, s. 52; 4 Bla. Comm. 304. So here, the taking and carrying away constitutes an independent trespass; and the complaint in the declaration is for seizing, taking, and carrying away the goods of the [197] plaintiff. Where a party complains of a wrongful detention of his person, the time of limitation of the action dates from the last moment of his imprisonment; *Massey v. Johnson* (12 East, 73). But secondly, the action was well brought within three months after the sale. The "fact committed" in pursuance of the statute, is not the seizure merely, but the sale: the seizure is made, not for the purpose of the absolute detention of the goods, but only for the purpose of security, until the amount of the rate shall either be paid, or raised by their sale: and the grievance complained of is the entire act of trespass which is consummated by the sale. The case is distinguishable on this ground from all those which were cited when the rule was moved for. In *Saunders v. Saunders* (2 East, 254), it was held that an action of trover, to recover back goods seized on board a vessel on suspicion of smuggling, could not (under the statute 20 Geo. 3, c. 37, s. 23) be maintained more than three months after the original seizure of the goods, although within three months after their re-delivery under an order of the Court of Exchequer. The

same point was determined, in *Godin v. Ferris* (2 H. Bl. 14), and *Crook v. M'Tarish* (1 Bing. 167; 8 Moore, 265), as to an action of trespass under similar circumstances. In those cases the original seizure, being for a forfeiture, was in its nature absolute, and the wrongful act was thereby complete. In *Smith v. Wiltshire* (5 Moore, 322; 2 Brod. & B. 619), no such point arose; the only question was, whether the defendants, constables, acting under a search-warrant for stolen goods, who took goods of a different kind, were within the protection of the 24 Geo. 2, c. 44, s. 8. It is apprehended that the Statute of Limitations would in such a case as this begin to run from the time of the sale, not from that of the original seizure. According to our law, (although it is [198] otherwise by the law of France (see the Code Civile, arts. 2279, 2280)), a chattel, unless sold in market overt, continues the property of the party from whom it is wrongfully taken: no title can be gained by prescription to moveable goods. Even, therefore, if the plaintiff cannot sue for the chattel, he may follow and seize it after any lapse of time, and may justify, in trespass for the seizure, on the ground that the property remains in him. It must follow, that every detention of the possession of the goods is a fresh act of trespass to the party who so retains the property in them. It is clear that every continuance in the wrongful possession of land is a new trespass: but then the continuance in possession for twenty years gives a title. There is no difference in principle between the case of land and that of goods; and if there were a prescription for goods as for land, the whole difficulty would be renewed. If, therefore, this had been one continuous trespass, the limitation of time would have run from the last act of trespass. But here the trespasses were of different kinds; and, moreover, the plaintiff had no opportunity of recovering full damages till after the expiration of the six days. The time of limitation ought to be computed from the period when the plaintiff could have a fully beneficial action. In *Godin v. Ferris* and *Crook v. M'Tarish*, the action might have been brought with as much effect immediately after the seizure as afterwards: there was there a complete conversion in the first instance, and nothing subsequent which could be so treated. The cases are distinguished on that ground by Parke, B., in *Jenkins v. Cooke* (1 Ad. & Ell. 372, n.). Here, until the expiration of the six days, the goods might have been redeemed by tender of the arrears of the rate.

Gurdon (with whom was Kelly), contra. The whole question is, what is the meaning of the words "after the [199] fact committed" in the statute? The plaintiff contends, that he has a right to treat the "fact committed" as being the last portion of the injury done to him. But it is clear the first act of seizure was a trespass: and from that moment, even if he had paid the money, under protest, an action of trespass would have been maintainable: *Lindon v. Hooper* (Cowp. 414). The constable is clearly entitled to the protection of the statute as to time, even though the irregularity was such as made him a trespasser, having acted *bonâ fide* in pursuance of the act: *Theobald v. Crichmore* (1 B. & Ald. 227). In 1 Saund. 24, note (1), the law is thus stated as to continuing trespasses:—"The continuing of a trespass from day to day is considered in law a several trespass on each day, and must be directly and positively answered by the defendant, as well as the original trespass: 2 Ld. Raym. 976; *Monkton v. Pashley*; just as the removing of goods, wrongfully taken at first, from one place to another, is held to be a several trespass at each place. . . . But there are many acts of trespass, which, when executed, cannot be done again, but terminate upon the commission of them, and therefore cannot in their nature be continued; as where a man cuts down another's trees, or kills his horses, dogs, or rabbits, or takes away his goods. In these and the like cases, if the trespasses were repeated, it is necessary to allege that they were committed on different days and times, or at least to insert as many counts in the declaration as there are trespasses; for they cannot be laid with a *continuando*." In the present case, the trespass is not laid with a *continuando*, nor *diversis diebus et temporibus*; only one trespass is complained of, viz. the taking of the goods, the sale being laid as matter of aggravation. The case of larceny of goods, carried into another county, has been referred to; but there the party may be indicted in [200] both counties. It is not that there is any second offence actually committed in the latter county, but by a fiction of law, which considers the continuance of possession a continuance of the original taking, the jury of that county are empowered to try the whole fact. The argument upon cases of trespass to the person and of trespass to real property is not applicable to the present. A false imprisonment is clearly a trespass throughout the whole continuance of the wrongful detention. So,

while I remain on the land of another, I am continuing the injury. But in the case of goods, the whole trespass is in the asportation. In *Fraser v. The Swansea Canal Company* (1 Ad. & Ell. 354; 3 N. & M. 391), it was held that a party entitled to goods as mortgagee, but which were in the possession of the mortgagor's lessee, might sue in trover for the goods within six months after the sale of them by a canal company, who had distrained them for tolls, under an act which directed that all actions for anything done in pursuance thereof should be brought within six months next after the fact committed: because, being out of possession, the plaintiff had no cause of action until the sale: but the Court intimated their opinion, that if the lessee had sued, whether in trespass or trover, his action must have been commenced within six months of the seizure. The party cannot waive the original tort, in order to evade the statute. The other cases which have been referred to are also in point for the defendant. It is said that they are distinguishable on the ground that in them the plaintiff had an equally beneficial action in the first instance. But in *Saunders v. Saunders*, the action was not brought for the original seizure, but for the non-delivery back of part of the goods: the plaintiff did not sue for all the goods taken, but only for those which were not forthcoming to be re-delivered. In *Godin v. Ferris*, and *Crook v. [201] M'Tavish*, the injury was as little complete in the first instance as it is here; nor could it have been made so by tender of amends.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by

PAIRKE, B. This case came before the Court, at the sittings after the last term, before my brother Alderson and myself, on shewing cause against a rule to enter a nonsuit. It was an action of trespass for seizing, taking, distraining and selling goods. There was a plea of not guilty. The defendant was a constable, and distrained for a church-rate; and the question which arose was, whether the action was brought within three calendar months "after the fact committed," within the meaning of the 53 Geo. 3, c. 127, s. 12. My Brother Littledale directed a verdict for the plaintiff, but reserved the point. The defendant distrained the goods on the 27th of October in Buckinghamshire, and afterwards took them into Oxfordshire, and brought them back and then sold them, on the 1st and 2nd of November, to pay the arrears and costs. The action was commenced on the 30th of January, more than three calendar months from the original seizure, but within three calendar months from the removal into Oxfordshire, and the sale: and the point to be decided is, whether it was brought in proper time. If the words "after the fact committed" are to be considered as equivalent to the words "after the cause of action," in the Statute of Limitations, then the plaintiff has clearly a right to recover, for he may treat the removal into Oxfordshire itself as a trespass, and sue in respect of that cause of action, and the subsequent sale, both being within the limited time: as he would have recovered, if the original seizure had been more than six years before, and the sub-[202]-sequent removal within six years of the commencement of the suit, and the ordinary plea had been pleaded. If the same construction is not to be put upon these restrictions, in acts of Parliament, in favour of public officers, as on the Statute of Limitations, (and probably it is not, though that point is not very clearly settled), still the action is in time; for the statute directs the arrears to be levied by distress and sale, and "the fact committed" under colour or in pursuance of the statute, is not merely the seizure, but the sale also. The seizure of the goods is made not absolutely, but with a view to their detention only until the amount should be paid, and their subsequent sale if it should not: and the seizure, when a sale has taken place, is but part of the entire act complained of, and which forms the real grievance to the plaintiff. And this circumstance distinguishes the present case from those of *Godin v. Ferris* (2 Hen. Bl. 14), *Saunders v. Saunders* (2 East, 254), and *Crook v. M'Tavish* (1 Bing. 167), in all of which the seizure was for a forfeiture, and was in its nature absolute, and must be considered as intended to deprive the plaintiff of his property immediately.

We agree, therefore, with my Brother Littledale's view of this question, and think that the rule must be discharged.

Rule discharged.

[203] ARKWRIGHT AND ANOTHER v. GELL AND OTHERS. Exch. of Pleas. 1839.—Before the year 1705, a company of adventurers had begun to construct a sough or level, now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth, in Derbyshire; being remunerated, by agreement with the proprietors of the mines, by a portion of the lead ore raised within the district benefited thereby (technically called the title of the sough. The water from this sough flowed into a brook called Bonsall Brook, and their united waters turned an ancient corn-mill. In 1738, they leased this easement, of continuing and maintaining the sough, to certain parties for 999 years. In 1771, A. obtained a lease for 84 years, from the owner of the land through which the sough was made, of the brook, of the stream of water issuing from the sough into it, and of the piece of land on which the corn-mill stood, with the right of erecting mills thereon; and accordingly, in 1772, erected extensive cotton-mills thereon, partly on the site of the ancient corn-mill, and they were worked by the same junction of the two streams. This lease contained a proviso, that if, during the term, the stream issuing from Cromford Sough should, by the bringing up of any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come to the mills sufficient water for working them, and the lessor should not be able otherwise to supply it, it should be lawful for A. to take down the mills, and remove them to another piece of ground therein described, of which a lease should be granted for the rest of the term. In 1789, A. purchased from the lessor the absolute interest in the land leased, and in that through which so much of the sough was made as lay within the manor of Cromford. In the meantime, another company had, in 1771, commenced the construction of another sough on a lower level, called the Meer Brook Sough, (commencing within the manor of Wirksworth), for the purpose of draining a larger portion of the mineral field, under a similar license from the same mine-owners who had before used the Cromford Sough. In 1836, Meer Brook Sough having been so far extended into Cromford as to drain the Cromford Sough, the water supplying A.'s mills was thereby diverted:—Held, that, under the circumstances, A. had not acquired, by his user of the water issuing from Cromford Sough, such a right to it as to entitle him to maintain an action against the proprietors of the Meer Brook Sough; this being an artificial water-course made for a particular and temporary purpose, and its water having been originally taken by him with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of the mines; and that he did not acquire such right by force of the stat. 2 & 3 Will. 4, c. 71, s. 2.

[S. C. 2 H. & H. 17; 8 L. J. Ex. 201. Approved, *Wood v. Ward*, 1849, 3 Ex. 776; *Greatrex v. Hayward*, 1853, 8 Ex. 293. Referred to, *Mason v. Shrewsbury and Hereford Railway*, 1871, L. R. 6 Q. B. 584; *Angus v. Dalton*, 1877, 3 Q. B. D. 123; in House of Lords, 6 A. C. 740. See *M'Eroy v. Great Northern Railway of Ireland*, [1900] 2 Ir. R. 333; *Hanna v. Pollock*, [1900] 2 Ir. R. 672; *Burrows v. Lang*, [1901] 2 Ch. 502.]

This was an action tried at the Derby Spring Assizes, 1838, before Park, J., when a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following special case; the Court to draw the same inferences from the facts as a jury might.

The declaration contained two counts, which, in substance, charged the defendants with diverting from certain cotton-mills of the plaintiffs the water to which the plaintiffs claimed a right, and which had usually flowed to and been used for the purposes of the said mills.

The defendants pleaded not guilty, and other pleas denying the right of the plaintiffs to the water, and the Statute of Limitations. Upon all these pleas issues were joined.

The plaintiffs are large cotton-spinners residing at Cromford, in the county of Derby, and carrying on business in co-partnership together, at certain mills called Cromford [204] Mills. The mills are rented by them (as tenants from year to year) of Richard Arkwright, Esq., of Willersley Castle, in the county of Derby, the real plaintiff in the cause, and for whose benefit the action is brought. The defendants

are gentlemen of fortune in the county of Derby, and are joint owners of a mineral sough, called Meer Brook Sough, hereinafter described. The action was brought to recover damages from the defendants for the diversion by them of a portion of the water flowing to the Cromford Mills, down a mineral sough called the Cromford Sough. The precise origin and date of the existence of this sough are not known, but a part of it, towards the mouth, in the township of Cromford, existed before 1704, and was made, and has to the present time continued to be used, for the purpose of draining the lead mines in the district of the wapentake of Wirksworth, a mining district of great antiquity, parcel of the possessions of the Crown in the right of the Duchy of Lancaster, including the Cromford Sough, and the Meer Brook Sough, and the plaintiff's mills, and the manors and townships of Wirksworth and Cromford. The mouth of the Cromford Sough is in the village of Cromford, and near to the mouth is a stream of water called the Bonsall Brook, into which the water from the sough has always discharged itself, so as to form a junction with the course of the brook. Below the point at which the sough water formed this junction with the Bonsall Brook, stood an ancient corn-mill, which was worked by means of the waters so united.

To what extent the Cromford Sough had been carried, previous to the year 1705, did not appear; but it appeared by an agreement dated the 1st of October, 1705, put in evidence by the plaintiff, that a society or company were then owners of part of the Hannage and other soughs, and Sir P. Gell and partners of the other part, and also of the Cromford and Bates soughs, and the composition ore that might be gotten by means of the same; and by that agree-[205]-ment two persons of the name of Burton and Hutchinson undertook to maintain, support, and keep open the Hannage Sough, (which the society was obliged to do by a previous agreement with several owners of mines, dated the 10th of June, 1704,) and also with all speed, at their own costs and charges, to settle and establish articles with the miners in Cromford Moor, Dovestone Leys, the Gang Plott, and Gang Rake aforesaid, and other places where mines were to be benefited and unwatered by the Cromford or Bates soughs, for their payment of one-fourth part of all the free lead ore that should be gotten in their respective lead mines on Cromford Moor, Dovestone Leys, the Gang Plott, and Gang Rake, and out of veins, mines, and rakes, that should be afterwards discovered, and receive benefit from either of the said soughs, for and as a composition or compositions for the bringing up and maintaining the said soughs, half of which said composition ore was to be paid to the company; and to drive and bring up the said Cromford Sough from the tail or mouth thereof, in the town of Cromford, to the mines, veins, and rakes of lead ore in Cromford Moor and the said other places, for the more effectually taking off the water from the said lead mines, and laying them dry thereof at a true level to the mouth of the said sough, or as near as the same could reasonably be carried; and that they would, on or before the 1st of June then ensuing, begin and open the mouth of the said Cromford Sough, and effectually open the same where it had been stopped, and carry on the same at the same level as it had formerly been carried, and respectively keep the said soughs in good repair and order, so that they should be carried to the said veins, rakes, pipes, or mines, so that the water standing therein and troubling the same might be effectually let off and carried away from the said lead mines, and the lead ore gotten. And the company, in consideration thereof, assigned to the said two persons one-half of all the composition ore that should be [206] gotten or should arise by reason of their share of Cromford Sough or Bates Sough. In both agreements there are covenants on the part of Burton and Hutchinson to Sir S. Evans and the others to indemnify them from any injury arising from the water of the smelting mill of Sir Philip Gell being diverted from the mill by the said Hannage Sough, and from all damage that might happen to any of the inhabitants of Wirksworth by reason of the water being taken away by the Hannage Sough.

It also appears, by an indenture of lease made on the 8th of March, 1738, by Sir Bibye Lake and others, under whom the said Richard Arkwright claims the reversionary interest in the sough, (and recited in the deed of 1836 hereinafter mentioned,) that those persons, forming a society and company, were in 1738 the owners of the Cromford Sough, and the composition ore to be gotten by means of it, and entitled to divers mines, veins, rakes, and pipes of lead ore within Cromford Moor, or Wirksworth, within the title of the said sough; and they thereby granted for 999 years to one Spencer the said sough, by the description of "all that sough or watergate,

lying and being in Cromford Moor, within the wapentake of Wirksworth, called Long or Cromford Moor Sough, which sough was begun and carried on for the unwatering of divers veins and rakes of lead ore in Cromford Moor, to wit, the Dove Stone Leys, the Gang Plott, and Gang Rake, within the wapentake and parish of Wirksworth : " and also all their share of the composition ore to be gotten by means thereof, and the several mines, veins, rakes, or pipes of lead ore, or share of mines in Cromford Moor or Wirksworth aforesaid, or either of them, then within the title of the said sough ; paying to the lessors one-sixth part of all the ore which should be got for composition in any of the mines or groves then in composition with the said sough, and also one-sixth part of all the ore that should be got by carrying up the level of the said sough, or out of [207] the mines or veins to be discovered thereby, or in any of the mines, veins, rakes, or pipes aforesaid, then within the title of the said sough : and the lessee covenanted with all speed to open and cleanse the said sough, from the tail thereof to the forefield thereof, and that he should and would from thence open and cleanse, and effectually drive forward and carry on the said sough, up to a stake or post that had then been fixed in or upon the said mines called Dove Stone Leys, the Gang Plott, and Gang Rake veins, as the mark or plan whereto the said Long Sough was to be driven, in such manner that the water troubling the said lead mines agreed to be unwatered by the same, might be effectually carried off, so as the same might be effectually mined and wrought, and the lead ore gotten out of the same, so far as the level thereof would admit : and should and would keep open a sufficient gate or sough from the said lead mines to the tail of the sough, so that the water troubling the lead mines might have a free passage from the said lead mines, that they might be discharged and unburdened thereof, in such manner and method as is usual in mineral cases ; and at all times keep the sough open, clean, and in good repair, from the tail or the beginning of the forefield or other extremity thereof, as the same should be driven or carried on to the above mark as aforesaid ; and also work the mines within the title of the sough, so as to get the lead ore thereout : provided, that if the said lessee should bring up a new sough or level, or part of a new sough or level, for unwatering any of the mines in composition with the Long Sough, or within the title of the said sough, and should pay to the said lessors a full sixth part of all the ore to be got by composition, or out of the mines and veins to be discovered in bringing up the said level, or out of the mines within the title of the said sough, as aforesaid, as they had before agreed to pay for bringing up the said Long Sough, then the said lessee should not incur any forfeiture of the lease [208] by reason of not bringing up the said sough, provided that the new sough should as effectually lay dry the mines in composition or within the title of the said sough, as if the Long Sough had been worked pursuant to the covenants as aforesaid. The Cromford Sough is now carried into Wirksworth township, and just before it enters that district, in Cromford township, part of the sough has fallen in, and is in ruin.

These kind of soughs, as are the Cromford and Meer Brook, are made at a vast expense, and require to be repaired from time to time. The Cromford Sough is constantly repaired by the proprietors of it. They are repaired by the parties, proprietors or lessees, owning them, and without these repairs they would in course of time fall into decay. There has been an increase in the water flowing down the Cromford Sough since Mr. Arkwright built his mills in 1772.

In the year 1771, William Milnes, of Cromford, Esq., and Mary his wife, were, by their trustee, Richard Nall, seised of the manor of Cromford, within the wapentake of Wirksworth, and the soil of the commons and wastes, and of divers messuages, farms, and lands within the same, including the lands through which the Cromford Moor or Long Sough was carried ; but were not proprietors of the sough itself.

The case then set out an indenture of lease, of the 1st of August, 1771, by which the said Richard Nall, by the appointment and direction of the said W. Milnes and Mary his wife, demised unto Richard Arkwright and others, "all that river, stream, or brook, called Bonsall Brook, situate &c., together with the stream of water issuing and running from Cromford Sough, in Cromford aforesaid, into the said Bonsall Brook, with full liberty and power to and for them (the lessees) to divert, turn and carry the said brook, stream, and water, down the south side of the highway in Cromford aforesaid, and under or over the same [209] highway ; and also all that piece or parcel of ground, in Cromford aforesaid, lying between Bonsall Brook and the intended new cut, and extending in length from the turnpike road leading to Matlock Bath, &c., &c.,

and containing by measure one acre and two roods, as therein mentioned, together with full and free liberty, power, and authority, to and for the said Richard Arkwright, &c., to erect and build, or cause to be erected and built, upon the said brook or piece of ground, one or more mill or mills for spinning, winding, and throwing silk, worsted, cotton, linen, or other materials, and also such and so many water-wheels, warehouses, shops, smithies, &c., banks, dams, &c., and other conveniences, as they should think proper and necessary for the effectual working of the said mills, so as the same mills, &c., were erected and built, and from time to time, during the several terms therein-after mentioned, worked and managed, in such manner as not to prejudice the corn-mill in the possession of Mr. Baxter, by taking away or diminishing the quantity of water then used or necessary for working the said corn-mill: to hold the said river, brook, or stream of water, piece or parcel of ground, and the said stream or water issuing from the said Cromford Sough, with the liberty of diverting the same, from the 25th of March then last for the term of eighty-four years, at the yearly rent of 14l., payable as therein mentioned: proviso, "That in case it should happen at any time during the continuance of this said lease, that the water or stream issuing and running from Cromford Sough aforesaid, should, by the bringing up of any other sough, or by any unforeseen or unavoidable accident, be taken away or lessened, so that there should not come to the said wheels and mills intended to be erected in pursuance and by virtue of these presents, water sufficient for the working of the same; and the said W. Milnes and Mary his wife, their heirs, &c., should not be able otherwise to supply the same with such deficient water; that in [210] that case it should be lawful for the said Richard Arkwright, &c., to take down the said mills, wheels, &c., and to remove the same to, and erect them upon a piece of waste ground lying in Cromford aforesaid (setting out its abutments); and that the said W. Milnes and Mary his wife, and all persons claiming &c., should join in a good and effectual lease of the said piece of ground last mentioned, with the mills &c. to be erected thereon, for so much of the said term of eighty-four years as should be then to come, at the same yearly rent; and from and after the granting and executing the new lease, the present lease, and the term of years thereby granted, should cease and be absolutely void."

In the year 1772, a cotton-mill and other buildings were erected by the lessees below the junction of the sough water with the Bonsall Brook, and at a short distance above the old corn-mill, and the water of the sough has, from the erection of the mill, been used by the occupiers of the mill for the purpose of turning the wheels and machinery thereof, and this water has formed a material part of the stream by which the mill has been kept in work.

In 1785 an alteration was made by order of Mr. Arkwright, the then owner of the mill, in the course of the stream: the sough water was separated from the brook course, and carried in another but parallel direction, at a higher level, to the cotton-mill, by which means the water from the Bonsall Brook was made to supply one wheel to the mill, and the sough water the other wheel, the two streams becoming united again in the mill-yard, and thence flowing in one stream into the river Derwent. In the year 1789, Mr. Arkwright, (then Sir Richard Arkwright), the father of the present Richard Arkwright, Esq., became the purchaser of the Cromford estate, through which part of the Cromford Sough is cut, including the manor of Cromford, the cotton-mills leased to him and his co-partner, but [211] then in his own occupation, and the site of the old corn-mill. [The case then set out the conveyance by lease and release of the 7th and 8th of April, 1789, of this property to Sir Richard Arkwright in fee.] Soon after the execution of the above conveyance very considerable additions were made to the cotton-mill, part of which was erected upon the site of the ancient corn-mill. The present Richard Arkwright, Esq., son of the late Sir Richard, is now owner in fee of the Cromford estate, including the cotton-mills.

In or about the year 1771, the said Meer Brook Sough was commenced at a place called Meer Brook, in the manor of Wirksworth, within the wapentake of Wirksworth, (about three miles lower down the river Derwent than the spot where the Bonsall Brook entered that river), by a company of proprietors not connected with the proprietors of the Cromford Sough, and at a considerably lower level (about twenty-nine yards) than the Cromford Sough. The object of the Meer Brook Sough was more effectually to unwater the extensive mineral field in the hollow or valley of Wirksworth, containing about 2000 acres, being the same mineral field as was partly

relieved by Cromford Moor Sough, but which could not drain the mines below its own level.

The case then set out an act of Parliament of 29 Geo. 3, c. 74, (1789), under which, among other persons therein named, Sir Richard Arkwright, Francis Hurt, and Charles Hurt, were made a corporate body by the name of the "Cromford Canal Company," with powers to make a canal from Cromford to Langley Bridge, through several lands therein mentioned, and amongst others, through the lands of Sir Richard Arkwright, and the said Francis Hurt, and to supply the intended canal, when made, with water from the river Derwent, and from all rivers, brooks, streams, and water-courses which should be found in digging the canal, or [212] within the distance of 2000 yards from any part of the canal, or from any reservoirs to be made as therein mentioned, and for that purpose to make and erect all such reservoirs, engines, &c., as are specified in the act, with a proviso that nothing therein contained should authorize or empower the Cromford Canal Company, or any other person or persons, to cut, dig, drive, or carry on any sough, level, trench, passage, &c., to or from any of the rivers, streams, soughs, &c., in, from, or by which the mills of Sir Richard Arkwright were worked or carried on, except from the river Derwent, in such manner as in the act is mentioned; and that it should not be lawful for the Cromford Canal Company, or any other person or persons, for the purpose of the intended canal, or for any other purpose whatsoever relating to the execution of that act, to draw off, take from, or diminish, any water which then supplied, or which at any time thereafter may be found necessary for the purpose of supplying, carrying on, or working the mills of Sir R. Arkwright, or to do any other act, matter, or thing whatsoever to prejudice, obstruct, or impede the same, without the consent of the said Sir R. Arkwright, his heirs and assigns, for that purpose first had and obtained. By the sixth clause of the act, power was given to Sir R. Arkwright to raise a weir on the river Derwent, and make an aqueduct through his lands to convey water to the canal. This act was amended by an act of 30 Geo. 3, c. 56, (1790), which, amongst other things, enacted, that if at any time thereafter, any part of the quantity of water from Cromford Sough and Bonsall Brook, or either of them, which at the time of passing of the said recited act flowed into the river Derwent above Cromford Bridge, should pass into the said river at any point below Cromford Bridge, or should by any means whatever be diverted into any other course or channel, the quantity of water which should pass into the river Derwent below Cromford Bridge aforesaid, or otherwise be so diverted, [213] should, in ascertaining the quantity of water taken for the supply of the said intended canal and collateral cut, or either of them, and also in ascertaining the quantity of water which the river Derwent produced at Cromford Bridge aforesaid, be deemed and reckoned as part of the water at Cromford Bridge aforesaid, anything in the said recited act, or in that act, contained to the contrary in anywise notwithstanding. And it was thereby also provided, that Sir Richard Arkwright should be entitled to all the lead mines discovered in cutting the canal through any lands of his, and that all and every such mine &c. should be subject to such laws, usages, and customs as other lead mines and veins of lead ore within the wapentake of Wirksworth, in the county of Derby, are subject and liable to. At the time of this act passing, the Cromford Moor Sough was a sough which supplied water to Sir R. Arkwright's mills. The water from the Meer Brook Sough flows into the river Derwent below Cromford Bridge.

The case then set out an indenture of the 11th of January, 1791, by which certain lands were conveyed by Sir R. Arkwright to the Cromford Canal Company, in lieu of certain lands which they were empowered to take by virtue of their act of Parliament; and also full and free liberty, power, and authority were granted to the Company to take water for the use of their canal, from and after the same had fallen over the basin between the two mills of the said Sir R. Arkwright, by a trunk or pipes under ground, so as not to injure, obstruct, or prejudice the mills of the said Sir R. Arkwright, or the working thereof. The case then stated an act of the 42 Geo. 3, c. ex. (1802), for allotting and inclosing the several commons and waste lands within the manor and township of Wirksworth, under which certain commissioners were appointed to divide and allot the same to the owner of the ancient messuages &c. The 16th section provided, that it should be lawful for the owners and proprietors of a certain sough [214] or level called Meer Brook Sough or Longway Bank Sough, to continue to work and carry forward such sough or level from time to time and at all times for ever thereafter, for the purpose of watering or draining any lead mine

or lead mines within the said manor or wapentake of Wirksworth, or otherwise, and to amend and repair the same when and as often as need should be and require; with power for those purposes to sink shafts &c., and make all necessary roads upon, under, through, or over any of the allotments to be made in pursuance of the act, making reasonable satisfaction for all damage done. Mr. Arkwright was a land-owner in Wirksworth at the time of the passing of this act, and took an allotment of about 44 acres, which was made to him under it.

In the year 1813, up to which period the Meer Brook Sough had been confined to Wirksworth, a branch or level into Cromford, and under the lands of Mr. Arkwright, was projected from the Meer Brook Sough, running towards the Godber vein, which was connected with the Gang Mine: and by an indenture of the 18th of November, 1813, made between Francis Hurt and others, proprietors of the Meer Brook Sough and certain mines, of the first part, John Simpson and others, lessees of the mineral sough called Cromford Sough, and lessees of certain mines and composition ore thereto belonging, under Charles Brown and Henry Dickenson, and the Sough Company, and also proprietors of other mines and parts of mines, and composition ore, of the second part, and Charles Brown and Henry Dickenson, for and on behalf of themselves and the rest of their society and companions of certain mines, and owners of the Cromford Sough, and likewise of certain mines and composition ore, of the third part; after reciting that the Cromford Moor Sough had become incapable of unwatering the mines, vein, pipes, and rakes of lead ore within the title of that sough, and of several other mines under composition thereto, by reason of the [215] bearing measures of the said mines having been worked to the level of such sough called Cromford Sough; and that the said Meer Brook Sough, having been driven at a much deeper level than the Cromford Moor Sough, was more capable of unwatering the mines &c. within the title of the said Long Sough, and also several other mines then under composition thereto, provided the same was carried forward to, near, or under the forefield of the then present works, or into a vein belonging to the Cromford Moor Sough, called Godber's vein, but which would be attended with very considerable expense:—it was witnessed, that in order to carry the several propositions and agreements into effect, the said Francis Hurt, and the said several other owners of the Meer Brook Sough Company, did agree with the said J. Simpson and his partners, that they, the Meer Brook Sough Company, with all speed, and agreeable to mineral usage, would at their own costs and charges drive, carry on, and continue the said Meer Brook Sough, or a branch thereof, at a true level, to the forefield of the said Godber vein, in such manner as that the water might be carried off, and the said mines within the title of Cromford Sough laid dry, so that the same might be effectually wrought; and would as long as the said mines, veins, &c., within the title of the Cromford Sough, should be duly worked by the lessees or owners thereof, keep open and in good repair the said Meer Brook Sough, and the branch or level so intended to be made as aforesaid, so that the water might at all times thereafter flow without obstruction to the tail thereof. And the said J. Simpson and his co-partners, with consent and approbation of the other parties, did thereby covenant that they would at all times, after the said Meer Brook Sough should be brought forward to the forefield of the said Godber vein, so as to unwater and relieve the same, or any other mines, veins, pipes, &c., within the title of the Cromford Moor Sough, pay and render to the said Francis Hurt & Co., their heirs, &c., one-twelfth part of the ore to be raised under the level of [216] the Cromford Sough, such level to be taken as therein mentioned.

The defendants then, in pursuance of this agreement, worked the Meer Brook Sough into Cromford, towards the Godber vein. During the time that this branch level was being driven towards the Godber vein, the forefield of the Meer Brook Sough, at the south-west end thereof, was shut up by means of wooden doors and flood-gates, which the defendants thought fit to erect, and these wooden doors were kept closed for the most part till about March, 1821, when, in contemplation of the agreement of June, 1825, hereinafter mentioned, cast-iron doors or flood-gates were put up by the defendants in the place of such wooden doors. While these wooden doors were closed, it did not appear that any actual diversion of the water took place from Mr. Arkwright's mills.

[The case then stated a correspondence between Mr. Arkwright and the attorney of the Meer Brook Sough Company, in April, 1820, on the subject of their driving the sough into Cromford, he being apprehensive of mischief to his mills thereby:

and an indenture of the 18th of July, 1825, whereby the Company agreed with him to work the levels in a particular manner, and to keep the flood-gates closed: either party having power to determine the agreement by three calendar month's notice in writing.]

The parties continued to act upon this agreement, and the works were carried on in Cromford in the Godber vein, till the month of July, 1836. The iron gates were kept shut during that time; and while those gates were so kept shut, the works in Cromford caused no diversion of the water from the mills of the plaintiffs. In the month of July, 1836, the Meer Brook Sough proprietors were desirous of carrying the sough further forward in a westerly direction in Wirksworth: and for this purpose it was necessary to remove the iron flood-gates; and in consequence, on the 9th of July, 1836, the Meer Brook Sough [217] Company gave the following notice to Mr. Arkwright, and the proprietors of the Cromford Moor Sough. [The notice, which was to determine the agreement of July, 1825, was then set out: and also a letter from the Company's attorneys to Mr. Arkwright, explaining that its object was merely to enable them to continue the sough westwardly, in Wirksworth.]

By indenture of the 29th of September, 1836, between the Hon. C. H. W. Pelham and Sir R. Gunning of the first part, the Hon. John Simpson of the second part, and Richard Arkwright of the third part, (after reciting at length the before-mentioned indenture of lease for 999 years of the 8th of March, 1738, and after other recitals not material to be set out), the said Pelham and Gunning, by direction of Simpson, granted to Arkwright, by way of conveyance only and not of warranty, and subject to the said term of 999 years, the Cromford Sough and composition ore to be got by means thereof, and all other premises demised by the before-mentioned indenture of 1738. By another indenture of the same date, the said John Simpson assigned to a trustee for the said Richard Arkwright some shares in the leasehold interest in the Cromford Sough, created by the said indenture of the 8th of March, 1738.

In May, 1837, the Meer Brook Sough proprietors caused the iron doors to be removed. The consequence of this was, that the water which would otherwise have flowed down the Cromford Sough was taken away, and the plaintiffs' mills could not be properly worked by reason of this diversion: and it was for this injury that the action was brought. A representation having been made to the defendants of the serious consequences which would arise from this diversion of the water, the gates were restored to their original state, until the right of the defendants to remove them should be determined, without prejudice.

The defendants have not, nor ever had, any interest in [218] the Cromford Sough, or in the lands through which it passes. Mr. Arkwright, the lessor of the plaintiffs, is the owner of the land under the deed of 1789, and he became also interested in the sough itself before the diversion complained of, by the deeds before mentioned of the 29th of September, 1836.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. Copies of all the deeds, and the acts of Parliament, and plans of both parties, were furnished, and were to be considered as part of the case, and either party to be at liberty to refer to any parts of them which might be thought important.

The case was argued in last Hilary Term by

Sir W. W. Follett, for the plaintiffs. It appears upon the face of this case, that since the year 1789, when the manor of Cromford, and the soil of the wastes therein, were conveyed to Sir Richard Arkwright, he, and Mr. Arkwright since his death, have been the owners of the ancient cornmill which was worked by the united water of the Bonsall Brook and the Cromford Sough, of the cotton-mills which were erected in 1772, and which have ever since been turned by the water of those two streams—of all the interest also in the streams themselves, which the parties possessed who granted the lease of 1771—and of the soil of the manor: whereas on the other hand, neither the defendants, nor those under whom they claim, ever had at any time any interest in the manor,—in the soil of the wastes,—or in the watercourses; but are merely the proprietors of another watercourse in another manor—the Meer Brook Sough,—by the cutting of which they have diverted the water from the Cromford Sough, and thereby prevented the working of the mills which the plaintiffs hold as tenants to Mr. Arkwright: and the question is, whether the defendants, so unconnected with any interest in the soil, had a right to divert the water from those [219] mills. It is submitted that they had not. The question might perhaps have properly arisen

between Mr. Arkwright and the owners of the land through which the water flowed, or of the streams themselves; but these defendants are mere strangers, having no interest whatever in either, but merely being owners of adjacent land, who contend that they have a right so to use their own land for mining purposes, as to destroy their neighbour's right of water. But there can be no distinction on the ground that it is a mining case: the general proposition of law is, that if a stream run through my land, the owner of adjoining land cannot use it for any purposes—whether for mining or quarrying, or otherwise,—so as to stop my enjoyment of it after twenty years' user. If by lapse of time I have acquired a right to water upon my land—whether it be a well or an open watercourse—no proprietor of adjoining land can use it to my detriment. It is clear that he could not divert it by erecting another well; or for any agricultural purposes; and how can the case be different because he diverts it for the uses of his mines? The case of *Balston v. Bensted* (1 Campb. 463), although a case at Nisi Prius, has always been referred to and considered as good law. There Lord Ellenborough laid it down as a proposition admitting of no doubt, that after twenty years' exclusive enjoyment of a spring of water, an absolute right to it was acquired by the owner of the soil in which it issues to the surface, and that he had a right of action against the owner of an adjoining close, who cut a drain whereby the supply of water to the spring was diminished. In *Beuley v. Shaw* (5 East, 214), the same learned Judge says—"The general rule of law is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. . . ." And again—"I take it that twenty [220] years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament." The rest of the Court state the law in similar terms. In the case of *Mason v. Hill* (3 B. & Adol. 312, S. C.; 5 B. & Adol. 1; 2 N. & M. 747), the great point in question was, whether a party through whose lands a stream had run for twenty years, although he had never appropriated it to any particular purpose, had a right of action against the owner of adjoining land who diverted it; and the Court held that he had. [Parke, B. I think the case was not actually decided on that ground: the object of the judgment was to set right the mistaken notion which had got abroad in consequence of certain dicta in *Williams v. Morland* (2 B. & Cr. 910), that flowing water is publici juris, and that the first occupant of it for a beneficial purpose may appropriate it.] The Court intimated a strong opinion on the other point. In *The Birmingham Canal Company v. Lloyd* (18 Ves. 515), an injunction was refused against draining a coal mine to the prejudice of a canal, but upon the ground of laches for two years: and the Lord Chancellor appears to recognise the right to recover at law.

But secondly, the operation of the stat. 2 & 3 Will. 4, c. 71, s. 2, is most material in this case. Its effect is to vest the right in a watercourse by the actual enjoyment of it for the period of twenty years, not to be defeated by proof of the actual commencement of the enjoyment; and to vest the absolute right by actual enjoyment for forty years, except when enjoyed under agreement in writing. The owners of the soil of Cromford manor might, at any period within twenty years after the commencement of Mr. Arkwright's enjoyment of the water, have made a sough and diverted the stream: but no such right [221] could belong to any third parties after the expiration of the twenty years.

The private acts of Parliament set out in the case, whereby the Cromford Canal Company were restricted from interfering with the flow of water to Mr. Arkwright's mills, are important, as shewing an exercise of ownership by him over the streams of water, and an acknowledgment by the Canal Company of his rights in them. On the other hand, the provision in the Wirksworth Inclosure Act of the 42 Geo. 3, authorizing the owners of the Meer Brook Sough to continue working that sough, could give them no greater right than they before possessed, to interfere with other interests of other parties.

Erle, for the defendants. There are two grounds on which the defendants are entitled to judgment. First, the plaintiffs have not shewn any right in themselves to the water diverted; secondly, the defendants have not been guilty of any wrongful act in the mode in which they have taken and applied it.

1. It appears upon the case, that this is an artificial stream of water, originally made by other persons than the plaintiffs or Mr. Arkwright, for purposes which gave

them no right to it as against the adjoining landowners, and that it was received from them by Mr. Arkwright, not taken by him for the purposes of his mill. Notwithstanding his purchase of the manor and the soil of the wastes, his title to the stream depends altogether on that of the Cromford Sough Company, who were not parties taking the water for purposes beneficial to themselves, but parties employed by the mine-owners to take it for the purpose of getting rid of a nuisance to their mines, and paid for their services in unwatering them by means of opening and maintaining the sough. Then Mr. Arkwright does no act of his own whereby to acquire a title to the water, but merely receives the water brought by the Cromford Sough [222] Company, and while brought, makes use of it with full notice—by the proviso in the lease of 1771—of the purposes for which it is brought, and of their liability to be deprived of it, or their right to take it elsewhere as convenience might require. It appears from the documents set out in the case, that there has been from time to time a constant making of lower soughs, as it became necessary, for the purpose of unwatering the mineral district deeper. That was the object of the agreement of 1705, and of the lease of 1738. That was no grant of the water of the sough itself, but merely of an easement in it, for the purpose of draining the mines: and it carries on the face of it clear notice that the usage of the district was for soughs to be carried on lower levels from time to time, as mining purposes required. This appears from the proviso, that if the lessee should bring up a new sough or level, and should pay a certain proportion of the ore to be discovered in bringing up such level, he should not incur any forfeiture of the lease by not bringing up the sough thereby granted, provided the new sough should as effectually lay dry the mines within its district. Next comes the grant of the land on which the cotton-mills were built, and of the Bonsall Brook, and subsequently of the Cromford manor and estate. But the grantor of these had no right whatever in the Cromford Sough. The parties who had the easement to drain the mines, had for seventy or eighty years poured it out over his land; he had acquiesced in their doing so; but he had gained no right thereby. If poured over his land for twenty years, they would acquire thereby the right of continuing so to pour it, but he would acquire no right whatever. The effect of the lease of 1771 is, that Mr. Arkwright shall have the power of turning the water to a beneficial purpose, so long as it shall continue to be poured into Bonsall Brook; but if for the necessity of mining operations it be taken off to a lower level, then that the lessor will indemnify him against the consequences, unless he can supply him from [223] other sources. There is a clear declaration by the lessor, and clear notice to the lessee, of the existing rights in the water. Now, what right had been acquired by the Sough Company at this time as against any of the landowners within the manor?—*a fortiori*, against landowners within other manors, to which the sough might subsequently be driven? They had the right at any time to say, “We want to use the water in our land for the purposes of our land;” or, “We will ourselves get rid of it, and do not any longer require you to carry it away.” It is a mere contract by the landowners with the Company to get rid for them of the nuisance of the water: as soon as they choose, they may turn their water elsewhere, or may discharge it by a steam-engine. Then the cotton-mill is erected with full notice of this arrangement among all the parties. The agreement of 1813, again, clearly contemplates the usage and course of bringing up soughs at lower levels. To that deed the parties interested in the Cromford Sough, both under the lease for 999 years, and as reversioners, and on the other hand the owners of the Meer Brook Sough, were parties: and as far as the former were concerned, it shews that they were most desirous that the Meer Brook Sough Company should come into the district within the title of the Cromford Sough, and drain the mines, that sough having become useless for the purposes for which it was originally made. Upon the whole case, therefore, it appears that this water was not so enjoyed by those under whom the plaintiffs claim as to acquire any right, but, on the contrary, merely received from those who had merely an easement to bring it there for the benefit of the landowners, and with full notice that it might be at any time withdrawn.

But further, it is very material to bear in mind what is the present state of the law as to the title to water. The old notion was, that running water was *publici juris*; that notion was favoured by the case of *Williams v. Morland*, but was corrected in *Mason v. Hill*, in which all the authorities [224] were examined: and the law is now established, that the flow of a natural stream belongs to him through whose land it goes

by nature. The recent statute makes no difference: the title must still be derived out of such a user as, before the statute, would have led to the presumption of a grant. Such is the law as to the right to a natural stream of water, as contradistinguished from an artificial one. All the cases proceed upon the ground, that the first title to the water is "donum naturæ," and speak of a "natural stream"—of the "natural channel" of the water, &c.: see *Mason v. Hill* (5 B. & Adol. 17), *Bealey v. Shaw* (6 East, 218), *Prescott v. Phillips* (cited id. 213), *Canham v. Fisk* (2 C. & J. 126). The title to water is therefore to be tried by ascertaining in the first place, where, by the laws of nature, it would flow; and, if a secondary title to it be claimed, whether there has been such a user of it, from which, before the stat. 2 & 3 Will. 4, c. 71, a grant would have been presumed. It is not sufficient that there have been a mere user for the twenty or forty years; it must have been by a party claiming right thereto; not by stealth or permission, or in any other way which would negative a grant: *Partridge v. Scott* (3 M. & W. 220), *Bright v. Walker* (1 C. M. & R. 211), *Tickle v. Brown* (4 Ad. & Ell. 369; 6 N. & M. 230), *Beasley v. Clarke* (2 Bing. N. C. 705; 3 Scott, 258), *Monmouthshire Canal Company v. Harford* (1 C. M. & R. 614). Here the Cromford Sough Company did not take the water as of right against the landowners: nor have the plaintiffs, or those under whom they claim, done any act to give themselves a right to it; they are mere recipients of an artificial stream brought by others for purposes of their own; and such reception and endurance of its coming that way for twenty or for forty years, can give them no right to compel the parties to bring it that way for all time. Suppose [225] water were brought by an artificial aqueduct for purposes of ornament, would the proprietor of the land over which the waste water flowed, with notice, acquire any right to it? Nor is there any injustice in this: he buys his land with the rights which nature gave it, and he is only reduced to that situation again; having, in the meantime, done no act of appropriation whereby to acquire any further right. Again, if Mr. Arkwright have acquired a right to have this water free from diversion, so has he also to have it free from increase; and if the Company drain a larger district, according to their contract, and so increase the quantity of water coming by the sough, the miller might equally have a right of action, although in such case he would actually prevent the Company from performing the duty for which the landowners gave them this easement. It is always to be remembered, that this is a right claimed only in respect of the plaintiffs' possession and rights as lessees of the mill.

II. The defendants have not been guilty of any wrongful act, even supposing the plaintiffs to have acquired some right. Their act was a perfectly lawful act of ownership; they have taken only unappropriated water, which they had a right to take. Subterraneous water, inaccessible to man, is not appropriated. [Lord Abinger, C. B. If the plaintiffs have established that they have a right as against you to keep the water, it is no answer that you are doing an act in your own land. All water was at first subterraneous.] It is not appropriated until it comes to the surface. There is no decision applicable to such a case; all the cases have arisen on the right to the natural flow of surface-water. This is a case where water percolates in various directions through many points into this sough. If the principle contended on the other side be tenable, the tapping of such water at any distance would be actionable; therefore, the first person who were to sink a well, would acquire a right to all the water, to the exclusion of all [226] the landowners whose waters drained towards his well, and who would be under the burthen of keeping their lands inundated to that height; and that, although they might have known nothing of the water percolating to the well, and if they had, could not stop the party from exercising his lawful right of digging in his own soil. Each party has the right to dig the well, and that party ought to have the benefit to whom nature gives it. As soon as water comes to the surface and becomes a visible and tangible matter of property, the law attaches to it the rights of property. In *Balston v. Bensted*, the water had actually been poured out on the surface. In such a case all the neighbours have notice, and have the means of interfering with the exclusive use of it. The principle alleged for the plaintiffs is, that the miller has acquired such a right by taking the water for his mill, that all the neighbouring owners of land within a large district, are laid under the burden of not reducing the water in their land below a certain level. But a party cannot, by an act of ownership in his land, deprive his neighbour of rights in his land, unless the facts raise the presumption of a grant. Here, no assent could exist on which a grant

could be presumed. This is in truth a claim to stop all the mineral operations of the district, in order to keep up the plaintiffs' mill.

Sir W. W. Follett, in reply, insisted that the unrestricted user of the water for twenty years, upon whatever supposed understanding it originally commenced, or for whatever purpose the sough was constructed, was sufficient to confer the right: that it was immaterial whether the stream was a natural or artificial one—a party would equally acquire by enjoyment, not under license or permission, for the requisite period, a right in a ditch cut through his land, as in a river, and whether upon or below the surface: that, even supposing the grant of 1771 were subject to a right in the landowner to divert the water, the answer was, that he [227] never had diverted it, but that there had been an enjoyment of it for a period sufficient to give a right as against third parties; the question was not whether the grantor made a qualified grant which he could resume, but whether strangers could do so? Secondly, the diversion underground was sufficient to render the defendants liable: the natural flow of water meant only its regular flow in a natural way, although through an artificial adit or channel; and there could be no distinction in law between surface and subterranean streams: the appropriation and user, for the time defined by law, gave an exclusive right to the enjoyment of the benefit which others would otherwise have a right to take:—the only difference was, that in cases of underground water, there was greater difficulty in proving the cause of the diversion.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by

LORD ABINGER, C. B. The plaintiffs in this case are the occupiers of certain cotton-mills, at Cromford, in the county of Derby, and complain of an illegal diversion by the defendants, of the water to which they were of right entitled for the supply of their mills. The defendants by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of [228] fact only, which inference might have been varied by a very slight circumstance.

From the facts and documents, however, the case appears to be this:—In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue, a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field, in the wapentake of Wirksworth. How they acquired the right to make that sough is not stated: it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express license of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines, within the level lying near and benefited by the sough (technically called within the title of the sough), in consequence of an agreement with the proprietors of the mines. The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for in 1738, the proprietors leased it for 999 years for a pecuniary consideration, with a reservation, by way of rent, of a part of the profits. Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion expectant on the determination of that lease; and he also acquired a portion of the interest of the lessees, by a conveyance from some of them. It does not appear to us, that this circumstance affects the question between the parties to this suit.

After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained, in the year 1771, a lease for eighty-four years from the lord of the manor of Cromford (who, upon the special case, is alleged to have been the owner of the land [229] through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed) of that piece of land, the brook, and the "stream of water issuing and coming from Cromford Sough," with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton-mills thereon; and in April,

1789, he purchased that land, and the fee-simple in the mills, and the manor of Cromford, including the lands through which the Cromford Sough was made.

In the meantime, another company of adventurers had began to construct another mining sough, called the Meer Brook Sough, on a much lower level, in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers; and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom, or by express license of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802; and also to have had the authority, prior or subsequent, of the owners of the mines drained by that sough, and contributing a certain portion of the ore by way of recompence. These facts are not distinctly found, but we think we must infer that such was the case; and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the agency of the adventurers, is immaterial. In 1813, the defendants, being themselves proprietors of mines drained by it, extended the Meer Brook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appear to have been then worked down to the level of that sough, for the purpose of regulating their respective rights; and the [230] recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them by the extension of this sough, and the unwatering, by means of it, of a further portion of their mineral field below the level of the former sough.

The new sough was therefore constructed by the consent of some, if not all, of those mine-owners, who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position, in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field, formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field, by means of the new sough. When the Meer Brook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water, which would otherwise have been discharged by the Cromford Sough, and thereby prevented it from flowing to the plaintiff's mill.

In 1825 an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meer Brook Sough Proprietors, which was not to affect their rights; and which, having been determined in 1836, left them in the same situation as if it had never been made: and the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiff's mills, the defendants are in the same situation as if no flood-gates had been made, and as if, in the construction of their sough for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meer Brook Sough. And the question is, whether the defendants, by so doing, are rendered liable to an action at the suit of the plaintiffs? This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law, and when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill* (5 B. & Ad. 1), and in other cases. This was an artificial watercourse, and the sole object for which it was made, was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it: and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and, in the ordinary course it would, most probably, cease when the mineral ore above its level should have been exhausted.

That Sir Richard Arkwright contemplated the discontinuance of this watercourse (if the question of his knowledge in this state of things can be material) there is

evidence in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened, or taken away, by the construction of another sough : and also that such an event was not improbable, appears from the clause in the second Cromford Canal Act, 30 Geo. 3, c. 55, s. 4. What then is the species of right or interest, which the proprietor of the surface, where the stream issued forth, or his grantees, would have in such a watercourse, at common law, and independently of the effect of user under the recent statute, 2 & 3 Will. 4, [232] c. 71 ? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity ; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner, not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests :—and what is there to raise an inference of such an intention ? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant ; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely ; a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of rights, to infer from the abstinence from such an act, an intention to grant the use of the water in perpetuity, as a matter of right.

Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended, for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible, from the fact of such a user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assign of his mine, with the [233] obligation to keep a steam-engine for ever, for the benefit of the landowner ? Or, if the water from the spout of the caves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation, not to alter their construction so as to impair the flow of water ? Clearly not. In all, the nature of the case distinctly shews that no right is acquired as against the owner of the property from which the course of water takes its origin : though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface, for eighty-four years, acquired a right to use the stream as against him ; and if there had been no grant, he would by twenty years' user, have acquired the like right as against such owner. But the user, even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

It remains to be considered, whether the statute 2 & 3 Will. 4, c. 71, gives to Mr. Arkwright and those who claim under him, any such right ; and we are clearly of opinion that it does not. The whole purview of the act shews, that it applies only to such rights as would before the act have been acquired by the presumption of a grant, from long user. The act expressly requires enjoyment for different periods, "without interruption," and therefore necessarily imports such an user as could be interrupted by some one "capable of resisting the claim ;" and it also requires it to be "of right." But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period, by any reason-[234]able mode ; and as against them it was not "of right ;" they had no interest to prevent it ; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority:—and therefore our judgment must be for the defendants.

Judgment for the defendants.

JONES v. DANVERS. Exch. of Pleas. 1839.—The Court cannot grant a habeas corpus to bring up a defendant for the purpose of charging him in execution, who is in custody under military arrest.

[S. C. 7 Dowl. P. C. 394 ; 2 H. & H. 84 ; 8 L. J. Ex. 216 ; 3 Jur. 582.]

Bayley moved for a habeas corpus to bring up the defendant for the purpose of charging him in execution. His affidavit stated, that the defendant was under military arrest at Woolwich, under circumstances which might or might not lead to a court martial. He urged, that as the party was not in criminal custody, the writ ought to issue.

Per Curiam. We cannot bring up a defendant to be charged in execution, unless he is in the custody of a civil goal-keeper. We have only civil jurisdiction, and have no authority to change the custody in such a case as this.

Motion refused.

[235] SIR JOHN TOBIN, KNIGHT v. CRAWFORD AND OTHERS. Exch. of Pleas. 1839.—Goods were shipped at Bombay on board a ship of the plaintiff, a ship-owner in Liverpool, and by the bill of lading were to be delivered “unto order, or to his and their assigns, on paying freight for the same.” The bill of lading was indorsed by the shipper, and forwarded to the defendants, East India agents in London, who indorsed it in blank to C. & Co., their factors in Liverpool. On the arrival of the goods at Liverpool, C. & Co. presented the bill of lading to the plaintiff, and received the goods: the plaintiff debited C. & Co. with the freight. C. & Co. became bankrupt without having paid the freight, whereupon the defendants claimed from them and took possession of the goods:—Held, that the defendants were not liable to the plaintiff for the unpaid freight.

[S. C. as to costs, 10 M. & W. 235.]

Assumpsit for freight ; with a count upon an account stated.

The defendants pleaded—1st, non assumpserunt ; 2ndly, a plea to which there was a demurrer, upon which judgment was given for the plaintiff ; thirdly, a custom at Liverpool, discharging the owners of goods under the circumstances alleged in the second plea. The replication to this third plea traversed the custom, upon which issue was joined.

The cause was tried before Coltman, J., at the Liverpool Summer Assizes, 1837, when a verdict was found for the plaintiff on both issues, with 741l. 4s. 5d. damages. A rule was afterwards granted by this Court, by which it was ordered that a case should be stated for the opinion of the Court, on the points in question, with liberty to turn the same into a special verdict : and the following case was afterwards agreed upon.

At the time of the transaction hereinafter mentioned, and from thence hitherto, the plaintiff was and is a shipowner residing at Liverpool, and the defendants at that time, and from thence hitherto, carried on business in partnership in London, as East India agents and merchants.

In the spring of the year 1836, the ship “Richard Walker,” being then and ever since the sole property of the plaintiff, was at Bombay, and being bound from thence to Liverpool, was, at Bombay, laden with merchandize by different parties, and amongst others by Messrs. Remington & Co., who were persons then carrying on business under that firm at Bombay. Messrs. Remington & Co. shipped on board the “Richard Walker” a quantity of cotton, for which four bills of lading were filled up and signed by the captain. One of the bills of lading was as follows:—

"Shipped in good order and well conditioned, by Reming-[236]-ton & Co., in and upon the good ship 'Richard Walker,' whereof is master for this present voyage, G. Fidler, and now riding at anchor in the Bombay Harbour, and bound for Liverpool :

"Eighteen bales of cotton, weighing gross 56 cwt. 0 qr. 13 lb. being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Liverpool, (the act of God, &c. &c., excepted), unto order, or to his or their assigns, on paying freight for the said goods, of 7l. per ton of four and a half bales, as per memorandum in the margin. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills being accomplished, the other three to stand void. Dated in Bombay, 22nd February, 1836.

"Weight and contents unknown to

"G. FIDLER."

Two other of the bills of lading were like the above, except as to the dates and quantities of cotton, one of the two being dated 23rd of February, 1836, for 146 bales and 11 half-bales, and the other dated 8th of March, 1836, for 300 bales of cotton, and one parcel of mustard. The fourth bill of lading was dated 23rd of February, 1836, for 14 half bales of cotton, and was in other respects like that first mentioned, except that, instead of the words "unto order or to his or to their assigns, on paying freight," the words were "unto Messrs. Crawford, Colvin, & Co., or to his or their assigns, on paying freight."

The Messrs. Crawford & Co., mentioned in the last bill of lading, are the defendants in the present action.

The three bills of lading made out to "order or assigns," were indorsed by Remington & Co. to the defendants, and by the said Remington & Co. forwarded with the others to the defendants in London, where the defendants received all the four.

The ship arrived with the cotton on board at Liverpool, at the latter end of September, 1836. The defendants [237] indorsed all the four bills of lading in blank, and forwarded them to Messrs. Coupland & Duncan, who were established in and then carried on business there as an agency house, and who acted as agents for the defendants, unknown to the plaintiff. There was no consideration for this indorsement of the bills of lading, and the same was made by the defendants to Coupland & Duncan, as the agents for the defendants. The cotton in the bills of lading mentioned, at the time of the delivery to Coupland & Duncan, was the property of the defendants, and so remained down to the time of the defendants taking possession of it as hereinafter mentioned, with the exception of the half bales hereinafter mentioned.

On the arrival of the "Richard Walker" at Liverpool, Coupland & Co., as the indorsees of the bills of lading, applied to the plaintiff for the cotton, the whole of which was delivered to them by the plaintiffs on the 25th of September, 1836, on the presentment and handing over of the four bills of lading by Coupland & Co., without any payment being made for the freight by Coupland & Co., or by any other person; and on that occasion the plaintiff debited Coupland & Duncan in account for the amount of the freight; but he did not know that Coupland & Co. were only agents in the transaction. Nothing has been received by the plaintiff from Coupland & Co., or from the defendants, or from any other person, on account of the freight.

In November, 1836, Coupland & Duncan became bankrupts, and a fiat of bankruptcy issued against them on the 25th of that month. Immediately before the issuing of the fiat, the defendants claimed from Coupland & Duncan, and took possession of the cotton, except a few half bales, which had been sold by Coupland & Duncan as such agents as aforesaid.

The action is brought for the freight of the above-mentioned cotton. The plaintiff contends that the above facts sustain the finding of the jury on the first issue. The de-[238]-fendants contend that the finding on that issue, upon these facts, ought to have been for the defendants.

If the Court shall be of opinion that the finding of the jury on the first issue is sustainable, on these facts, for the whole of the demand in question, the verdict is to stand accordingly. If the Court shall be of opinion that the finding cannot be sustained on these facts, either for the whole or for part, then a verdict upon the first issue is to be entered for the defendants; or the damages to be reduced, as the Court shall think fit; with liberty to either party to turn this case into a special verdict, if the Court shall think fit

The points marked for argument were as follows:—

The plaintiff will contend that the party obtaining the goods under such circumstances as are stated in the case, and whose property they are at the time they are so obtained under bills of lading, is liable to the payment of the freight.

The defendants will contend that they are not liable for the freight under the circumstances; that the defendants were not shippers of the goods, nor did they enter into any contract, express or implied, to pay the freight; that the indorsees of the bill of lading, whether principals or factors, are the persons liable for the freight, by receiving goods under such bills of lading as are stated in the present case, and that Coupland & Duncan, and not the defendants, were the persons who became liable under the contract arising out of the receipt of the goods under the bills of lading; that Coupland & Duncan had no authority to pledge the credit of the defendants for the freight in question.

Wightman, for the plaintiff. The indorsement of the bills of lading to Coupland & Duncan, under the circumstances stated, passed no property in the goods to them, and the defendants took possession of them in solido upon their arrival in this country. Coupland & Duncan were [239] the mere agents of the defendants; and as soon as the latter appeared as the real owners, and became known as such to the plaintiff, they became liable to him for the freight due upon the goods. No party has paid the freight. If the defendants had paid Coupland & Duncan the amount of it, then perhaps the plaintiff could not have recovered against them. [Parke, B. The plaintiff in the first instance enters into a contract with Coupland & Duncan for the freight, and debits them for the amount of it. You must undertake to shew that, notwithstanding this, the defendants are the persons really liable to pay for the freight. You might have had a claim against the defendants in the first instance, but since you have debited Coupland & Duncan, it is of no consequence what occurred afterwards.] It is submitted that the ordinary rule applies, that when a party contracting with an agent discovers the real owners or principals, he has a right to sue them. [Parke, B. The question is, whether the defendants are principals. They are not so, unless they have authorized Coupland & Duncan to undertake to pay freight in futuro. Lord Abinger, C. B. A bill of lading imports that the party is to pay freight on delivery.] That is, provided the captain insists on present payment. Supposing the words "on paying freight" had not been inserted in the bills of lading, and the defendants had indorsed them to Coupland & Duncan, merely as their agents, and without consideration, would not the defendants be liable? [Parke, B. No; the shipper of the goods would be liable. To render them liable, you must make out that they are contracting parties. The difficulty here is, that you cannot assume that the defendants are the owners.] In *Domat v. Beckford* (5 B. & Adol. 521), in indebitatus assumpsit for freight, it appeared that goods were laden in Jamaica on board the plaintiff's ship, according to a bill of lading which stated them to have been shipped by W. Jackson in a vessel bound for London, on account of the defendant, and that they were [240] to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned. The goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees, without receiving the freight, it was held that the defendant was liable in law to pay the freight to the shipowners, and that independently of any express contract by charter-party. There Parke, B., says: "From the fact that the goods were laden on a ship to be conveyed from Jamaica to London, the law will imply a contract by the owner of those goods to pay for the carriage." [Lord Abinger, C. B. These defendants were the owners of the goods at the time they took possession of them, but not before. They were not bound by any contract to pay freight until they got possession of the goods; and the subsequent adoption of them makes no difference.]

W. H. Watson, contra, was stopped by the Court.

LORD ABINGER, C. B. I am clearly of opinion that the defendants are entitled to judgment. If it had appeared upon the case that Coupland & Duncan were merely the agents of the defendants in making the contract for the payment of the freight in futuro, the argument for the plaintiff would be applicable. If a master sends his servant to a tradesman, and he delivers goods to him without his paying for them, no doubt the master is liable. But here the authority is to receive the goods on paying freight for them; which means that the assignees of the bills of lading are to receive them on payment of the freight in present. If a person consents to take a factor as

his debtor, I cannot see how a contract is to arise with the principal. I think what is here contended for would be carrying the law of agency much too far. The possession of the factor is not the possession of the owner; the goods may be liable to certain duties in his hands: but the possession of a servant is the possession of his master, who is the owner.

[241] PARKE, B. I am entirely of the same opinion. There is nothing in the rules of law clearer than this, that to render a party liable upon a contract, you must shew that he either expressly or impliedly entered into it. Here it was incumbent on the plaintiff to shew that the defendants entered into a contract with Coupland & Duncan, as their agents, authorizing them to undertake to pay freight in futuro. That ought to be made out to our satisfaction, which it has not been. All the four bills of lading stand upon the same footing, and are in the same situation. A great deal has been said of Coupland & Duncan being the agents of the defendants: but that is very vaguely stated: the only evidence of it is, that these bills of lading were indorsed by the defendants and delivered over to them. That only imports that they were to pay freight on receipt of the goods. The result is, that the plaintiff must fail in this case.

MAULE, B. I am of the same opinion, and think that the defendants are not liable to the plaintiff for this freight. It might perhaps have made some difference, if the defendants had been identified with Remington & Co., but they are not. As the case does not state that Coupland & Duncan were the agents of the defendants to contract for the payment of freight in futuro, the inference must be that they were not their agents for that purpose.

Judgment for the defendants.

HOPKINS AND WIFE v. LOGAN. Exch. of Pleas. 1839.—An executed consideration, whereon the law implies a promise to pay on request, (as upon an account stated), is not sufficient to support a promise to pay at a future day.

[S. C. 7 Dowl. P. C. 360; 8 L. J. Ex. 218. Referred to, *Elderton v. Emmans*, 1848, 6 C. B. 174.]

Assumpsit. The declaration stated, that after the intermarriage of the plaintiffs, and before the commence-[242]-ment of this suit, to wit, on the 1st day of October, 1838, at the request of the defendant, an account was stated by and between the said Richard Hopkins, for and on behalf of himself and his said wife Ellen, on the one part, and the defendant on the other part, of and concerning certain monies, amounting to a large sum of money, to wit, the sum of 1000l. by the said Ellen, while she was unmarried, lent and advanced to the defendant at his request, and remaining unpaid before, at, and after the time of the said intermarriage, and of and concerning certain other monies, amounting in the whole to a large sum of money, to wit, to the sum of 555l. 3s. 11d., by the defendant before the stating of the said account paid to the plaintiff; and which said last-mentioned monies the said plaintiff Richard Hopkins, for and on behalf of himself and his said wife, at the time of the said stating of the said account, and at the request of the defendant, agreed should be taken and considered as satisfying and discharging so much of the said first-mentioned sum of money; and upon the account so stated as aforesaid, the defendant was then found to be and then was in arrear and indebted to the plaintiff in a large sum of money, to wit, the sum of 441l. 16s. 1d., residue of the said first-mentioned sum of money; and being so found in arrear and indebted as aforesaid, the defendant, in consideration of the premises, promised the plaintiffs to pay them the said last-mentioned sum of money on the 10th day of October then next ensuing, which period had elapsed before the commencement of this suit. Breach, in nonpayment of the last-mentioned sum of money.

Pleas, first, that the said sum of 1000l. in the declaration mentioned, was secured to the said Ellen Hopkins before her said intermarriage, by a certain bond or writing obligatory sealed with the seal of the said defendant, and, to wit, on the 6th day of April 1836, given by the said defendant to the said Ellen Hopkins before the said intermarriage, at [243] the request of the said E. H., for and on account of the said 1000l.; and that the said E. H. before her said intermarriage, to wit, on the 6th day of April 1836, took, accepted, and received the said bond or writing obligatory of and

from the defendant, for and on account of the said debt, and in lieu, stead, satisfaction, and discharge of the same; and that by the said bond or writing obligatory the said defendant, to wit, then became bound to the said Ellen Hopkins, then Ellen Logan, in the penal sum of 2000l., subject to a certain condition thereunder written, by which the payment of the said sum of 1000l. was to take place and be made by the defendant to the said Ellen Hopkins on the 6th day of April, which will be in the year 1840; and that the account in the declaration mentioned, as far as regards the said sum of 1000l. therein mentioned, was stated of and concerning the said sum of 1000l. so secured, and for which the said bond or writing obligatory had been given and accepted as aforesaid, and of and concerning the money supposed at the time of the said account to be due on the said bond; whereas no part of the said sum of 1000l. was then due or payable upon the said bond, and so the said account was stated erroneously and in mistake. Verification.

Special demurrer, and joinder in demurrer.

J. Henderson, in support of the demurrer. The plea is bad in substance. Assumpsit lies on an account stated, and express promise of payment, though the debt were previously secured by deed: *Ashbrook v. Snape* (Cro Eliz. 240), *Foster v. Allanson* (2 T. R. 479), *Moravia v. Leey* (2 T. R. 483, n.). A further consideration is needless to the validity of the promise, or, if necessary (see Bac. Abr., title. Assumpsit, A.), appears sufficiently on this declaration; for part of the consideration stated is the appropriating, at the request [244] of the defendant, in a certain way, in account, a previous payment. In consequence of the giving and acceptance of the bond stated in the plea, the one party was not bound to pay, nor the other to receive, the principal of the original debt till 1840; but the bond does not affect the validity of a subsequent parol contract, founded on sufficient consideration. The parties lawfully might, as they did, by mutual agreement, accelerate the time of payment, discharging a portion of the debt at once by an appropriation in account, and appointing an earlier day of payment as to the residue. Such an arrangement might be mutually advantageous; the creditor obtaining the use of his money at an earlier period, and the debtor being relieved from future interest. The advantage to the debtor is recognised in practice, according to which money due on mortgage cannot be paid off in nolentem, and to save interest, without six months' notice.

The plea does not shew any mistake of fact as to which the defendant was without the means of knowledge; and an error as to the legal effect and operation of the bond would not avail him. The alleged error and mistake, therefore, afford no defence at law: *Brisbane v. Dacres* (5 Taunt. 143), *Dawson v. Remnant* (5 Esp. 24), *Skyring v. Greenwood* (4 B. & Cr. 281; 6 D. & R. 401), *Milnes v. Duncan* (6 B. & Cr. 671; 9 D. & R. 731).

The plea is also bad in form. It is too general, in not stating with precision sufficient for the purposes of an issue, the details of the alleged error or mistake, and it is double, in attempting to raise too distinct defences; the one, that the debt which is the subject of this action of assumpsit, is secured by a bond not yet due; the other, that the account was stated erroneously and in mistake.

Crompton, contra. First, the declaration is bad. It shews no consideration moving from the husband and wife [245] for the promise to them. The consideration moves from the husband only, yet the promise is laid to both; and they are not entitled to join in the action, unless the cause of action would survive to the wife. (Com. Dig., Baron and Feme, W., *Holmes v. Wood* (referred to in *Weller v. Baker*, 2 Wils. 424). How can the cause of action survive to the wife, on a consideration moving from the husband only? This is not a case in which the wife is the meritorious cause of action, and in that respect it is distinguishable from *Nurse v. Wills* (4 Barn. & Adol. 739; 1 Nev. & M. 765). But further, putting out of the question the relation of husband and wife, the declaration is bad in laying the accounting as made by A. for B. Again, the consideration raises the implication of a promise to pay on request, and does not support a promise to pay at a more distant period (see *Brown v. Crump*, 2 Marshall, 567).

Secondly, this is a good plea in confession and avoidance. Though a valid account stated might arise on a debt secured by deed, yet a parol promise cannot be good to antedate the time of payment, where nothing is due at the time of the accounting.

As to the objections of form, the allegation of error and mistake is a mere conclusion of fact, and not a substantive answer to the declaration, and therefore is not

to be impugned for not sufficiently shewing the mistake, nor as rendering the plea double.

J. Henderson, in reply. *Nurse v. Wills* (4 Barn. & Adol. 739; 1 Nev. & M. 765), affirmed on error (1 Ad. & Ell. 65), affords a direct authority in favour of this declaration. The wife could not state an account, but, for the purposes of a joint action, the husband might well state an account for both. So, in *Nurse v. Wills*, the wife could neither contract for the forbearance there agreed for, nor forbear, and both the promise and the performance enured in law as the acts of the husband alone; yet the consideration [246] was held sufficient to support an action by both. [Parke, B. In *Nurse v. Wills* the forbearance was past, and being an act done, was a good consideration, though perhaps the contract might not have been obligatory, nor the consideration a good one, if executory.] In the present case the debt was due to the wife *dum sola*, and without that debt there could have been no cause of action. She is therefore the meritorious cause of action, and so must be, or at least may be joined as a co-plaintiff: *Drew v. Thorne* (Alleyne, 72), *Pratt v. Taylor* (Cro. Eliz. 61), *Philliskirk v. Pluckwell* (2 M. & Sel. 393), *Nurse v. Wills*. [Lord Abinger, C. B. The declaration states that the money remained unpaid at and after the intermarriage of the parties, but does not state that the money remained unpaid at the time of the accounting.] The statement of a mutual account necessarily implies the continued existence of the debt, and the objection suggested, even if available on special demurrer, is cured by pleading over. It is not to be presumed that the debt alleged had been satisfied, and such a presumption is excluded by the allegation that an account was stated concerning that debt, and that on such account a balance was due to the plaintiffs. If the statements in the declaration be true, the debt must have remained unpaid at the time of the accounting, for there could not, properly speaking, be any accounting concerning a debt which did not exist, nor could the defendant be found indebted on the account as alleged, in the residue of the original debt, if it did not remain unpaid at the time of the accounting. [Parke, B. The promise that arises on an account stated is a promise to pay on request, but the promise laid in this declaration is a promise to pay at a future day.] The promise laid not being the promise implied by law, must, if traversed, be proved; and if not traversed, be taken as an express promise, and "expressum facit cessare tacitum." The debt, the appropriation in [247] account of the 555l. 3s. 11d., and the accounting, constitute a sufficient consideration for the promise stated to have been made.

LORD ABINGER, C. B. I am of opinion that this declaration is bad, for that the contract declared upon is not binding on both parties, the consideration being executed upon which the new promise is attempted to be founded. The promise, it is true, proceeds both on the accounting and on the payment of the 555l. by the defendant; but both those considerations are executed. The liability of the defendant on the account stated, would be to pay the amount on request; to render him liable on the promise here alleged, to pay on a future day, there ought to be some new consideration. I think it is also questionable, whether enough appears upon the allegations in the declaration to found any promise, inasmuch as there is no direct statement that the money was due at the time of the accounting; and I am not prepared to say that the omission of the words "then due" is immaterial. Again, it appears that the 555l. has been paid to the plaintiffs, which imports a payment to the husband; but this must be on the wife's account, and, as far as appears, in part of the 1000l. due to her: if so, this payment only leaves the rest of the debt to stand as it did originally, and can therefore furnish no consideration for the defendant's agreement.

As to the plea, I am inclined to think it good, but it is unnecessary to decide upon it.

PARKE, B. I concur in thinking that the judgment must be for the defendant. If it were necessary to decide upon the validity of the plea, I should be inclined to say that it is bad; but, as the Court are agreed that the declaration cannot be supported, it is not necessary to pronounce upon the sufficiency of the plea. If the declaration were upon an account stated merely, and concluded with the promise implied by law, the action would be [248] properly brought by both husband and wife, for the nature of the debt would not be changed. But there are several fatal objections to the declaration as it stands; first, that this is not an account really stated, because it is not shewn that any money was then in arrear; and the subsequent averment does not supply the defect, because there is no foundation laid for the accounting: secondly,

the promise as laid cannot be supported, because there is no consideration for any promise different from that which the law implies. The promise which arises in law upon an account stated, is to pay on request, and any other promise is nudum pactum, unless made upon a new consideration. At the time of the alleged promise, the party is liable to pay in presenti on request; and if, by a single promise, without fresh consideration, there can be a contract for future payment, the Statute of Limitations may be defeated by a mere verbal promise (see *Jones v. Ryder*, 4 M. & W. 32). Any promise to pay money in futuro, which is payable in presenti, is bad, unless it be on a new consideration. The plaintiff here proceeds on an executed consideration, which constitutes an existing debt, and no such new consideration appears in the present case.

ALDERSON, B. If it were necessary to give an opinion upon the plea, I should wish to take some time to consider it; but I concur with the rest of the Court in thinking that the declaration is bad. The consideration is clearly executed, and the promise which the law implies thereon is to pay on request. In order to convert that promise into a promise to pay at a future day, there must be a new consideration. Here there is none, and on that ground the declaration is bad. If it were otherwise, the consequence would follow, that, as such a promise may be by word of mouth, the Statute of Limitations might always be evaded without a writing.

[249] MAULE, B. I agree that an executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration. On this ground, without advertng to the objections raised to the plea, I think that the defendant is entitled to judgment.

Judgment for the defendant.

BRAYNE v. COOPER. Exch. of Pleas. 1839.—Words spoken of a tradesman, imputing to him that his trade is maintained by the prostitution of a female employed by him, are not actionable (although laid to be spoken of him in his trade); unless they can be construed as imputing that he kept a bawdy-house.

[S. C. 9 L. J. Ex. 80.]

Case for slander. The declaration stated that the plaintiff carried on the trade and business of a stay-maker, to wit, at &c., and that before and at the time of the speaking and publishing of the words by the defendant, he had employed one Sarah Barnes as his servant and assistant in such trade, yet the defendant, contriving and intending to injure the plaintiff in his said trade and business, &c., in a certain discourse, &c., falsely and maliciously spoke of and concerning the plaintiff in his said trade and business, the several false, &c. words following: that is to say, (inter alia), "The business of a staymaker does not keep him, but the prostitution of the person in the shop; after it is shut, it is as bad as any bawdy-house in the town." Plea, not guilty. At the trial before Littledale, J., at the last assizes for Sussex, the words having been proved, the learned Judge left it to the jury to say whether they imputed to the plaintiff that he kept a bawdy-house; stating his opinion to be, that unless they did, the action could not be sustained. A verdict having been found for the defendant,

Platt moved, in the beginning of this term, for a new trial, on the ground of misdirection. It was not necessary, in order to entitle the plaintiff to a verdict, that the words should import an imputation that the plaintiff kept a bawdy-house. Being laid to be spoken of him in his trade, [250] they were actionable as imputing immorality in his household, and therefore likely to injure him in his trade. [Alderson, B., referred to *Ayre v. Craven* (2 Ad. & Ell. 1).]

Cur. adv. vult.

The judgment was delivered on a subsequent day by

LORD ABINGER, C. B. This was an action for words spoken concerning the plaintiff in his trade of a stay-maker. The learned Judge left it to the jury to say whether the words imputed to the plaintiff the keeping an improper house, for which he would be indictable: the jury found for the defendant. It appears to us that the words spoken did not relate to the plaintiff in his business, and that we cannot consider them as used in any other sense than as a general imputation on his moral conduct. There will therefore be no rule.

Rule refused.

LYON AND ANOTHER v. EDWARD HOLT. Exch. of Pleas. 1839.—To a declaration by the indorsee of a bill of exchange, alleged to have been indorsed by the drawer to the defendant, by the defendant to W., and by W. to the plaintiff, the defendant pleaded, that the bill was indorsed by the defendant to H. for his accommodation, and without consideration; that H. indorsed it to W.; that the alleged indorsement by the defendant to W., in the declaration mentioned, was the said indorsement by the defendant to H., and by him to W.; and that after the bill became due and was dishonoured, the plaintiff and H. stated an account respecting this and other dishonoured bills on which H. was liable to the plaintiffs, and agreed to take from B. renewed bills in lieu of them, and not to press any parties for payment of the original bills during the currency of the latter; and averred that the substituted bills were accordingly drawn and accepted and delivered to the plaintiff without the defendant's knowledge or consent, and that the plaintiff gave time thereby to the parties in the original bills. At the trial, the agreement alleged in the plea was proved in substance, but it appeared that H. did not indorse the bill to W.:—Held, that this indorsement was a material part of the defence, since, unless H. was a party liable on the bill, the agreement between the plaintiff and H. was not such a giving of time as to discharge the defendant; and therefore that the plea was not proved, and the plaintiff was not entitled to a verdict.—Where a bill is drawn payable to the order of the drawer at a particular place, semble, that a declaration against the drawer or indorser, alleging a presentment generally, is sufficient after verdict.

[S. C. 2 H. & H. 41.]

Assumpsit on a bill of exchange for 100l., dated 1st March, 1835, drawn by W. C. Hobson upon and accepted [251] by Thomas Hynes, payable to the order of the drawer in London, three months after date, indorsed by Hobson to the defendant, by the defendant to T. & H. F. Wooster, and by them to the plaintiffs. The declaration alleged presentment generally, not stating that it was in London. There was also a count on an account stated.

Plea to the first count, that after the making of the bill of exchange in the declaration mentioned, to wit, on the 1st of March, 1835, the said bill of exchange was indorsed by the defendant to certain persons other than the defendant, carrying on business under the style, firm, and description of John Holt and Co., for the accommodation and at the request of the said John Holt & Co., and that there was not at the time of the indorsement, or at any other time, any consideration whatever for the last-mentioned indorsement; and that afterwards, and before the indorsement to the plaintiffs in the declaration mentioned, to wit, then, the said John Holt and Co. indorsed the said bill to the said T. & H. F. Wooster; and the defendant avers, that the said alleged indorsement by the defendant to the said T. & H. F. Wooster, in the declaration mentioned, was the said indorsement from the defendant to the said John Holt & Co., and from the said John Holt & Co. to the said T. and H. F. Wooster, in this plea mentioned: and the defendant further says that before the said bill of exchange became due and payable, to wit, on &c., the same was duly accepted by the said Thomas Hynes, the said drawee thereof; of all which said several premises in this plea mentioned the plaintiff, to wit, then, had notice: and the defendant further says, that after the said bill of exchange became due and payable, and after the non-payment thereof by the said acceptor, to wit, on the 31st day of December, 1835, the plaintiffs were possessed as of their own property, and were the holders for value, as well of the said bill of exchange as of two others overdue and dishonoured bills of exchange on which the said John Holt and [252] Co. were liable to the plaintiffs, as parties to the said two last-mentioned bills of exchange; and thereupon a certain account was had and stated between the said John Holt & Co. and the plaintiffs, of and concerning the amount due to the plaintiffs, as well upon the said bill in the first count mentioned, as upon the said two other bills in this plea mentioned; and upon that accounting, the said amount was ascertained and agreed to be a large sum, to wit, 397l. 1s.; and it was thereupon agreed by and between the said John Holt & Co., and the plaintiffs, without the knowledge or consent of the defendants, [the plea then proceeded to state an agreement by John Holt and Co., to accept and deliver to the plaintiffs in lieu of the said three bills of exchange, three fresh bills at different dates

for the amount of them, with interest, and that the plaintiffs should deliver to them the overdue bills when the others were paid, and should not press any parties for payment of the former in the meantime: and averred, that the substituted bills were drawn and accepted, and delivered to the plaintiffs accordingly, without the knowledge or consent of the defendant:] and the plaintiffs afterwards did give time to the parties on the said three bills of exchange, according to the stipulations aforesaid, for a long time, to wit, from the day last aforesaid for two months, and during all that time forbore suing, pressing for payment, or having recourse to, any of such parties as aforesaid. Verification.

Plea to the second count, non assumpsit.

Replication to the first plea, de injuriâ; on which issue was joined.

At the trial before Lord Abinger, C. B., at the London sittings after Trinity Term, 1838, the defendants gave in evidence a memorandum of agreement between the plaintiffs and John Holt & Co., by which his Lordship thought the plea was in substance proved. It appeared, however, that the bill had not in fact been indorsed by John Holt [253] & Co., as stated in the plea; and the plaintiffs' counsel contended that this was a material allegation, and must be proved in order to entitle the defendant to a verdict; since, unless John Holt & Co. were parties to and liable upon the bill, the agreement to give time to them could not be a defence to the defendant. Under his Lordship's directions, a verdict was found for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for the amount of the bill and interest. In the following term,

R. V. Richards obtained a rule nisi accordingly, or for judgment non obstante veredicto; against which, in Hilary Term last,

Cresswell and Crompton shewed cause. The averment of indorsement by John Holt & Co. is immaterial. It was proved that the bill passed through Holt & Co. to Messrs. Wooster, to whom therefore they were liable. A valid contract was proved, the effect of which was to give time to the acceptor: nothing appears in the books to shew that the contract must be with him. [Lord Abinger, C. B. Could the acceptor have set up that contract, being no party to it?] The plaintiffs could not have sued the acceptor immediately, in breach of their contract. Time is given to the acceptor, on a contract which binds the plaintiffs; their right of action on those bills is, therefore, suspended. [Lord Abinger, C. B. That is the question; whether, if the action were against Hynes, who is no party whatever to this transaction, he could set it up. If he were an accommodation acceptor, perhaps he might, but not when he is an acceptor for value; the plaintiffs would recover against him, but for the benefit of Holt & Co., who made the bargain with them.] They would, at all events, be precluded in equity from suing. [Lord Abinger, C. B. I do not admit that; how can the acceptor be relieved from paying, because there is an agreement between other [254] parties to give time to him? it is *res inter alios acta*. Could the acceptor give evidence of a judgment against Holt & Co., in discharge of the bill? If not, neither could he of such an agreement.] Being made for his benefit, he may assent to and ratify it.

Richards, *contra*. When time is given to any of the parties to a bill, subsequent indorseees are discharged, and for this reason, because otherwise the agreement to give time would be violated, by their suing the parties to whom time is given; *Claridge v. Dalton* (4 M. & Sel. 226), *English v. Darley* (2 Bos. & P. 62); but the rule goes no further. There is nothing shewn here to discharge the acceptor. The plea ought at least to have stated specifically that the agreement was made for the benefit of Hynes, and that he adopted it. [Lord Abinger, C. B. I thought at the trial that the plea was bad, because it did not aver that the drawer or acceptor had notice of the agreement; but I certainly was disposed to think the indorsement by Holt & Co. immaterial. The question seems to be, whether the law does not presume a party's acceding to a contract made for his benefit, until the contrary be shewn; and there is a class of cases, of which *Atkin v. Barwick* (1 Str. 165) is the principal, which rather seems to support Mr. Crompton's argument on this point. If so, how is the indorsement by Holt & Co. material? *Alderson, B.*, referred to *Hawkshaw v. Rawlings* (*id.* 23).]

Cresswell then proceeded to contend, in arrest of judgment, that the declaration was bad, on the ground that the presentment was not stated to be in London; citing *Gibb v. Mather* (2 C. & J. 254; 8 Bing. 214; 1 M. & Scott, 387), *Sanderson v. Bowes*

(Bayl. on Bills, 175), and *Ambrose* [255] v. *Hopwood* (2 Taunt. 61). [Parke, B. The question is, whether, after verdict, presentment to the acceptor would not be taken to mean presentment according to the tenor and effect of the note.]

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said,—In this case, the Court, on consideration, are of opinion that the plea was not proved, and therefore the verdict must be entered for the plaintiff; and Mr. Cresswell will have a rule to shew cause why the judgment should not be arrested.

PARKE, B. It is clear, on looking at the plea, that it proceeds on the principle that the discharge of the principal is the discharge of the surety: but if the averment of the indorsement to Holt & Co. were struck out, the plea would be only matter of agreement with a stranger, and no bar—not accord and satisfaction.

Rule absolute to enter a verdict for the plaintiff.

The cause was afterwards settled, and the rule for arresting the judgment was not argued.

RIVIS v. WATSON. Exch. of Pleas. 1839.—A rent-charge may be divided by will, or by deed operating under the Statute of Uses, so as to make the tenant liable, without attornment, to several distresses by the devisees or cestuis que use.—And semble, since the statute 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind.

[S. C. 9 L. J. Ex. 67.]

Trespass for breaking and entering a close of the plaintiff called the Garth, situate at Market Weighton, in the county of York, and spoiling the grass, &c. &c., and seizing and carrying away, &c., two haystacks of the plain-[256]-tiff. The defendant pleaded, first, not guilty, on which issue was joined: secondly, as to all the trespasses, except the carrying away and converting the haystacks, *actionem non*; because the defendant says, that before and at the time of the making of the indenture of bargain and sale hereinafter next mentioned, Francis Lord Hawley, Sir Charles Harbord, Sir William Haward, Sir John Talbot, Sir Robert Stewart, and William Harbord, were, in accordance with the provisions of two acts of Parliament,—the one made and passed in the 22nd Car. 2, intituled “An Act for advancing the sale of fee-farm rents and other rents,” and the other made and passed in the 22nd & 23rd Car. 11., intituled, “An Act for vesting certain fee-farm rents and other small rents in trustees,”—seized in their demesne as of fee of and in a certain annual or fee-farm rent of 34l. 11s. 2½d., reserved, issuing, and payable out of and for all that manor of Weighton Underwold, in the said county of York, with its rights, members, and appurtenances, payable at &c., with power, right, and authority to them the said Francis Lord Hawley, &c., to take a distress or distresses in and upon the said manor, and every part thereof, for the said annual or fee-farm rent, and for such part or parts thereof as from time to time should be in arrear and unpaid; the same power, right, and authority having heretofore, and before the date and making of certain letters patent by his said late Majesty (Chas. II.), to them the said Francis Lord Hawley, &c., of (amongst other things), the said annual or fee-farm rent, pertained, together with the said rent, to his said late Majesty. The plea then proceeded to set forth the following deeds, &c. deducing the title to the fee-farm rent:—

20th & 21st December, 1671. Indentures of lease and release between the above-named trustees of the one part, and Erasmus Smith of the other part, whereby, in consideration of 6179l. 5s. 3½d., the trustees, in pursuance of the above acts of Parliament, and in obedience to an order of [257] the Lords Commissioners of the Treasury, granted the rent to the said Erasmus Smith in fee:

9th May, 1690. Will of the said Erasmus Smith, whereby he devised the rent to his five younger sons, Samuel Smith, Hugh Smith, Roger Smith, Montague Smith, and Henry Smith, severally, and to the heirs of their several bodies, subject to a proviso that if any of them should die without such issue, the share, portion, and interest of the son so dying should go to the survivor or survivors of them, and the heirs of their or his respective bodies or body:

1st September, 1691. The said Erasmus Smith died seised of the said rent, without altering the said devise thereof, leaving his said five younger sons him surviving, whereof they became seised of the rent as tenants in tail as aforesaid :

1st December, 1691. Death of Roger Smith without issue :

3rd and 4th June, 1724. Indentures of lease and release between the said Samuel Smith and Hugh Smith of the one part, and Thomas Fell of the other part, whereby they granted to Fell their two fourths of the rent in fee, to the intent that he might become tenant to the præcipe for the purpose of suffering a recovery thereof, to enure to the use of the said Samuel Smith and Hugh Smith, as tenants in common in fee :

Trin. Term, 10th Geo. 1. Recovery suffered accordingly.

The plea then proceeded to deduce the title to these two fourth parts of the rent, through several other settlements and wills, until they became vested in John Smith Barry for life : it then averred that the said two fourth parts of the said rent were duly answered and paid for the space of three years, within the space of twenty years next before the first day of the session of Parliament of the first year of George the Second, 1727 : and that the said close in which, &c., in the first count of the declaration mentioned, during all [258] the time in the plea aforesaid and in the declaration mentioned, was and is part and parcel of the said manor of Weighton Underwold, in the county of York : and because at the said time when &c., in the declaration mentioned, there was due and in arrear to the said J. S. Barry, the sum of 43l. 4s. of the said two fourth parts of the said rent, for three years next before Lady-day then past, the defendant, by his authority and command &c., [justifying the trespasses as bailiff of the said John Smith Barry, as a distress for arrears of the rent due to him]. Verification.

There were other pleas which, in like manner, deduced the title (subsequent to the death of Roger Smith), to the other two undivided fourth parts of the same rent, and justified the trespasses under the parties respectively entitled thereto.

To each of these special pleas the plaintiff demurred specially. The points of demurrer stated were (amongst others), that the pleas do not any of them shew the nature and origin of the fee-farm rent in the pleas mentioned, nor the commencement of the title thereto, nor how or when the locus in quo became charged and chargeable with the said rent : also because the several distresses appear to have been made for divided aliquot parts of the said rent, which is an entire rent, and no power so to distrain is shewn in the said pleas, or any of them : also that it is not alleged by the said pleas, or any of them, when and how the said rent vested in his said late Majesty ; also that the first averment in the first plea contained, and which is incorporated by reference thereto with the other pleas, as to the seisin of Francis Lord Hawley and others, is informal, as it attempts to put in issue matter of law, and no single or sufficient issue of fact can be taken or raised thereon ; and also that it is not alleged, nor does it appear in or by the said pleas, or any of them, with sufficient certainty, in what manner the person or persons originally granting, reserving, or creating the said rent, had [259] power to charge the said close of the plaintiff, in which, &c., with the payment of the same, &c., &c. Joinder in demurrer.

The case was argued in Hilary Term, 1838, by

Cresswell, in support of the demurrer. There are several objections to the pleas. First, they do not state that the trustees were seised of the rent by virtue of the acts of Parliament mentioned in the pleas, but only in accordance with those acts. The defendant, therefore, does not plead the acts of Parliament as vesting any title in the trustees, which could be derived from them to the parties under whom the defendants claim. [Parke, B. We know from the acts of Parliament that the trustees were seised by virtue of letters patent : it was not necessary, therefore, to say that they were seised by virtue of the statutes, which they were not, but under letters patent from the Crown.] Secondly, the pleas do not state that the rent was issuing or payable out of the lands on which the distress was made, or any particular lands within the manor, but out of the manor itself. And the only averment as to the close in question is, that it was during all the time, &c., parcel of the manor. It is not alleged that it was parcel of the demesne lands of the manor, or that it was parcel of the manor chargeable with the rent. The right to distrain cannot extend beyond the lands out of which the rent issues. In one sense, all the lands within a manor are parcel of the manor : copyholds are in law parcel of the manor, the freehold being in the lord. Suppose, then, the plaintiff traversed the averment that the close in

question is parcel of the manor; and it appeared that it was part of a copyhold tenement within the ambit of the manor: that would in terms satisfy the allegation in the plea. [Parke, B. Would it not be intended to mean parcel of the demesne lands of the manor?] If that be the legal construction, the plaintiff might safely rest upon a simple traverse of the averment; [260] but it is apprehended that copyhold lands within the manor are equally parcel of the manor. [Lord Abinger, C B. You say a rent issuing out of a manor issues only out of the lord's rights in the manor.] Yes. The plaintiff must therefore admit the first allegation, that the rent issues out of the manor; and traversing the other, viz., that the close of the plaintiff is parcel of the manor, will fail on its being proved to be a copyhold within the manor. [Parke, B. The question is, whether we are not to intend that the word "manor" is used in the same sense in both.] Then the plaintiff is entitled to construe both in the narrower sense, and the defendant fails for want of an averment that the close is copyhold land liable to the rent. The defendant is bound to make out a paramount title by distinct averment. [Parke, B. The rent is charged upon all the manor, and every part and parcel of it; if the plaintiff's estate is part of the manor, it is charged on that. The defendant must prove, under this allegation, if traversed, that it issues out of everything which was parcel of the manor in the time of Charles II.] It is submitted, that "the manor" does not import everything which is parcel of it, but only the demesne lands and services. In common parlance, it is said that the lord is seised of a manor and of every part of it, though there are copyholds granted out. It is clear that a copyholder could not be affected by the part of a rent-charge by the lord. Com. Dig. Copyhold, Q. 4.

Thirdly, the rent-charge could not be divided as alleged in the plea, so as to render the land liable to several distresses. The effect of the old cases is, that unless the tenant be a party concurring in the multiplication of the distresses, it cannot be imposed upon him by the act of the grantee of the rent-charge. It is different in the case of a rent-service, because that is of common right (Co. Lit., 142 a.; 148 a.): it has therefore been held that it may be apportioned, and that [261] the tenant is compellable to attorn to the several parties among whom it is divided. But it is not so with regard to a rent-charge, which is called by Littleton a rent "not of common right" (sect. 217), and is therefore not apportionable at common law by the act of the party; and if divided, the power of distress is gone, without attornment by the tenant (sect. 222; see Co. Lit., 148 a.). [Parke, B. It seems to be doubtful, whether a fee-farm rent of this kind be a rent-charge or a rent-service; see Mr. Hargrave's note to Co. Litt., 144 a. You argue it as if it were clearly a rent-charge.] It is for the defendant to make out clearly that it was a rent to which the distress was incident. The old cases lay it down, that after a distress under which enough might have been taken to satisfy the rent, the party cannot distrain again for the residue: Moore, 7; *Anon.*, Cro. Eliz. 13. And the case is much stronger against a severance than against an apportionment of rent; by the former the tenant gains nothing; he is not exonerated from any part of the rent, and yet is to be made liable to several distresses. Accordingly, it is laid down in Bro. Abr., Distresse, 60, that where the rent is severed by the act of the party, the tenant shall not be liable to several distresses. The same doctrine is stated in the Year Book, 9 H. 6, 13; in Co. Litt. 148 a.; Gilb. on Rents, 164; *Roll v. Osborn* (Hob. 25), and *Wotton v. Skirt* (Cro. Eliz. 742); nor is any distinction made between a severance by conveyance and by devise. The same reason applies to both, that the tenant is not to be burthened by the division of the power of distress, unless he was himself a concurring party. [Parke, B. In Bac. Abr. Rent, M., it is laid down, that "if A., possessed of a term for twenty years, leases it for ten years, reserving 30l. rent, and afterwards devises 20l. of the rent to each of his three sons, equally to be divided, this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion remains [262] entire; for there is nothing in the nature of the thing to hinder such a division or apportionment; and if the tenant omits to pay the rent, the several actions are a mischief which he brings upon himself."] At all events, all the devisees, though entitled to the rent as tenants in common, ought to join in one distress. Perhaps, however, it would be considered that the devise of the rent-charge would be good, but the mode of enjoyment by distress void.

The remaining question is, what is the operation of the stat. 4 Anne, c. 16, s. 9, upon the case. If the devise could not be made before the statute, so as to sever the

distress, and the tenant was not compellable to attorn, the statute can make no difference. Its object was merely to simplify the remedy, where the party had the legal right before; to give rights without attornment, which might have been attained before by compelling an attornment.

Hoggins, for the defendant. The first objection taken to the plea has been already disposed of by the Court. With regard to the second, the plaintiff might have traversed the seisin in manner and form as alleged in the plea, i.e. with a power of distress "upon the manor and every part thereof." The only important point is that as to the severance of the rent.

The stat. 22 Car. 2, c. 6, s. 8, enables the grantees of crown rents to sue for and recover the same by such and the like ways and means, whether by distraining or otherwise, as the Crown might have recovered them. An assignee of the whole of this rent would, therefore, clearly be entitled to recover it as if it were still in the hands of the Crown: and the question is, whether the assignee of a portion of it by devise may not do so also. It does not appear on the face of this plea, that there has ever been any grant of the rent or any part of it; but that it has passed only by devise and descent. Now, on the devise of a rent-charge, no attornment at all by the tenant is necessary: Com. [263] Dig., Attornment (L.); Co. Litt. 323; Moore, 281; because a devisee has no power to compel an attornment. In *Colborne v. Wright* (2 Lev. 239), it was expressly held, that by conveyance of devise, or fine to uses, a rent-charge may be divided without the assent or attornment of the tenant, and so as to make him liable to several distresses, because his assent or attornment is not necessary to the perfection of those conveyances. In Cruise's Dig., tit. Rents, ch. 3, (vol. 3, p. 202), it is even said—"Now the necessity of an attornment is taken away; but still a division or apportionment of a rent-charge, by a conveyance of part of it to a stranger, is held good." The same reasoning which is now directed against the division of a rent-charge was once applied to a rent-service, but has in process of time been abandoned as to that: and, in *Colborne v. Wright*, the Court extended the same reason on which it was abandoned as against a rent-service, to the case of a rent-charge. But further, it is alleged in the plea, that the rent, after its severance, was duly paid for the space of three years within twenty years next before the first Parliament of George II.; that would supply the want of an attornment, even if it were necessary, under the statute of Anne. That averment was, indeed, introduced into the plea, in order that the defendants might have the benefit of the stat. 4 Geo. 2, c. 28, s. 5, in case this were deemed to be a rent-seck.

But, in truth, this is a rent-service, as appears from Mr. Hargrave's note to Co. Litt. 144 a., already referred to; and the note to *Bradbury v. Wright* (Dongl. 267 a.), where many authorities are cited to shew, that where there is tenure in fee-farm, the rent is rent-service; although, where there is a lease in fee-farm since the statute of quia emptores, there may be a fee-farm rent which is not a rent-service. Now, this rent might have been granted by the Crown either before or since the statute of quia emptores: the [264] Crown, being seised of all the lands within the realm, might put any part of its land to farm in fee for services. If, then, this be a rent-service, it is clear that the grantee or assignee might devise it, and the devisees would be clothed with the right of distress: if it be a rent-charge, it is submitted that, upon the authorities already cited, the same right attaches to it; but even if by the severance the power of distress has been lost or suspended, then it is a rent-seck, and falls within the remedy given by the 4 Geo. 2, c. 28, s. 5.

Cresswell, in reply. The argument founded on the statute of 4 Geo. 2, c. 28, cannot help the defendant, because the date of the severance, as alleged in the plea, is immaterial, and there is no averment that it was antecedent to the statute. Nor is it alleged that the payment of rent was by any party under whom the plaintiff claims title. The statute was meant to operate only upon parties who, by their previous act of payment, had admitted the rent to be due from them. If the rent originally issued out of Whiteacre and Blackacre, and were severed, could an attornment by the tenant of Blackacre supply the necessity of an attornment by the tenant of Whiteacre? A rent-charge would not become a rent-seck within the act, merely by losing its incident of distress: the statute evidently points at rents to be subsequently created. Again, it is argued that a severance by devise is good, without attornment, because the devisee could not compel an attornment: that is arguing in a circle. The attornment, in case of severance by devise, is not, as in the case of a

grant of the land, an acknowledgment of a tenancy ; it is the assent of the tenant to the act whereby he is subjected to several rents. In *Colborne v. Wright*, the whole rent was vested in one person at the time of action brought. *Bradbury v. Wright* is an express authority to shew that [265] distress is not incident to a fee-farm rent as such, unless the case be brought within the statute 4 Geo. 2, c. 28, s. 5.

Cur. adv. vult.

The judgment of the Court was delivered in last Michaelmas Term by—

LORD ABINGER, C. B. This was an action of trespass for breaking and entering the plaintiff's close, and taking his goods. There were five special pleas. The first was a justification as a distress for two undivided fourth parts of a certain annual or fee-farm rent, reserved, issuing, and payable out of and for all that the manor of Weighton Underwold, in the county of York.

The plea states, that certain trustees were, in accordance with the provisions of the 22nd & 23rd Charles 2, seised in fee of the rent, with power to take a distress in and upon the said manor, and every part thereof, for the rent ; that these trustees, by virtue and in pursuance of the acts, sold the rent to one Erasmus Smith, who, by his will, devised the same to his sons as tenants in common in tail, and one fourth became vested, in pursuance of the will, in each son. The plea then deduces a title by mesne conveyances, in two of these fourths, to John Smith Barry, by whose order the distress was made ; and it also avers, that the two fourths were answered and paid for three years within the space of twenty years before the passing of the 4 Geo. 2, c. 28, and that the locus in quo was parcel of the manor.

The second special plea deduced a title in one fourth of two other of the said fourth shares to certain persons, who authorized the defendant to distrain. This one-fourth was created by a deed operating by virtue of the Statute of Uses.

The third and fourth special pleas, in the like manner, [266] deduced a title, the former to another fourth of the two fourth shares, the latter to an half of one-fourth of two fourths, similarly created.

There were special demurrers to each plea, which were fully argued.

The principal point in the case was, whether one tenant in common of a rent-charge could distrain for his undivided share, it being contended that, upon these pleadings, it must be taken that the rent in question was a rent-charge, at least not a rent-service, which it is admitted might be divided, so as to leave a power of distress incident to each portion. And we think that the assumption was proper ; but on a review of the authorities, which were very ably discussed at the bar, we are of opinion that a rent-charge may be divided by the act of the party, and that the assignee of each portion may distrain for it. That it was severable by act of law, was admitted to be clear : and also it was agreed that it could be divided with the attornment or express consent of the person chargeable with it ; but it was contended, that without such attornment or consent it could not be done, on the ground that the party would be made liable to several distresses for the same rent. It has, however, been decided by a majority of judges, with reference to a rent-service disconnected from the reversion, that it might be divided by will, in the case of *Ards v. Watkin* (Cro. Eliz. 637, 651), though the same objection was stated ; but it was answered, that it was the tenant's own fault, and if he paid the rent, he would avoid it ; and it was also said, that the devise would enure without attornment : and a similar point was decided by the whole Court, in *Colborne v. Wright* (2 Lev. 239), with respect to a rent-charge : and it was held, that by the conveyance of devise, and fine to uses, the rent might be divided without the consent or attornment of the party, because his consent [267] is not necessary for the perfection of these conveyances. It is true, that the divided portions of the rent-charge had reunited in one person, in whose right the action was brought ; but the case was not settled on that ground, but on the general proposition laid down by the Court, that the rent might be divided.

We think, therefore, on the authority of these decisions, that the rent was legally divided in this case by will, and by deed operating under the Statute of Uses ; and as attornment, since the statute of 4 Anne, c. 16, is no longer necessary to the perfection of any grant, we should probably hold that the form of the conveyance would not make any difference. And this view of the case agrees with what may be inferred from Bacon's Abridgment, Rent, M., to have been the opinion of Chief Baron Gilbert on this point.

This disposes of the main ground of objection. Other objections were to the form

of the pleas : one was, that the rent is not stated to have issued out of all the lands in the manor, but only out of the manor ; and that the close in question is not stated to have been chargeable with the rent. We think the answer is, that it is averred that it issued out of all the manor ; that is, out of all the demesne lands, and everything else out of which a rent could issue, which was parcel of the manor at the time of the alleged seisin, including copyholds, if there were any ; and the locus in quo is also averred to have been parcel of the manor. Other objections were also taken on the argument, upon most of which the Court intimated an opinion during the discussion.

We are strongly inclined to think these objections are either unfounded, or not properly pointed out by the special demurrer ; and therefore are disposed to give judgment for the defendant ; but as the question of fact, whether the land in question was actually chargeable with the rent, is suggested to be one of importance to the [268] plaintiff, we allow leave to withdraw the demurrer, and to amend on the usual terms, in order that he may take issue on that fact.

An application was accordingly made by the plaintiff to withdraw the demurrer and amend. The defendant also applied for an amendment of the pleas, by stating that the rent was issuing and payable out of the demesne lands of the manor and that the plaintiff, during the time when the arrears of rent accrued due, was seised of and occupied lands, part and parcel of the said demesne lands of the manor. The pleas having been amended accordingly, the plaintiff then filed a replication to each of them, stating, that the said manor, therein respectively mentioned, from time immemorial hath been called and known by the name of Wighton-with-Skipton, and that the said close in which &c., in the declaration mentioned, from time whereof the memory of man is not to the contrary, and long before the said annual or fee-farm rent was reserved, granted, or created, was situate within and parcel of the said manor in the pleas mentioned, and a customary tenement of the said manor, demised and demisable by copy of the Court Rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor ; and that he, the plaintiff, before and at the said time when &c. in the declaration mentioned, respectively, was seised of the said close in which &c. in his demesne as of fee at the will of the lord of the said manor, to wit, the most noble William Spencer, Duke of Devonshire, then being lord of the said manor, according to the custom of the said manor ; and that he, the plaintiff, being so seised, and the customary [269] tenant of the said close in which &c., at the said times when, &c., respectively, was possessed of the said goods and chattels in the declaration mentioned, as of his own proper goods and chattels, then being in and upon the said close in which &c.—Verification.

To these replications the defendant demurred specially ; assigning as cause of demurrer, (amongst others), “ that although the replication does not profess to traverse, yet neither does it sufficiently confess and avoid, the pleas, or any or either of them ; inasmuch as each of the pleas shews in the defendant, at the said time when &c. in such plea mentioned, a right to take a distress for the arrears in such plea also mentioned, in all and every closes and close in the seisin and possession of the plaintiff, wheresoever situate ; and in the replication, the plaintiff confesses that at the time when &c., he was seised and in possession of the close in which &c.” The plaintiff joined in demurrer, and the case was set down, and stood in the paper for argument during Hilary Term. Subsequently, however, the plaintiff obtained leave to withdraw the replications, and took issue upon the averment in the pleas, that the close in question was parcel of the demesne lands of the manor.

End of Easter Term.

[270] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER AND EXCHEQUER CHAMBER, TRINITY TERM, 2 VICTORIA.

WATKINS v. LEE. Exch. of Pleas. 1839.—In case for a malicious arrest, the declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof, and thereupon it was considered by the Court, that the defendant should take nothing by his writ. The defendant pleaded not guilty:—Held, that the averment of the discontinuance of the suit was a material allegation, which the defendant should have taken issue upon by his plea, and that, not having done so, the discontinuance was admitted on the record.—The plea of not guilty, in such a case, merely puts in issue the wrongful act, viz. the malicious arrest without probable cause.—Quære, whether the averment, that the plaintiff suffered the suit to be discontinued, is proved by the production of the rule to discontinue, and proof of payment of the costs thereon, without proof of the judgment of discontinuance.

[S. C. 7 Dowl. P. C. 498; 8 L. J. Ex. 266; 3 Jur. 484.]

Case for a malicious arrest. Plea, Not guilty.

The declaration averred, that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof, and thereupon it was considered by the Court that the defendant should take nothing by his writ.

To prove this allegation, the plaintiff at the trial proved a rule to discontinue, and that the defendant had paid the costs of the discontinuance. Jervis objected that this did not prove the judgment of discontinuance, upon which [271] Parke, B., allowed the plaintiff to amend, and saved the point whether a rule to discontinue on payment of costs, was a sufficient termination of this suit to enable the plaintiff to sue for a malicious arrest.

Jervis now moved for a nonsuit on the point reserved. No action for a malicious arrest can be maintained until the prior suit is finally terminated. For this purpose a rule to discontinue is not enough, even though acted upon by payment of costs. In *Bristow v. Heywood* (4 Campb. 211; 1 Stark. N. P. 48), it was decided to be sufficient, but the case went off upon another point, and no opportunity was afforded of reviewing that decision. In *Brandt v. Peacock* (1 B. & Cr. 649; 3 D. & R. 2), the point arose immediately, but there was there a judgment of discontinuance, and if the rule had there been deemed to be sufficient, much discussion would have been saved. In *Fanshaw v. Heard* (1 M. & P. 191), it was decided that the first action must be legally determined, and in *Drummond v. Pigou* (1 Bing. N. C. 114; 4 M. & Scott, 237), Gaselee, J., said that a rule for a discontinuance is not evidence to shew that the action has been discontinued; there must be a judgment of discontinuance. If this would do, a rule for judgment as in case of a nonsuit would have the like effect. [Lord Abinger, C. B. How does the question arise upon this record?] In *Drummond v. Pigou*, that point was raised, but not decided. In truth it is a doubtful question upon the construction of the late rules. The plea of not guilty operates as a denial of the wrongful act, but not of the facts stated in the inducement (R. G., II. 4, W. 4). The termination of the suit is not inducement, but material to the maintenance of the action. The want of it would be cured by verdict, because it would be presumed to have been proved at the trial (1 Wms. Saund. 228).

[272] LORD ABINGER, C. B. As the action cannot be maintained until the former suit is terminated, the discontinuance is a material allegation, which the defendant should have denied; not having done so, he admits the discontinuance. The plea of not guilty puts in issue merely the malicious arrest without probable cause.

ALDERSON, B. The meaning of the rule is, that the wrongful act only is put in issue.

Rule refused.

FRANCIS v. DOE D. HARVEY. Exch. of Pleas. 1839.—The application to review the taxation of costs in error from this Court, must be made to the Court of Error. This Court has no jurisdiction over the taxation.

[S. C. 7 Dowl. P. C. 193, 523; 1 H. & H. 465, 488; 8 L. J. Ex. 280.]

In Hilary Term, Montague Smith moved for a rule to shew cause why the Master should not review his taxation of costs in error. At the trial of this ejectment before Patteson, J., the plaintiff obtained a verdict, and the defendant having tendered a bill of exceptions to the ruling of the learned Judge, the exceptions were afterwards argued in the Exchequer Chamber, and the judgment affirmed (4 M. & W. 331). On the taxation of the costs of the defendant in error, which are double by 13 Car. 2, st. 2, c. 2, s. 10, the Master refused to allow double costs for drawing and settling the bill of exceptions, on the ground that they were costs in the Court below; and also refused to double the costs of executing a writ of inquiry issued under 16 & 17 Car. 2, c. 8, s. 4, on the ground that this statute being subsequent to the 13 Car. 2, the provisions of that statute doubling the costs did not apply. He intimated a doubt whether the application should be to this Court or to the Court of Error. Since the 11 Geo. 4 & 1 Will. 4, c. 70, the record remains in the Court below, and a transcript only is sent to the Exchequer Chamber; and by sect. 8, [273] “the proceedings and judgment as altered or affirmed shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains.” Taking this statute with the rule of this Court, Michaelmas Term, 2 Will. 4, that the costs in error from this Court be taxed by the Master of this Court, it is doubtful whether the application to review the taxation of the costs in error should not be made here.

Per Curiam. We have no jurisdiction over this matter. It is the Court of Error which is to give judgment and to award the costs. Until judgment is given on the bill of exceptions in that Court, we cannot know which party is in the wrong, and which party is entitled to costs. When judgment has been so given, we can then carry it into execution on the record being returned to us. We have no power to give judgment as to the costs, and you must make your application to the Court above.

Rule refused.

A defendant in Error, on a bill of exceptions, is entitled to double costs for settling the bill of exceptions, such costs being costs in error, and not costs in the Court below.—The lessor of the plaintiff in ejectment, if taken by the defendant to a Court of Error, is also entitled to double costs of executing a writ of inquiry under 16 & 17 Car. 2, c. 8, s. 4.

In the same term, M. Smith renewed his application in the Court of Exchequer Chamber.

The Court said, that instead of a formal motion, it would be better that he should refer them to the statutes and authorities, and they would consider of it and direct how the taxation should be. M. Smith then referred to the statutes 13 Car. 2, st. 2, c. 2, s. 10, and 16 & 17 Car. 2, c. 8, s. 4. He also referred, as to the first point, viz. the costs of the bill of exceptions, to *Gardner v. Baillie* (1 B. & P. 32), and as to the second point, the costs of the writ of inquiry, to *Shepherd v. Mackreth* (2 H. Bl. 284).

[274] In this term, TINDAL, C. J., said, the Court had looked at the statutes and cases to which they had been referred, and had no doubt whatever that the defendant in error was entitled to double costs. And the Master was directed to alter the taxation accordingly.

KNIGHT v. COLEBY. Exch. of Pleas. 1839.—Where the sheriff had withdrawn from possession under a fi. fa., in consequence of the defendant's having informed him “that he had sold the goods to cheat the plaintiff:”—Held, that he might take the defendant under a ca. sa. for the same debt, without previously returning the fi. fa.

O'Malley had obtained a rule to shew cause why the defendant should not be discharged out of custody, under the following circumstances:—Two warrants against

the defendant, one upon a fieri facias, and the other upon a ca. sa., were delivered to the sheriff on the same day. On the 16th April, the sheriff's officer went to execute the fi. fa., but found that the defendant had absconded, and that there was nothing to levy upon except some articles of very trifling value, on which he levied. The next day he received a letter from the plaintiff's attorney, directing him to execute the ca. sa. only. On the 29th April he saw the defendant, who told him that he had sold his goods in order to cheat the plaintiff. The officer thereupon told the defendant he would have nothing to do with the goods, withdrew from possession, and took the defendant under the ca. sa. This motion was made on the authority of *Miller v. Parnell* (6 Taunt. 370).

Knowles shewed cause. The general rule no doubt is as stated in *Miller v. Parnell*, viz. that if the sheriff has seized under a fi. fa. he cannot take the defendant in execution under a ca. sa. until the fi. fa. has been returned. But if it appear that in fact the goods are not the defendant's, but have been transferred to some other person, the sheriff is justified in relinquishing the execution, and acting [275] upon the ca. sa.: *Edmond v. Ross* (9 Price, 5), *Dicas v. Warne* (10 Bing. 341; 3 M. & Scott, 814; 2 Dowl. P. C. 762). Here, the defendant having alleged that he had sold the goods, and for the fraudulent purpose of cheating the plaintiff, he cannot now be permitted to say that they were his own goods, and available to the first writ.

O'Malley, contri. The cases cited proceeded on the ground that in effect there was no levy at all under the fi. fa., the goods being in the custody of the law. The sheriff ought to have returned the writ. If the goods were fraudulently sold, they would remain the property of the defendant notwithstanding, and be available pro tanto to satisfy the debt.

LORD ABINGER, C. B. The rule must be discharged. The defendant cannot complain if the Court gives credit to his assertion, that he had sold the goods, and therefore had no goods on which a levy could be made. The general rule no doubt is, that the sheriff cannot execute the ca. sa. until after the return of the fi. fa.; but the cases cited by Mr. Knowles are founded on good reason, and I think this case falls within the exception established by them.

ALDERSON, B. The defendant has no right now to say that these are his goods, when he has himself stated that he has sold them. He cannot take advantage of his own fraud.

GURNEY, B., and MAULE, B., concurred.

Rule discharged.

[276] JOHNSON v. BEALE. Exch. of Pleas. 1839.—Where a cause is tried before the sheriff, &c., under a writ of trial, and judgment is signed thereon in vacation, the defendant may apply to the Court in the following term, to enter a suggestion on the roll for the purpose of obtaining costs under a Court of Requests Act, although no application was made to the sheriff for a certificate to stay the judgment and execution, under the 3 & 4 Will. 4, c. 42, s. 18.

[S. C. 7 Dowl. P. C. 487; 8 L. J. Ex. 255.]

In this case the defendant had obtained a rule calling upon the plaintiff to shew cause why a suggestion should not be entered on the roll, in order to deprive the plaintiff of costs, under the provisions of a local Court of Requests Act, under which the debt was recoverable. The action was tried before the sheriffs under a writ of trial, on the 16th of May, and judgment was signed on the 18th. This motion was made on the 22nd, which was the first day of term.

Evans shewed cause. This application is too late, having been made after the expiration of the rule for judgment. The question turns on the 18th section of the statute 3 & 4 Will. 4, c. 42, which enacts, "That at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom such writ of inquiry shall be executed, or such sheriff's deputy, or Judge before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment and execution shall be stayed till a day to be

named in such order." If, therefore, the defendant was desirous of availing himself of the provisions of the Court of Requests Act, he ought to have applied to the sheriff at the trial, or to a Judge, to stay the proceedings, under the above clause: having omitted to do so, he has precluded himself from the benefit of the act. *Calvert v. Everard* (5 M. & Sel. 510), (which was decided when the Judge [277] had no power to stay judgment and execution), shews that after final judgment, the defendant is too late to make such an application as the present. [Lord Abinger, C. B. Do you contend that if the trial takes place in vacation, and no application be made to the sheriff or to a Judge to stay judgment and execution, the defendant cannot avail himself of a Court of Requests Act to deprive the plaintiff of costs?] The argument must go to that extent. *Buddley v. Oliver* (1 C. & M. 219; 1 Dowl. P. C. 598), which may be relied upon on the other side, does not apply, because there was an order for speedy execution under the 1 Will. 4, c. 7, upon which the judgment was entered up in the vacation; and that statute contains no provision for staying the proceedings. *Nichols v. Chambers* (2 Dowl. P. C. 693) is distinguishable, because that was not an application to enter a suggestion on the roll, but to set aside the judgment signed in vacation, as having been signed too soon.

R. V. Richards, *contra*. Before the statute 1 Will. 4, c. 7, the rule certainly was that an application of this kind should be made before final judgment signed. But unless some qualification of that rule be now admitted, the consequence will be that such an application (which must be made to the Court, since the Judge at the trial has no power to grant it, *Buddley v. Oliver*) cannot be made at all. The practice in this respect must be considered as virtually altered by that statute, and, in cases before the sheriff, by the 3 & 4 Will. 4, c. 42, s. 18, which gives the power of signing judgment immediately on the return of the writ of trial.

Per Curiam. It is clear that if this had been a case at Nisi Prius, the defendant would not have been too late to enter a suggestion on the roll; and writs of trial must [278] stand in this respect on the same footing as causes tried at Nisi Prius. *Buddley v. Oliver* shews that the suggestion may be made even after judgment has been signed and execution issued on a Judge's order. The rule must be absolute.

Rule absolute.

IN THE MATTER OF OTHO MANNERS. Exch. of Pleas. 1839.—A party who seeks to traverse an inquisition in outlawry, which has been returned into the office of the Queen's Remembrancer, must be instructed by one of the sworn clerks, and not by an attorney of this Court.

[S. C. 7 Dowl. P. C. 516; 8 L. J. Ex. 256.]

A special writ of *capias utlagatum* had issued out of this Court, directed to the sheriff of Yorkshire, commanding him to inquire of the goods and lands of the defendant. The inquisition having been made, the writ and inquisition were duly returned, and carried into the office of the Queen's Remembrancer of the Court of Exchequer.

On a former day in this term, Cresswell and Hoggins, on the part of different mortgagees, obtained rules to shew cause why those parties respectively should not be at liberty to traverse the inquisition, or why it should not be quashed. The affidavits in support of the rules were entitled "In the Exchequer of Pleas," and the counsel received their instructions from attorneys of this Court.

Wightman now shewed cause, and objected that the affidavits ought to have been entitled "In the Office of the Queen's Remembrancer of the Court of Exchequer," and that the counsel in support of the rule ought to have been instructed by one of the sworn clerks. He cited Manning's Practice of the Court of Exchequer, p. 96, where it is said, "The claim is entered in the Court into which the inquisition is returned, which in modern times is usually the Court of Exchequer; and though a common law proceeding, the traverse is taken in the Remembrancer's office, on the equity side of the Exchequer, from which extents commonly issue."

[279] Per Curiam. This objection must prevail. The inquisition having been carried into the office of the Queen's Remembrancer, a party who seeks to traverse it cannot be heard, unless he is instructed by one of the sworn clerks. The opening

of this Court took place only in respect of the law, not the revenue side of the Court. The present rule is therefore a nullity, and must be allowed to expire.

SPECK v. PHILLIPS. Exch. of Pleas. 1839.—Where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would be a bar to the action, is not admissible in mitigation of damages.—Thus, where to an action for wrongfully discharging the plaintiff from the defendant's service, the defendant pleads only payment of money into court, he cannot prove, in mitigation of damages, that he discharged the plaintiff for misconduct.

[S. C. 7 Dowl. P. C. 470 ; 8 L. J. Ex. 249, 277.]

Assumpsit. The declaration stated, that in consideration that the plaintiff would enter the service of the defendant for one year, at a certain salary, the defendant promised to employ him : and averred, that the plaintiff did enter into the defendant's service, and that the defendant, before the expiration of the year, wrongfully discharged, him from his service.

The defendant pleaded payment into court of the sum of 5l. 5s., and that the plaintiff had not sustained damages to a greater amount than that sum. Replication, that the plaintiff had sustained damages to a greater amount than the said sum of 5l. 5s.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings in Michaelmas Term, the plaintiff having proved that he was discharged during the year, and without any notice, the defendants's counsel tendered evidence to shew that the defendant had discharged the plaintiff on a Saturday evening on the ground of drunkenness, and that on the Monday following he refused to return to his service. The plaintiff's counsel objected to this evidence, contending that the defendant could not prove, even in mitigation of damages, facts which might have been pleaded in bar to the action ; and the learned Judge being of that [280] opinion, rejected the evidence, and the plaintiff had a verdict.

Humfrey having obtained a rule nisi for a new trial, on the ground that this evidence ought to have been received,

Erle and Thomas now shewed cause. This evidence was inadmissible, even for the purpose of reducing the damages. It is admitted on this record that the discharge was wrongful, and the only question is as to the account of damages ; but the defendant now seeks to shew, in reduction of the damages, facts which would shew that the discharge was lawful. That which is admitted of record between the parties cannot be denied in evidence by either of them. Such a course would be most unfair to the plaintiff, who assumes the fact of his wrongful discharge to be admitted, and prepares no evidence on that point. On this principle it is, that, in an action for libel, if not guilty only be pleaded, the defendant cannot prove the truth of the libel, even in mitigation of damages. [Alderson, B. That is not so strong a case as this, because there is nothing contradictory to the proposed defence upon the record. In trover for a horse, and the only plea not guilty, can the defendant shew, in mitigation of damages, that it is not the plaintiff's ?]

Platt and Humfrey, contra. The same evidence was admissible under this issue as would have been admissible upon a writ of inquiry, after judgment by default. This was a mere inquiry of damages. Before the new rules, even payment of the debt could be given in evidence on a writ of inquiry, to reduce the amount to nominal damages. It is said the plaintiff does not come prepared to meet this defence ; but is it possible that the party is not prepared to prove all the circumstances attending his discharge ? The whole question in the cause is, under what circum-[281]-stances he was discharged, and what damages he is entitled to for it. The defendant, although he admits some wrong done, is surely entitled to shew that the greater part of the injury of which the plaintiff complains was brought upon him by his own act. Suppose he had gone immediately and obtained another service, could not that have been given in evidence on this issue ? The defendant was ready on the Monday to give him that very advantage of which he complains that he was deprived. A judgment by default only admits a right of action to some amount, and the circumstances attending the transaction are proper to be shewn in order to ascertain the real amount to which the plaintiff is entitled. But further, the misconduct alleged against the

plaintiff might not have turned out to be such as to be a bar to the action : it might not be sufficient misconduct to justify his dismissal, and yet such as to disentitle him from recovering the whole amount claimed. [Alderson, B. Is not the loss which the plaintiff sustains the same, whether it has arisen from one cause or another?] Not as against the defendant. If the misconduct proved amount to all but a justification, can it be said the plaintiff is entitled to the same damages?]

LORD ABINGER, C. B. It is a principle as old as my recollection of Westminster Hall, that matter of justification cannot be given in evidence in an action, in order to mitigate the damages. In an action of assault against the sheriff, if he pleads not guilty only, he cannot give evidence of his writ in mitigation of damages. The case of payment was the only exception to the rule. Now, this evidence, although tendered in mitigation of damages, was clearly intended to shew that the plaintiff was not discharged except for drunkenness; and that would have been a justifiable ground of discharge. I did not refuse to receive any evidence that the defendant himself afterwards offered to employ him; it is clear that would have been [282] admissible in mitigation of damages; but I thought that the proposed evidence, as it was put, amounted to a justification, and was therefore not admissible. In an action of assault, could the defendant prove, in mitigation of damages, under not guilty, that he committed the assault under fear of his life? If the plaintiff had had notice of this defence by a plea of justification, he might have had a dozen witnesses to disprove the drunkenness. It would be most unjust, therefore, to admit it.

ALDERSON, B. I am also of opinion that there is no ground for a new trial. The question is, whether it is competent to the defendant, in mitigation of damages, to give evidence to contradict a fact admitted on the record. If it were, the grossest injustice might be done; because the other party does not of course come prepared to prove the fact so admitted. That was the ground on which the new rule was made as to pleading payments in reduction of damages: otherwise, if the defendant had a case of false or sham payment, he had only to plead the general issue, and losing the costs of that issue, if the sum in dispute were of sufficient amount to induce him to do so, he might succeed by his evidence of payment in reducing the claim to nominal damages. But here the defendant seeks to go a step further. The proof of payment contradicts no fact averred in the declaration; but here he is seeking to give evidence to contradict a fact specifically averred in the declaration and admitted by the plea. That which the plaintiff has lost by his dismissal is precisely the same, whether lost by one cause or the other: if by a justifiable cause, he is entitled to no damages; if by an unjustifiable cause, how can the defendant shew that what he has lost is of less value to him? The thing lost is the same—it is the value of his opportunity of being employed if he conducts himself properly. An offer to employ him afterwards by a third party might well be given in evidence in mitigation [283] of damages; so also an offer by the defendant himself; and that he loses such situation by his own misconduct and folly; because thereby he increases the damage necessarily produced by the wrong of the other party.

GURNEY, B. I am of the same opinion. It is clear the evidence was offered to shew that there was no lawful discharge of the plaintiff; and I think it was not competent to the defendant to do so on this record.

MAULE B. I am of the same opinion. No question was made that the plaintiff was wrongfully discharged; and I think it was not competent to the defendant to give evidence to negative that which is admitted by the plea. If it were, the consequence would follow, that no defendant would ever plead specially; he would pay a shilling into court, and set up as many defences as he pleased, and, succeeding on any one of them, would get a verdict and his costs. This would be setting aside not only the new rules, but all the old rules which require special pleading in actions of this nature. I think, therefore, that the evidence was properly rejected, and the rule must be discharged.

Rule discharged.

TOLLIT v. SHERSTONE. Exch. of Pleas. 1839.—A declaration in case stated, that J. Y. delivered to the defendant, a livery stable keeper, a horse of the plaintiff to be kept by him for J. Y., and to be delivered upon the request of J. Y. on satisfaction of the defendant's demands; and it thereupon became and was the

duty of the defendant, on being paid his demand in respect of the horse, to re-deliver it on the request of J. Y.: averment, that J. Y. requested the defendant to deliver the horse to the plaintiff, and the plaintiff then paid the defendant all his demands in respect of the horse: yet the defendant did not, when so requested, deliver the horse to the plaintiff, but wrongfully kept and detained him, whereby the plaintiff lost the profit arising from the possession and employment of the horse:—Held, on motion in arrest of judgment, that the count was bad, as not shewing any duty in the defendant to re-deliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion.

[S. C. 7 Dowl. P. C. 455; 8 L. J. Ex. 244.]

Case. The declaration stated, that whereas heretofore, to wit, &c., a certain person, to wit, John Young the [284] younger, at the request of the defendant, caused to be delivered to the defendant, being a livery stable keeper, a certain horse of the plaintiff of great value, to wit, &c., to be taken care of and safely kept by the defendant for the said John Young the younger, for certain reward to the defendant in that behalf, and to be delivered by the defendant upon the request of the said John Young the younger, on satisfaction of all claims or demands of the defendant in respect of the said horse; and it thereupon then became and was the duty of the defendant, as such livery stable keeper as aforesaid, to re-deliver the said horse upon the request of the said John Young the younger, upon being paid and satisfied all his claims and demands in respect of the said horse: and the plaintiff further says, that afterwards, to wit, &c., the said John Young the younger requested the defendant to deliver the said horse to the plaintiff, and the plaintiff then paid to the defendant all his claims and demands in respect of the said horse, to wit, the sum of 2l. 4s., and then requested the defendant to deliver to him the said horse: yet the defendant, not regarding his said duty in that behalf, did not nor would, when so requested as aforesaid, deliver the said horse to the plaintiff, but, on the contrary thereof, wrongfully kept and detained the said horse from the plaintiff for a long space of time, to wit, for the space of four weeks next following; by means whereof the plaintiff, for and during all that time, lost and was deprived of the use, profit, and advantage which he otherwise would have derived from the possession and employment of the said horse, and also was hindered and prevented from applying his care, diligence, and attendance in and about the treatment of his said horse, and the said horse for the want thereof became and was lame and disordered, and much injured and lessened in value, to the damage &c. Pleas, not guilty, and that the horse was not the plaintiff's; on which issues were joined. At the trial before Lord [285] Abinger, C. B., at the London Sittings after Hilary Term, the jury found a verdict for the plaintiff, damages 15l.

In the following term, Kelly obtained a rule to shew cause why the judgment should not be arrested, on the ground that the declaration disclosed no right of action in the plaintiff, the right of possession of the horse appearing on the face of it to be in Young.

Thesiger and C. Wilson now shewed cause. This count may be supported after verdict, as an informal count in trover. It alleges that the horse was the plaintiff's; that he was entitled to the possession of it; that the defendant wrongfully detained it from the plaintiff after demand, and a damage to the plaintiff by reason of such detainer; and although it does not in terms allege a conversion, that is not of the essence of a count in trover, at least after verdict. A wrongful detainer is in effect a conversion. *Smith v. Goodwin* (4 B. & Adol. 413; 1 Nev. & M. 371) is a strong authority in support of this view. There the declaration contained six counts in case; the seventh count then charged that the defendants took and distrained for rent the goods of the plaintiff, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully and vexatiously again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use. It was held that this was an informal count in trover, and well joined with the other counts. Suppose the horse had been the property of Young, and he had given it to the plaintiff, who thereupon demanded it from the defendant; *Hudson v. Hudson* (Latch, 214) is a direct authority to shew that in such case the plaintiff might have maintained trover on a refusal to deliver it to

him. The case of *Irons v. Smallpiece* (2 B. & Ald. 551), where it was held that chattels do not pass by a verbal gift with [236]-out delivery, may be supposed to have shaken the authority of *Hudson v. Hudson*: but the latter case was not there cited, and in 2 Williams's Saunders, 47 a., n. (d), the learned editors observe upon that circumstance, and intimate that "it does not follow that the case of *Hudson v. Hudson* is overruled, for it may still be held that a donee by a parol gift acquires such a special property as to be able to maintain an action against a mere wrong-doer, though the donor may resume the thing given." This is even a stronger case; because here it is admitted that the general property in the horse was in the plaintiff, and that he had satisfied all the defendant's demand. [Lord Abinger, C. B. Are not all the allegations of this declaration consistent with the fact that Young's order to deliver the horse was an order to deliver him to the plaintiff as his, Young's, agent? If so, how can any duty result to anybody but Young?] There was a duty resulting to both parties, the plaintiff and Young, and either might bring the action: *Bell v. Chaplain* (Hardr. 321), *Fleuellen v. Wray* (1 Bulstr. 68). [Alderson, B. There all the parties agreed to the contract. The person suing for a breach of duty arising out of a contract, must be a party to the contract. Here the defendant is no party to any contract to re-deliver to the plaintiff; the duty arising out of the original contract is to re-deliver to Young or his order.] Then the order being given to deliver to the plaintiff, he becomes in law a party to the contract by payment of the defendant's demand, and so the duty results to him. After such payment, and demand of the chattel, the order was not revocable by Young. The rule of law is, that the judgment shall not be arrested, if there be any possible case in which the declaration will be good. It is said the plaintiff may be only Young's agent; but it is equally consistent with the declaration that the plaintiff is the owner, and that Young had the possession of the horse [287] for a temporary purpose only, and returned it to the plaintiff as owner: and there are circumstances leading to that view of the case; viz. that it appears the plaintiff paid the charges for keep, and that it is alleged that the plaintiff lost the profit to be derived from the employment of the horse. [Maule, B. For aught that appears on this declaration, the defendant had no notice of the plaintiff's property in the horse.] Knowledge that the property was the plaintiff's is not an essential ingredient in an action of tort; if a party deals with property not his own, he is liable to the true owner, whoever he may turn out to be: *Glasspoole v. Young* (9 B. & Cr. 697; 4 Man. & R. 533), *Garland v. Carlisle* (4 Bing. N. C. 7; 3 M. & W. 152). [Maule, B. Is a simple detainer and non-delivery on request, without notice that the chattel belongs to the party demanding it, a conversion?] The averment here is of a wrongful detainer. [Maule, B. That may be in breach of the defendant's contract with Young.] The plaintiff has a right of action independent of any contract, because it is his horse, and the defendant shews no excuse for detaining it.

Kelly, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B. I was at first disposed to think that this might be treated as an informal count in trover, in which case it would have been sufficient to sustain the verdict; but on consideration, I think it cannot be treated as such. The declaration alleges the contract as a contract by the defendant with Young, and as shewing the existence of a special property in Young, consistent with the general property in the plaintiff: if it do not, the plea denying the plaintiff's property could not be sustained. If the count did not shew the existence of Young's interest, it might be a sufficient count in trover, after verdict, as [288] only shewing more fully the special circumstances under which the horse came to the hands of the defendant; and his refusal to deliver it on the plaintiff's request might be a sufficient conversion. But here the plaintiff admits that Young had a certain interest in the horse, which authorized him to make a contract with the defendant: the defendant is in possession under Young, and there is no averment of notice to him that the horse is the plaintiff's. Can we then, upon this count as it stands, infer that the refusal to deliver amounts to a conversion? We must take it on the face of the count, that the plaintiff is a stranger to the defendant: if so, the question is, whether the demand by the plaintiff is of itself a sufficient allegation that Young's interest is at an end. I think not: because it is quite consistent that the plaintiff might go to demand the horse as Young's agent, and that the interest of the latter had not been in any way determined. Then as the declaration recognises such an interest in Young as enabled him to make a lawful

contract with the defendant, and there is nothing to shew the determination of that interest, we must take the wrong to be done to Young, and not to the plaintiff. Then, if the count be not maintainable as a count in trover, is it so on the ground of a duty resulting to the plaintiff? In the cases cited by Mr. Thesiger, the persons claiming were parties to the original contract; but here the only contract of the defendant was with Young, and the order by him was, for aught that appears, to deliver to the plaintiff as his agent, and the detention was from him: there is, therefore, no breach of duty to anybody but Young.

ALDERSON, B. I am of the same opinion. Treating it as a count in trover, the defect is, that there is no sufficient allegation of a conversion, but at most an allegation whence the jury might infer a conversion; viz. a request to deliver, non-delivery, and a detainer. That is not sufficient [289] in a count in trover. As to the other point, I think the only duty stated is a duty resulting to Young, and that it does not extend to the plaintiff.

GURNEY, B., concurred.

MAULE, B. It is clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract. With respect to the other point, the refusal to deliver, and subsequent detention, do not necessarily amount to a conversion, or to any wrong for which an action can be maintained. When the party merely keeps and detains the chattel, without any knowledge that it belongs to the other party, that, I think, is no wrong which gives any ground of action.

Rule absolute.

COLLINGBOURNE v. MANTELL. Exch. of Pleas. 1839.—To an action of debt for work and labour and materials, the defendant pleaded that he was indebted to the plaintiff in 11l. 6s. for work and labour and materials; and it was thereupon agreed between the plaintiff and defendant, that the plaintiff should lay a malt-house floor for the defendant at a certain price, and that the plaintiff should take for the work that had been done by the plaintiff for the defendant, and also for the laying of the floor, in malt and beer; and the defendant averred, that the plaintiff did lay the floor in pursuance of the agreement, and that he, the defendant, had always been ready and willing to perform his part of the agreement; and alleged the identity of the work to which the agreement applied, with that for which the action was brought:—Held, that the plea was bad; for that, as to the work previously done, it was a plea of accord without satisfaction; and as to the other, it amounted to the general issue.

[S. C. 7 Dowl. P. C. 518; 8 L. J. Ex. 251; 3 Jur. 847.]

Debt for work and labour, and materials, with a count for an account stated. Plea, as to the first count of the declaration, except as to the sum of 11l. parcel &c., that before the commencement of this suit, and before the making of the agreement hereinafter mentioned, the defendant was indebted to the plaintiff in the sum of 11l. 6s. for work before that time done, and materials for the same provided, by the plaintiff for the defendant at his request; and it was thereupon agreed between the plaintiff and the defendant, that the plaintiff should lay a malt-house floor at 2l. 10s. per square yard, and should find all materials [290] for the same, for the defendant, and that he, the plaintiff, should take for the work that had been done by the plaintiff for the defendant as aforesaid, and also for the laying the said malt house floor pursuant to the said agreement, and for all materials found in or about the said work, one half the value thereof in malt, and the other half in beer, in good articles, at the usual prices. The plea then averred, that the plaintiff did, in pursuance of the said agreement, lay the said malt-house floor, and find certain materials necessary for that purpose; and that the work in the first count of the declaration alleged to have been done, and the materials alleged to have been provided, (except so far as the same relates to the said sum of 11l.), are the work done, and materials for the same provided, previous to and in pursuance of the said agreement hereinbefore mentioned; and that he, the defendant, from the time of the making of the said agreement hitherto, hath always been ready and willing to perform the said agreement, and hath always been ready and willing to deliver malt and beer, in good articles, at the usual prices, in

satisfaction and discharge of the said work and materials, for which the plaintiff agreed to take malt and beer as aforesaid. Verification.

A similar plea was also pleaded as to 19l. 9s. 2d., the amount claimed for the laying of the malt-house floor, &c.

Special demurrer, assigning for causes, that the plea admits that the defendant was and is indebted to the plaintiff in the sum of 11l. 6s., and does not shew that the same is satisfied or discharged; and the facts set forth in the plea amount to a mere accord or agreement to satisfy the said sum of 11l. 6s., which, in law, is no answer or defence to the same; and also, that as to the residue of the debt in the first count mentioned, and to which the plea is pleaded, the facts stated therein merely amount to the general issue, and argumentatively deny the existence of the said residue of the debt, and give the plaintiff no colour to maintain his action in respect of such residue, &c.

Joinder in demurrer.

[291] Francillon, in support of the demurrer. This plea merely amounts to an accord without satisfaction. In *Allies v. Probyn* (2 C. M. & R. 408), a plea to a declaration in assumpsit, that the plaintiffs agreed, in consideration that the defendant would secure a certain portion of the debt by executing a mortgage of certain premises when called upon to do so, the amount to carry interest and be payable by certain instalments, that no proceedings should be instituted against the defendant for that amount, until default was made in payment of the instalments, with an averment that the defendant had always been ready to execute the mortgage, but had never been called upon to do so,—was held bad on general demurrer, as being a plea of accord without satisfaction. This case falls within the same principle. The agreement of the plaintiff to take out the debt in malt and beer was merely nudum pactum: *Wray v. Milestone* (ante, p. 21). The Court then called upon

D. Whateley to support the plea. This is not put as a plea of accord and satisfaction. A new consideration is shewn here, which distinguishes it from the cases cited. Fresh work is done by the plaintiff for the defendant, and thereupon the latter agrees to pay for that work, and also for the work previously done, in a particular manner. In *Good v. Cheesman* (2 B. & Adol. 328), an agreement between a debtor and his creditors for satisfaction of his debts, by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and to give a warrant of attorney as a collateral security, was held, though not strictly an accord and satisfaction, to be a good defence under the general issue, the debtor appearing to have been always willing to perform his part of the engagement, although the creditors had not acted upon it. There Parke, J., says: "I think that a mutual engagement like this, with an immediate remedy [292] given for nonperformance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient defence to the action." [Alderson, B. What do you say as to the residue beyond the 11l. 6s.? The plea is no answer to the declaration unless it answers all the plaintiff's demand.] It is to that that the other objection is directed, that the plea amounts to the general issue. But this being a new and substituted contract, the defendant is entitled to plead it according to the form of the contract itself. He must have pleaded it as to part of the demand, although he might have given it in evidence under the general issue as to the other part. A party is not bound to sever, in pleading, a contract which in its nature is entire. The case, therefore, is not within the principle that a plea bad in part is bad in toto.

Francillon, in reply. This plea does not set up a substituted contract for new consideration; it alleges no consideration for the defendant's employing the plaintiff to lay the malt-house floor; but merely states that, the defendant being indebted in 11l. 6s., it was agreed that he should pay it in a particular manner; and so also as to the residue, that it was agreed that the plaintiff should lay a malt-house floor, and be paid for that in a particular manner. These are two distinct and different contracts, and the one cannot be made part of the consideration for the other. [Alderson, B. As to the latter, the plea amounts to this—"I do not owe you the debt, because you agreed that I never should owe it you in money." That is the general issue beyond all doubt.]

LORD ABINGER, C. B. This plea does not state any consideration, but merely the fact of an agreement that the plaintiff would take the debt in malt and beer if the defendant would give it him so. It does not state that, in consideration of the

defendant's employing the plaintiff, he [293] agreed that he should pay him the amount of the debt in a particular manner. As to the rest of the demand, the plea states circumstances which, if they have any effect at all, go to bar the plaintiff's claim altogether. Part of the defence is accord without satisfaction, and the other part the general issue. The plea is therefore bad, and our judgment must be for the plaintiff.

ALDERSON, B., GURNEY, B., and MAULE, B., concurred.
Judgment for the plaintiff.

PERCIVAL v. COOKE. Exch. of Pleas. 1839.—In an action in one of the inferior Courts against an attorney, a plea to the jurisdiction, that he is an attorney of another Court, is still good without an averment that he is not an attorney of the Court in which he is sued.

[S. C. 7 Dowl. P. C. 500; 8 L. J. Ex. 258; 3 Jur. 728.]

This was an action of assumpsit against the defendant, an attorney; he pleaded to the jurisdiction, that he was and is an attorney of the Court of Queen's Bench, but without alleging in the plea that he was not an attorney of this Court. Special demurrer to the plea, assigning for cause the want of this allegation, and joinder in demurrer.

Peacock, in support of the demurrer. The plea is bad, because it does not negative the fact of the defendant's being an attorney of this Court. Since the Uniformity of Process Act, an attorney of the Court of Exchequer, though he be also an attorney of the Court of Queen's Bench, may be sued in this Court. In *Lewis v. Kerr* (2 M. & W. 226), the plea accordingly contained the allegation that the defendant was not an attorney of the Court of Exchequer. The defendant ought to shew clearly and by distinct averment that this Court has no jurisdiction over him. It is laid down in the books that a plea in abatement "is an odious plea, and the defendant must state every thing that can [294] oust the plaintiff of his right of suing:" *Casseres v. Bell* (8 T. R. 167). Thus, in a plea of nonjoinder of other defendants, the plea must expressly allege that they are alive; whereas in other cases the duration of life would be presumed; and a plea in bar, of nonjoinder of plaintiffs, need not aver that they are alive: *Cubell v. Vaughan* (1 Saund. 291 b., n. 4). [Alderson, B. That is because otherwise the defendant does not give the plaintiff a better writ. Maule, B. Is not this the old form of such a plea?] Before the Uniformity of Process Act, when the defendant set up his privilege of being sued in his own Court, and by bill, he shewed the privilege sufficiently by stating that he was an attorney of the Court of King's Bench.

Crompton, contra. The old form of pleading is not altered by the Uniformity of Process Act; and the old precedents clearly shew that it was sufficient to give the plaintiff a better writ, by shewing that the attorney could be sued in another Court: *Cainfield v. Warren* (1 Lutw. 639), *Barrington's case* (Hardr. 164), *Levingston v. Crompton* (Styles, 359), *Nere v. Nelson* (1 Keb. 256). And the defendant has still the same right as before the statute, to set up his privilege of attending in another Court; the old precedents are therefore still applicable. If the defendant were bound to exclude every inference, the replication would be nothing but a mere simple traverse. In a plea of infancy, the defendant is not bound to allege that the goods were not necessities. It is sufficient if the defendant state enough to give the plaintiff a better writ. The plaintiff may allege in his replication the fact that the defendant has not signed the roll of this Court, if the fact be so.

LORD ABINGER, C. B. I think that, upon the authorities, [295] we must take this plea to be good; and we have the less difficulty in so construing it, because if the plea contained the allegation that the defendant is not an attorney of this Court, and issue were taken upon it, the judgment for the plaintiff would be final, and the defendant would be barred from every defence. If the fact be that he is, the plaintiff may allege it in his replication.

ALDERSON, B., GURNEY, B., and MAULE, B., concurred.
Judgment for the defendant.

EVANS v. JONES AND ANOTHER. Exch. of Pleas. 1839.—Debt lies on an absolute covenant by A., to pay on a certain day a sum certain due from B. on mortgage.

[S. C. 7 Dowl. P. C. 482; 8 L. J. Ex. 257; 3 Jur. 705.]

Debt on an indenture, dated the 31st of August, 1837, made between Robert Roberts of the first part, the plaintiff of the second part, and the defendants of the third part, whereby the defendants covenanted, promised, and agreed with the plaintiff, that they, the defendants, their executors, &c., would pay to the plaintiff the sum of 100l., with lawful interest for the same, on the 31st of August then next ensuing, without any deduction or abatement whatever. Breach, in nonpayment of the said sum, with interest.

The defendants, in their plea, craved oyer of and set out the indenture of the 31st of August, 1837. It recited, that by an indenture of demise, dated the 4th of June, 1836, in consideration of the sums of 300l. and 100l. paid to Robert Roberts by the plaintiff, Robert Roberts mortgaged certain leasehold premises to the plaintiff, as a security for the re-payment of the said sums. The indenture then, after certain covenants of Robert Roberts, proceeded thus:—"And for the still more effectually securing the said sum of 100l. and interest to the said, David Evans (the plaintiff), his executors, &c., they the [296] said John Jones and Richard Hughes (the defendants) do hereby, for themselves, their executors, &c., covenant, promise, and agree to and with the said David Evans, his executors, &c., that they the said John Jones and Richard Hughes, their executors, &c., or some or one of them, shall and will well and truly pay or cause to be paid to the said David Evans, his executors, &c., the said sum of 100l., with lawful interest for the same, at or upon the 31st of August next ensuing, without any abatement or deduction whatsoever." The plea then averred, that the defendants were liable as sureties only for Robert Roberts, and not as principals.

Special demurrer, and joinder in demurrer. The point marked for argument on the part of the plaintiff was, that the covenant declared on being an absolute covenant to pay the amount specified therein at a day certain, the matter of the plea was no answer in law to the declaration.

J. Henderson appeared in support of the demurrer; but the Court called upon

Crompton to support the plea. This is a merely collateral engagement by the defendants to pay the debt of Roberts, upon which debt will not lie, but covenant only. [Lord Abinger, C. B. It is a covenant to pay a sum certain on a particular day; if payment be not made on that day, it becomes a debt.] The same reasoning would apply to an action against the drawer or indorser of a bill of exchange; and yet the authorities are strong to shew that debt cannot be maintained in such case, unless where there is an immediate privity between the parties. *Priddy v. Henbrey* (1 B. & Cr. 561; 3 D. & R. 165), and the cases there cited. A covenant to pay the debt of another person raises not a debt, but only a [297] collateral duty, for which an action can be maintained only on the covenant itself: *Randall v. Rigby* (4 M. & W. 130). This is a stronger case than that, because here the principal does not join in the covenant.

J. Henderson. This case is altogether distinguishable from *Randall v. Rigby*. There was there a rent issuing out of land, and a covenant by the mortgagor to pay; here there is merely an absolute covenant by the defendants that they or one of them will pay. In *Randall v. Rigby*, the covenant was, in effect, that the annuity should be primarily payable out of the land, and that the principal debtor should be primarily liable. Here there is no obligation on the alleged principal to pay, and no charge on the land. It is not even alleged that the deed was sealed by Roberts. It is a mere case of a direct covenant by A. to pay money, which it is alleged has been lent to B.

LORD ABINGER, C. B. I think this case is distinguishable from *Randall v. Rigby*; indeed, that case itself distinguishes this, because it was there admitted that an absolute covenant to pay a sum certain on a given day is a good foundation for an action of debt. It is quite a different case where there is a collateral and independent covenant to pay the debt of another person on nonperformance by him—as in the case of the assignment of a lease, alluded to in *Randall v. Rigby*. Here the defendants

entered into an absolute covenant to pay a given sum to the plaintiff on a given day, and therefore became his debtors on nonpayment.

ALDERSON, B., GURNEY, B., and MAULE, B., concurred.

Judgment for the plaintiff.

[298] *BARTON v. BROWN*. Exch. of Pleas. 1839.—Under the plea of not guilty in trover, the defendant cannot set up an absolute property in himself in the chattel, by sale from the plaintiff, although the only evidence of a conversion is a demand and refusal.

Trover for a pig. Plea, not guilty. At the trial before Williams, J., at the late Merionethshire Assizes, it appeared that the plaintiff, who was absent from home, having sent instructions to an auctioneer to sell by auction his farming stock, &c., at his residence near Tremadoc, in Merionethshire, he wrote a letter to his housekeeper there, fixing certain prices for which they were to be sold, amongst which the price of 4l. was assigned to the pig in question. The housekeeper, who could not read English, on the day before the sale, took the letter to the defendant's wife to read for her, and the defendant thereupon agreed with her for the pig at that price, which he paid her, and obtained possession of the pig; but whether he took it away did not appear. On the following day, it was found that the pig was of greater value, and the 4l. was tendered back to the defendant, and the pig demanded from him, but he refused to deliver it. Evidence was given to shew former sales by the housekeeper of live stock belonging to the plaintiff. It was however contended by the plaintiff's counsel, that under the plea of not guilty, the defendant could not set up a sale of the pig to him from the plaintiff. The learned Judge reserved the point, and left it to the jury to say whether the housekeeper had authority to sell the pig to the defendant. The jury found for the defendant, and leave was thereupon given to the plaintiff to move to enter a verdict for him for 4l.

In Easter Term, Jervis obtained a rule nisi accordingly, citing *Stancilffe v. Hardwick* (2 C. M. & R. 1), and *Vernon v. Shipton* (2 M. & W. 9).

Welsby now shewed cause. The defendant is entitled [299] to retain his verdict. The question in this case appears to be that which was expressly reserved for future consideration in the cases of *Stancilffe v. Hardwick* and *Vernon v. Shipton*; viz., whether, where the only evidence of a conversion is by proof of a demand and refusal, the defendant is not at liberty to shew that by reason of his claiming property in the chattel, the refusal to deliver it constituted under the circumstances no conversion. The plea of no property, in trover, means no property as against the defendant; *Owen v. Knight* (4 Bing. N. C. 54; 5 Scott, 307; 6 Dowl. P. C. 245). [Maule, B. The argument would be good if the defendant set up only a qualified right of property, as a lien. Alderson, B. The defendant here claims an absolute property in the animal, altogether inconsistent with the plaintiff's having any property in it, whereas the plea admits the property of the plaintiff.] In *Owen v. Knight*, Coltman, J., says that that plea denies only the right of possession, as contradistinguished from the right of property, and therefore the plea was held to be supported by proof of a lien. [Alderson, B. The allegation of the declaration is, that the plaintiff is possessed as of his own property, which is denied by the plea Maule, B. The defendant here says, "This is my pig, because I bought it from you:" that is altogether inconsistent with any property in the plaintiff.]

Per Curiam.(b) It is quite clear that the defendant could not, on this record, deny the plaintiff's property in the pig. The rule must be absolute.

Rule absolute.

Jervis and Townsend were to have argued in support of the rule.

[300] *WILLIAMS AND OTHERS v. GRIFFITH*. Exch. of Pleas. 1839.—Where, in an action for the balance of a banking account, the question between the parties was whether a disputed sum, above six years old, had been paid by the plaintiffs with the defendant's authority or not:—Held, that, the jury having found that the payment was authorized by the defendant, the plaintiffs were entitled to

(b) Lord Abinger, C. B., Alderson, Gurney, and Maule, Bs.

apply subsequent unappropriated payments of the defendant in discharge of the sum in question, so as to prevent the operation of the Statute of Limitations.

Assumpsit for money lent, money paid, interest, and on an account stated. Pleas, non assumpsit, and the Statute of Limitations. At the trial before Williams, J., at the last Carnarvon Assizes, it appeared that the action was brought to recover the sum of 530l., the balance of a banking account due from the defendant to the plaintiffs, bankers at Carnarvon. The only sum ultimately in dispute between the parties, was an item of 112l. which appeared to the debit of the defendant, of the date of May 1st, 1826, alleged to have been paid by the plaintiffs in discharge of a half-yearly payment of an annuity payable by the defendant to his brother. The defendant denied that this payment had been made by his authority; and it appeared that he had objected to the item so long ago as the year 1830 or 1831, and had never afterwards admitted his liability in respect of it. It was however clearly proved on the part of the plaintiffs, that the payment was expressly authorized by the defendant. It appeared also, that the custom of the bank was to send to their customers half-yearly statements of their accounts, and it was sworn that such accounts had been regularly transmitted by post to the defendant, from 1826 to 1830. Copies of several of these accounts were put in, which shewed that in that interval the defendant had made general payments on account much exceeding the item in question, although the actual balance was always against him. It was contended for the defendant, that under the circumstances, the Statute of Limitations was a bar to the plaintiffs' recovering this disputed item of 112l. The learned Judge thought otherwise, and under his direction a verdict was found for the plaintiffs for the whole amount claimed, leave being given to the defendant to move to reduce the damages by the sum of 112l.

[301] Jervis, in Easter Term, obtained a rule nisi accordingly, against which

R. V. Richards (Welsby with him), now shewed cause. The jury having found that this sum was paid by the defendant's authority, the plaintiffs have a right to apply his subsequent payments in discharge of it. The Court then called on

Townsend (with whom was Jervis), to support the rule. It must be admitted, that according to the rule laid down in *Clayton's case* (1 Meriv. 572), the defendant's payments not having been specially appropriated by him, the plaintiffs would have a right to apply them in discharge of any undisputed earlier items of their account. But here it appeared that this item had been disputed between the parties ever since 1830. [Alderson, B. The defendant had been regularly furnished with the account containing this item ever since it appeared to his debit.] It was not proved that he had received those accounts, and he alleges that he had not. [Alderson, B. The jury having found that the money was paid by his authority, there is an end of the question. If it was a good debt, it was a paid debt. The point is perfectly clear.]

Per Curiam. Rule discharged.(b)

[302] THORPE v. MATTINGLEY. Exch. of Pleas. 1839.—Where a composition for tithes, made in 1711, and duly confirmed by the Court of Chancery in 1715, was set aside by a decree of the Court of Exchequer in Equity, in a suit commenced within the time limited by the 2 & 3 Will. 4, c. 100, s. 3:—Held, that the rector might bring an action of debt on the 2 & 3 Edw. 6, for not setting out the tithes, before the determination of an appeal to the House of Lords against the decree of the Court of Exchequer.

[S. C. in Equity 2 Y. & C. 421; 9 L. J. Ex. Eq. 9: varied nomine *Plowden v. Thorpe*, 1840, 7 Cl. & F. 137; 1 West, 42. Dissented from, *Thorpe v. Plowden*, 1845, 14 M. & W. 542.]

Debt for the treble value of tithes not set out. Plea, nil debet, upon which issue was joined. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Michaelmas Term, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case which stated in substance as follows:—

(b) See *Mills v. Fowkes*, 5 Bing. N. C. 455.

The plaintiff was, on the 31st of December, 1831, instituted and inducted into the possession of the rectory of Aston-le-Walls, Northamptonshire, and has from thence and until the commencement of this suit been and still remains rector of the said parish. All the requisites necessary to support this action have been complied with on the part of the plaintiff, provided the circumstances hereinafter stated were not sufficient to defeat his claim.

The defendant was, at the time alleged in the declaration, the occupier and in possession of lands within the titheable places of the said parish, and on which titheable crops of corn, hay, &c., had been grown, and at the times mentioned in the declaration, the defendant cut down and carried away the same, without setting out the tithes thereof.

On the part of the defendant, it was proved that the said lands in his occupation formed part of an estate which, in the year 1711, was the property of one William Plowden, and afterwards descended to, and at the time of the commencement continued to be the property of, one Edmund Plowden, to whom the defendant was tenant. The case then set out an agreement made in the year 1711, between the then rector and William Plowden, (who was patron of the rectory and lord of the manor of Aston-le-Walls), for an exchange of the glebe lands of the rectory, which lay dispersedly among the lands of William Plowden, in an uninclosed district called Aston Field, for other lands of [303] the said William Plowden, and for a composition of 40l. for all the tithes of the lands of the said William Plowden, including those occupied by the defendant, to the then rector and his successors: which agreement was confirmed by a decree of the Court of Chancery in 1715, in a suit to which the ordinary, patron, and incumbent were parties: and the composition was received by the then rector and his successors, and by the present plaintiff up to and until Michaelmas 1832, and not since; and no tithes or tenths, or any payment in lieu thereof, except as aforesaid, have been received or taken for the said lands so exempted therefrom, including the lands occupied by the defendant, from the time of making the said agreement hitherto: and the said composition for tithes, at the time of the passing of the statute 2 and 3 Will. 4, c. 100, had not from the time of making thereof been set aside, abandoned, or departed from.

The case then stated that on the 7th June, 1833, a notice was served by the plaintiff on the several occupiers of titheable lands, that he did from that time require all the tithes, both great and small, to be set out and paid to him in kind; that on the 10th July, 1833, he filed his bill in the Court of Exchequer against the several occupiers of the lands exempted from tithes by the said agreement, and amongst others the defendant, praying that the defendants might be decreed to account for the single value of the tithes; and that on the 15th of February, 1837, the Court decreed that the defendants should account according to the prayer of the bill. Against this decree the defendants, on the 23rd of November, 1837, appealed to the House of Lords, and such appeal has not yet been heard, or judgment given upon it. The present action was commenced on the 15th of October, 1838.

The question for the opinion of the Court is, whether the plaintiff be, under the circumstances detailed in this case, entitled to retain the verdict. If the Court shall be [304] of opinion that he is, then the verdict entered up in his favour shall be retained, the value of the tithes cut down and carried away by the defendant to be settled by the junior counsel of the several parties: otherwise the verdict is to be set aside, and to be entered up in favour of the defendant.

Kelly, for the plaintiff. The question is, whether the agreement of 1711 be binding on the successors of the then rector. But the point has been already decided in favour of the plaintiff in this case, on the equity side of this Court.(a). He was then stopped by the Court.

Thesiger, *contrâ*. The agreement of 1711 has no doubt been decided to be invalid; but the question is, whether the defendant is not entitled to a verdict in this action, under the provisions of the 2 & 3 Will. 4, c. 100, ss. 2 & 3. The second section enacts, "That every composition for tithes, which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside,

(a) *Thorpe v. Mattingley*, 2 Y. & C. 421, where Alderson, B., held the agreement to be void under the stat. of 13 Eliz. c. 10, s. 3.

abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law." The third section provides, "That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced during the present session of Parliament, or within one year from the end thereof." But this latter section does not apply to the present case; it extends only to the very suit or action in question; and this action of debt for the treble value of the tithes was not commenced until long after the period limited by the clause. It is true that the plaintiff commenced, within the year [305] therein limited, another suit, viz. that in the Exchequer in Equity for the single value; but that suit is still subjudice, an appeal being yet pending against the decree of that Court. The composition, therefore, has not yet been set aside, and this action, having been commenced before the determination of the appeal, is at least prematurely brought, and the defendant is entitled to the verdict.

Kelly, *contra*. If the argument on the other side be well founded, and the plaintiff is bound to wait until the determination of the appeal in the equity suit, until he brings an action under the statute, then it would equally follow, that if a suit were brought by the plaintiff, upon which he obtained judgment and execution, and ten years afterwards he brought an action of debt for the treble value of tithes not then set out, the defendant might sue out a writ of error, and contend that the action was premature, on the ground of the question being still sub judice. The statute must receive a reasonable interpretation, and be construed to mean, that if the incumbent have commenced, within the time limited, any action or suit in which he has proceeded to and obtained a judgment, the case is excepted out of the operation of the second section.

LORD ABINGER, C. B. I think the reasonable construction of the statute is, that parties shall not be entitled to raise the question of the validity of a tithe composition confirmed in the manner mentioned in s. 2, unless they commence their action or suit within the time limited by the third section. The plaintiff has done this by his suit in the Exchequer, by the decree in which the composition has been set aside, and he is therefore entitled to our judgment.

GURNEY, B., and MAULE, B., concurred.

Judgment for the plaintiff.

[306] BEVANS *v.* REES. Exch. of Pleas. 1839.—Where the defendant, who owed the plaintiff 108*l.*, for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount, sent a person to the attorney, who told him he came to settle the amount due on the notes, and desired to be informed what was due; and laid down 150 sovereigns, out of which he desired the attorney to take the principal and interest; but the attorney refused to do so, unless a shop account, due from the plaintiff to the defendant, were fixed at a certain amount:—Held, that this was a good tender of the 108*l.*

[S. C. 7 Dowl. P. C. 510; 8 L. J. Ex. 263; 3 Jur. 608.]

Assumpsit by indorsee against indorser of two promissory notes; with counts for money lent, interest, and on an account stated. The defendant pleaded a tender, on which issue was joined. At the trial before Coleridge, J., at the last Pembrokeshire Assizes, it appeared that the plaintiff's attorney, a Mr. Rees, had written to the defendant, demanding payment of the principal and interest due upon the notes, amounting to about 108*l.* There was at this time a dispute between the plaintiff and the defendant respecting the amount of a shop bill for goods, owing from the plaintiff to the defendant. On the receipt of the attorney's letter, the defendant sent his shopman to him, who informed him that "he came to settle for the two notes, principal and interest, and he wished to know what was due." He put down 150 sovereigns on the attorney's desk, and told him to take the principal and interest. Mr. Rees said he would not take it unless the defendant would consent to fix the shop account at 8*l.* 13*s.* The shopman said, he would pay the notes and interest without reference to the shop account, and desired Mr. Rees to take what he said was due. This he refused to do, and the shopman thereupon took away the money again. This was the account of the transaction as given in evidence by the shopman, who was however contradicted in some particulars by Mr. Rees. The learned Judge left it to the jury to say, whether

the tender was unconditional, and whether the attorney made any objection on the ground of the shopman's not specifying the amount due on the notes. The jury having found a verdict for the defendant,

Chilton, in Easter Term, obtained a rule nisi for a new trial, on the ground that this was not a good tender of [307] the 108l.; citing *Strong v. Harvey* (3 Bing. 304; 11 Moore, 72), and *Brady v. Jones* (2 D. & R. 305).

Evans now shewed cause. The jury having found for the defendant, it must be taken that they believed his witness; and upon his evidence this was a sufficient tender. It is expressly laid down in the third resolution in *Wade's case* (5 Rep. 115), that "if a man tender more than he ought to pay, it is good, for omne majus continet in se minus; and the other ought to accept so much of it as is due to him: quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est: et in majori summâ continetur minor." The doctrine so stated has been recognised by many subsequent authorities: *Douglas v. Patrick* (3 T. R. 683), *Black v. Smith* (Peake's N. P. C. 88), *Cadman v. Lubbock* (5 D. & R. 289), *Dean v. James* (4 B. & Adol. 546; 1 Nev. & M. 393). It is said that the tender here was conditional. If the party had said, "I will pay you, if you will tell me the amount," that might have been so; but all that the witness did was to desire the plaintiff's attorney himself to take the sum due out of the amount tendered. But, at all events, it is a question for the jury whether a tender be conditional or not; *Eckstein v. Reynolds* (2 Nev. & P. 256; 7 Ad. & E. 80); and here the jury have found that question, which was expressly left to them, in favour of the defendant. The cases cited on moving for this rule are distinguishable. In *Strong v. Harvey*, one sum was tendered in full of several demands, for different sums, and against several persons, which clearly did not support a plea of tender of a certain portion of that sum for one of them; and in *Brady v. Jones*, the defendant, at the same time that he tendered the money, (viz., seven sovereigns, in payment of a demand of 6l. 17s. 6d.), de-[308]-livered also a counter-claim on the plaintiff of 1l. 5s.: that was clearly a tender coupled with a condition of payment of the counter-demand.

Chilton and T. W. Hill, in support of the rule. In order to make a tender valid, two things are necessary: first, there must be a specification of the amount due; and next, an express offer to pay it. *Ryder v. Lord Townsend* (7 D. & R. 119), *Alexander v. Brown* (1 C. & P. 288), *Evans v. Julkins* (4 Campb. 156). The debtor has no right to place a heap of money before his creditor, and by requiring him to take out of it the amount due, at once to make him admit that no more is due, and to throw upon him the onus of not taking too much. It is as easy for the debtor to ascertain what is due as the creditor. In *Wade's case*, and the other authorities cited for the defendant, the money was produced in such a manner that the sum due was separable from the mass by the creditor: and in *Wade's case*, the actual amount due was in fact tendered.

LORD ABINGER, C. B. I think there is no ground for making this rule absolute. I am not disposed to lay down general propositions, unless where it is necessary to the decision of the case; but I am prepared to say, that if the creditor knows the amount due to him, and is offered a larger sum, and, without any objection on the ground of want of change, makes quite a collateral objection, that will be a good tender. Here it is admitted that Mr. Rees, who was the agent of the plaintiff, knew the amount due for principal and interest on the notes. The shopman (whose evidence was believed by the jury) asked him to take out of the money produced the amount of them. He refused to do so, or to tell him what was due, except on a condition he had no right to impose, viz. that the balance of a shop account should be fixed at a certain amount.

[309] ALDERSON, B. I am of the same opinion. Mr. Rees puts it upon the ground, that he would not name the amount due, unless the other party would admit a set-off to a certain amount. That was a condition he had no right to impose. Then the tender in effect is—"I will pay you what you say is due, if you will tell me; if not, take what you say is due." I think that is a good tender.

GURNEY, B. I am of the same opinion, that this was a good tender.

MAULE, B. I am of the same opinion. No doubt, a tender must be of a specific sum, on a specific account: and if it be upon a condition which the creditor has a right to object to, it is not a good tender. But if the only condition be one which he has no right to object to, and he has still power to take the money due—as if the condition were, "I will pay the money if you will take it up," or the like—that does not invalidate

the tender. Here the defendant offers the plaintiff the option of taking any amount which he says is due, and only offers it in satisfaction of that amount: there is no condition, therefore, which the plaintiff has a right to object to.

Rule discharged.

LEACH v. SIMPSON AND ANOTHER. Exch. of Pleas. 1839.—The rule, that a written deposition taken before a magistrate under the 7 Geo. 4, c. 64, s. 3, is the best evidence of the statement of the witness, is not confined to the proceeding in which the deposition is taken, but extends to all proceedings, civil as well as criminal, in which it is sought to adduce the statement of the witness in evidence.

[S. C. 7 Dowl. P. C. 513; 3 Jur. 654.]

Trespass for assault and false imprisonment. There was a plea of not guilty by both defendants; and the defendant Simpson also pleaded, that he was acting manager of a theatre, at which the plaintiff was engaged to perform in a certain piece about to be exhibited; that the [310] plaintiff unlawfully went into the boxes set apart for visitors, and from thence across the pit and benches upon the stage, and conducted himself violently and improperly, and, without the consent of the defendant Simpson, addressed the audience, and excited them to riot and breach of the peace; and that a portion of the audience, excited by the said conduct of the plaintiff, proceeded to make a great uproar and disturbance, and to act in violation of the peace, &c. &c.; whereupon the defendant Simpson, as such manager, in order to preserve the peace, and to prevent further mischief, gave the plaintiff in charge to the other defendant, a constable, who took him into custody, &c.: which are the same supposed trespasses, &c. Replication, *de injuriâ*.

At the trial before Lord Denman, C. J., at the last Warwick Assizes, the defendant, in support of his justification, proved the violent conduct and language of the plaintiff, as described in the plea, and the disturbance that ensued in consequence; and that the plaintiff was thereupon taken into custody, and on the following morning brought before a magistrate on a charge of riot. The plaintiff's counsel proposed to ask some questions as to what had been said by the defendant Simpson before the magistrate, to shew that he admitted having directed the imprisonment of the plaintiff; but as it appeared that his statement had been taken down in writing, the defendants' counsel contended that the deposition must be put in, and that the matter of it could not be proved by parol; and the Lord Chief Justice being of that opinion, rejected the evidence. A verdict having been found for the defendants,

Waddington, in Easter Term, moved for a new trial, on the ground, amongst others, that this evidence was improperly rejected. The rule, that the deposition of the witness is the only admissible evidence of what is stated by him [311] before a magistrate, applies only to criminal cases, and not where it is sought to make the proceedings evidence for a collateral purpose in a civil action. The 7 Geo. 4, c. 64, s. 3, provides, that in cases of misdemeanor, "the justices shall take the examination of the person charged, and the information upon oath of those who shall prove the facts and circumstances of the case, or so much thereof as shall be material, in writing, before he shall commit to prison or require bail from the person so charged." But that enactment only makes the deposition the sole evidence in the particular case as to which it is taken, and does not exclude oral testimony of what was said by the party before the magistrate, as an admission against his interest, in a civil suit. The mere fact of the statement being taken down by another person clearly would not make the writing the only evidence; it must be said that it is so, because it is taken down by the magistrate, as a judicial act. But neither does the circumstance of testimony having been noted down by a person in authority, exclude all other proof; otherwise a judge's notes would be the only evidence, on an indictment for perjury, of the evidence given on a trial *at nisi prius*. [Lord Abinger, C. B. A judge only takes notes for his own private convenience; there is no law which requires him to do so. I have always understood that wherever a magistrate had jurisdiction, you cannot ask what was said before him without producing the deposition.] It would not be the duty of the magistrate, under the statute, and for the purpose of the criminal proceedings, to have the deposition signed by the defendant; but if it was not signed, can it be deemed sufficiently authenticated to exclude other evidence of what he said?

LORD ABINGER, C. B. I have always understood the law to be, that when testimony has been reduced to writing by a person of competent authority, you must [312] inquire, in the first instance, what the witness said by the writing: and the rule is the same, whether the evidence be taken upon interrogatories in Chancery, or by depositions before a magistrate. I never before heard it objected that the rule does not apply when it is sought to use the evidence in civil cases; but there can be no doubt that it does.

PARKE, B. The rules of evidence must be the same in civil as in criminal cases. The presumption is, until the contrary is shewn, that the magistrate took down all that was material in the testimony of the witness. The written deposition, therefore, is the best evidence of what he said, and must first be produced, before you can inquire by other means as to what passed on the occasion; then if it appear, on production of the deposition, that any particular statement alleged to have been made is not contained in it, you may add to it by parol evidence of that statement. As to the signing, as the act only requires that the deposition should be signed by the magistrate, the signature of the witness is not requisite to make it the best evidence.

ALDERSON, B., and MAULE, B., concurred.

The rule was therefore refused on this point; but on another ground a rule was granted, which was discharged after argument in this term.

[313] *BRAITHWAITE v. WILLIAM SKINNER*, the Elder, *WILLIAM SKINNER*, the Younger, AND *GEORGE SKINNER*, SUED WITH *ROBERT ELLERSON*. Exch. of Pleas. 1839.—A testator devised lands in fee, after the determination of certain life estates, to A., B., and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to and to be equally divided among the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands, to mortgagees for 500 years:—Held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed.

[S. C. 8 L. J. Ex. 240; 3 Jur. 1054.]

Debt. The declaration stated, that one George Ellerson, being seised in his demesne as of fee in certain messuages and lands, by his will devised the same, subject to certain life estates of his sisters, unto and to the use of his nephews George Ellerson, Thomas Ellerson, and the defendant Robert Ellerson, and their respective heirs, as tenants in common, subject nevertheless to, and charged (amongst other things) with the payment of the sum of 200*l.*, which he the said George Ellerson, the uncle, thereby bequeathed to be equally divided between and amongst all and every the child and children then living, and thereafter to be born, of his the testator's niece Isabella Braithwaite, and that the shares of her children should be considered vested interests when they should respectively attain the age of twenty-one years: that the said legacy should be paid in the manner following, that is to say, the shares of such of the said children as should be under twenty-one years at the decease of the testator's sisters and his said niece Isabella Braithwaite, or the survivor of them, to be paid as and when he, she, or they respectively should attain that age; and the share of such of them as should attain the age of twenty-one years during the lives of the testator's sisters, his niece, or the survivor of them, to be paid within six months after the decease of such survivor. The declaration then averred, that the testator George Ellerson died seised without revoking his will; that his sister Mary Ellerson died, and Isabella Ellerson survived her; that Isabella Braithwaite, the testator's niece, died, and Isabella Ellerson survived her; and that in the lifetime of Isabella Ellerson, by a certain indenture made between the testator's nephews, George Ellerson and Thomas El-[314]lerson of the one part, and the defendants William Skinner the elder, William Skinner the younger, and George Skinner, of the other part, the said Thomas and George Ellerson, in consideration of the sum of 500*l.* due and owing to the defendants (the Skinners), from the said Thomas and George Ellerson, on the balance of a certain account, did grant, bargain, sell, and confirm to the defendants (the Skinners), their executors, administrators, and assigns, all that the remainder or reversion expectant upon, and to take effect in possession immediately from and after the decease, or other sooner determination of the estate for life, of the said Isabella Ellerson, of and in the

two third parts of the message and lands to which the said George and Thomas Ellerson were entitled under the will of the said George Ellerson the uncle : to hold the same unto the said defendants (the Skinners), their executors, administrators, and assigns, for the full term of 500 years, subject to the life estate of the said Isabella Ellerson : by virtue of which said indenture, the said remainder or reversion of the two undivided third parts in the said message and lands, was vested in the defendants (the Skinners), the further reversion thereof belonging to the said George and Thomas Ellerson : that the said Isabella Ellerson died, after whose death all the defendants entered into and upon the said messages and lands, and the said Robert Ellerson then became and was, and from thence hitherto hath been and still is, seised in his demesne as of fee of and in one undivided third part of and in the said messages and lands, and the pignor of the profits thereof, and the said defendants (the Skinners) then became and were, and thence hitherto have been and still are, possessed as joint tenants of two other undivided third parts of and in the said messages and lands, for all the residue and remainder of the said term of 500 years : that the said messages and lands so devised were and are of much greater value than the sum of 200l. : that the [315] plaintiff was one of the eight children of Isabella Braithwaite ; that she attained the age of twenty-one years after the death of Isabella Ellerson : and that by means of the premises, the defendants became liable to pay the plaintiff the sum of 25l. being the plaintiff's share of the said sum of 200l., together with interest. Breach, in non-payment of the said sum of 25l. and interest.

Plea, that the said George Ellerson, the uncle, also charged the said messages and lands with the payment of the further sum of 200l., to be divided amongst the children of his niece Mary Robinson, and with the payment of the further sum of 200l. to be divided amongst the children of his niece Sarah Ellerson, and directed that the shares of the children of the said Mary Robinson, Sarah Ellerson, and Isabella Braithwaite, in the said legacies of 200l., and 200l., and 200l., should be vested interests when they should attain the age of twenty-one years : that the said testator George Ellerson also charged the said messages and lands with the payment of three annuities of 10l. each to the said Mary Robinson, Isabella Braithwaite, and Sarah Ellerson, with powers of entry and distress for securing the same : that Mary Robinson died in the lifetime of Isabella Ellerson, leaving six children her surviving, who respectively attained the age of twenty-one years before the commencement of the suit, and were still living : That the defendants, since the death of Isabella Ellerson, have not been in the possession or occupation of the said messages and lands, nor have they received the rents or profits of the same, to an amount equal to the said several legacies of 200l. and 200l. so given and bequeathed to the children of the said Isabella Braithwaite and Mary Robinson, or sufficient to pay or satisfy the said legacies and other charges in the said will and in this plea mentioned. Verification.

Replication, that the defendants were and have been, since the death of the said Isabella Ellerson, and still are, [316] in possession of two undivided third parts of the said messages, lands, and hereditaments in the declaration mentioned ; concluding to the country.

Special demurrer, and joinder in demurrer. Besides the causes of demurrer stated to the replication, the defendants (the Skinners) stated the following points for argument against the sufficiency of the declaration :—

That an action of debt is not maintainable for the recovery of the plaintiff's proportion of the legacy, without some express and valid agreement by the defendants for payment of the amount, which is not alleged :

That such an action cannot be maintained against the above-named defendants, they not being devisees mentioned in the will, or charged with the payment of the legacy, being possessed of a chattel interest for a term of years only in a portion of the property, and it being alleged in their plea, and not denied by the plaintiff, that they have never been in occupation of any part of the property, or received sufficient monies to satisfy the charges :

That such action is not maintainable against these defendants, who are only entitled to a leasehold interest, jointly with the other defendant, who is alleged to be tenant in common in fee-simple of one-third of the property :

That if any action be maintainable, it should be brought against all the tenants in fee-simple ; and also that all the persons entitled to proportions of the entire legacy of 200l. ought to be joined as co-plaintiffs :

That the action is not maintainable without its being alleged and shewn by the plaintiff,—and which has not been done,—that the estate of the defendant Robert Ellerson, together with the interest of the other defendants, were of equivalent or greater value than the said legacy of 200l.:

That the plaintiff ought to have alleged that the property, or the estates and interest of the defendants therein, was of sufficient value to satisfy all the charges.

[317] That the testator's personal estate is not shewn to have been exhausted, or to have been exonerated from payment of the legacy in question, and the declaration is in this respect also insufficient.

Wightman, in support of the demurrer. First, no action at law is maintainable for the legacy claimed by the plaintiff. This is a mere pecuniary legacy; it differs from the case of a bequest of money payable solely out of the land. It is indeed charged on the land, but is payable not only out of the real estate, but also out of any funds in the hands of the executors. Howsoever, therefore, the legatee may be entitled in another way to make the land available, in law the legacy is payable out of the general funds of the estate. The bequest to the legatees is general; the subsequent devise to the nephews is charged with the payment of the legacies: the legatees might go, therefore, against the general assets of the testator. [Parke, B. It is in effect, "I charge my land with 200l., which 200l. I bequeath to certain persons."] If the land were insufficient to satisfy it, they would have a right to resort to the personalty: there is no exclusion of the personal estate as a fund to which they are to look. [Maule, B. It is not an absolute devise to the nephews, but subject to the payment of the 200l.; so that they get the estate minus the 200l.] But the money is not made payable out of that specific fund only; it is but a charge upon the realty, which does not take away the right of the legatees to resort to the personalty.

But secondly; conceding that the legacy is payable solely out of the land, the cases which shew that a legacy cannot be recovered at law, apply in principle. Specialty creditors would have a right to come upon this fund. The same reasons of convenience and justice, which were relied on by Lord Kenyon in *Deeks v. Strutt* (5 T. R. 690), equally apply [318] to the case of a legacy charged on land. *Atkins v. Hill* (Cowp. 284) was decided on the ground that an express promise to pay the legacy was admitted by the demurrer; and its authority appears to have been denied in *Jones v. Tanner* (6 B. & Cr. 542). *Nicholson v. Sherman* (1 Sid. 45; T. Raym. 23; 1 Keb. 116) is another authority to shew that no action can be maintained for a legacy. The difference is between a bequest of a sum payable out of land, and of a sum charged on land: in the former case it may well be said the terretenant is bound to pay. The dictum of Lord Holt, in *Ewer v. Jones* (Salk. 415; 2 Ld. Raym. 937; and see 6 Mod. 27), will be relied upon on the other side,—where it is said, that if money be devised to be paid out of certain lands, the devisee may have an action of debt against the terretenant for the money, upon the statute of 32 Hen. 8, c. 1, of wills. In the report in Lord Raymond, this dictum is appended to the case of *Ewer v. Jones*, with the subject-matter of which it has no connection whatever; in 6 Mod., it is reported as an anonymous case; and it appears to have been altogether extrajudicial. But if it were otherwise, it is not strictly applicable here, because this is not the case of money devised to be paid out of land, but only charged upon it.

Thirdly; at all events the action is not maintainable against the defendants, the Skinners, who are merely termors for 500 years by assignment from two of the devisees in fee. There is no privity of contract or of estate between the legatee and the termors, so as to entitle her to sue them in debt. [Parke, B. Does not the terretenant mean the owner of the freehold?] Yes, for this purpose. If the action will lie against these termors, it might equally be maintained against an ordinary tenant from year to year. On this point the Court called on

[319] Martin to support the declaration. The consequence of the action being maintainable at all, is, that it must be brought against all the parties who are in the possession of the land. It is assumed for the purpose of this part of the argument, that the land is the sole security, and that there is no distinction between the cases of a bequest charged on and payable out of the land. Lord Holt's dictum in *Ewer v. Jones* was cited with approbation by Lord Ellenborough in *Webb v. Jiggs* (4 M. & Sel. 119), and was recognised by this Court in *Hopkins v. Mayor of Swansea* (4 M. & W. 620); see also Com. Dig., Action on Statute (A.), 12, and Debt (A.). Actions against executors for legacies chargeable merely on the personalty are distinguishable:

the personal estate is administrable in the Ecclesiastical Court only; and on that principle the case of *Jones v. Tanner* proceeded. But this is a case depending on the Statute of Wills, which, when it gave the power of devising lands, gave, as incidental to that right, a power to charge them in favour of another person. If the general principle, then, be established, that the action of debt lies in such a case as this, the next question is, against whom? Lord Holt says, against the terretenant. A charge upon the land by devise may be assimilated to the case of a charge by a recognizance under a statute merebant or statute staple; which, by the statute of Westminster, 13 Edw. 1, c. 18, and subsequent statutes, constitutes a lien on the land; and in such case the proceedings must have been against all the lands, and the heir might insist on the joinder of the other parties in possession: *Underhill v. Devereux* (2 Saund. 68), *Harbert's case* (3 Rep. 11). In this case an execution might issue against the land itself. [Parke, B. How is your remedy against the land?—you must have a general judgment, and general execution. A judgment or recognizance binds the land by force of the statute of Westminster.] There is [320] here no personal contract, but the defendants are bound by reason of their possession of the lands at the time when the legacy was payable. The judgment is to be enforced like that upon a bond against an heir, where the execution is limited to the value of the lands, and the heir comes in and specifies the lands descended to him: *Davy v. Pepys* (Plowd. 439), (where the form of execution in such case is given). There would be no privity between a subsequent purchaser of the land, and the creditor under a statute staple: so here, there is no privity between the party in whose favour the charge is made and the owner of the land: his liability arises by reason of the possession of the land. [Parke, B. The Statute of Westminster expressly gives an execution against the land—the Statute of Wills does not; it only imposes an obligation on the terretenant to pay, which gives an action of debt against him, according to the authority of Lord Holt: but there is nothing to limit the execution to the land; it is general against the person or estate of the party.] It is clear that the termors would be liable in equity: *Watkins v. Cheek* (2 Sim. & Stu. 199). All that appears on the declaration is that they are owners for 500 years, subject to no rent. The terretenant does not mean the freeholder. [Parke, B. The meaning of the term may vary according to the subject-matter to which it is applied. In scire facias, it means the owner of the fee: 2 Saund. 9 a., n. (9).] The word seems rather to be used for the purpose of distinguishing between the party who is strictly tenant of the land, that is, the freeholder, and the party in actual possession. No person ought to be omitted as a defendant who is entitled to any present interest in the land. [Maule, B. The 500 years' term may determine in one year. Is the creditor to hold the land afterwards till the debt is paid, as against the reversioner?] Yes, as under an elegit; his possession would be liable to be questioned by an eject-[321]-ment. If debt lies for a legacy charged on land, the only mode of giving effect to that remedy is by giving it against all the parties who have taken on themselves the possession of the lands for their own benefit.

Wightman, in reply. The analogy sought to be derived from the proceedings on a recognizance, or in an action against the heir, is not applicable here. There, the proceeding is for execution out of the land, and no personal liability is incurred; but there is nothing in the form of this action to vary the ordinary judgment: it would be, that the plaintiff recover his debt and damages against the defendants, and their persons might be taken in execution upon it. The note to *Jefferson v. Morton* (2 Saund. 9 a., n. (9)) shews clearly that by the terretenants is meant the tenants in fee-simple. If they have aliened, they will have had the benefit of the land; if they have demised, they are nevertheless the owners: but here the defendants, the termors, are not even occupiers, but only possessed of a term of 500 years in the land. They have an intermediate interest between the owners of the freehold and the actual occupiers; and therefore on neither construction of the word are they terretenants. They certainly are involuntarily, but they have no notice of the charge; and the argument on the other side goes to this extent, that if they were only tenants from year to year, without notice of any incumbrances, they might be taken in execution for the whole debt. Besides, this land is charged with other payments, and it is not alleged in the declaration that the value of the land is equal to all the charges, but only to these particular charges; and if this action lies, there would be no defence to actions by other persons having charges on the land. This shews that the plaintiff's remedy must be in equity; since otherwise the defendants may be made [322] liable to all

the charges, although exceeding the whole value of the land. In *Duppa v. Mayo* (1 Saund. 275), an action was certainly held maintainable against the assignee of an executor for a legacy, after express assent by the executor; but that case shews that the action must be against the person having the whole estate. The very circumstance that an action like the present has never been brought, affords a strong presumption that no such action can be supported in law. [He admitted that the plea was not sustainable.]

LORD ABINGER, C. B. I entertain great respect for the authority of Lord Holt, and should be disposed to support it as far as possible; and if the case appeared to be one in which any immediate interest in the land was given to the party benefited by the will, it seems reasonable that he should have also any legal remedy that immediately results from the interest so given in the land. But it never could be the meaning of Lord Holt, that whatever interest was given in the shape of a legacy, although charged on land, might be the subject of an action at law. Suppose a party took but an equitable estate, and he was chargeable out of it to different persons, you could not at law take notice of their interest, although they might have a remedy in equity. But giving the fullest effect to Lord Holt's dictum, I should say it could only take effect in a case of this sort,—where it appeared clearly and distinctly that the parties against whom the action was brought had taken possession of the estate, and that the estate which was in their hands was competent to discharge the incumbrances upon it; for I take it, if the action were maintainable at all, it must be, like any other ordinary action of debt, followed by a judgment against the defendants which makes them personally liable. I cannot adopt the analogy which Mr. Martin suggests, that this is like an action against an heir, or a proceeding by scire [323] facias on a judgment against the land; I see no analogy in the nature of the charges, or in the mode of their creation. I do not see why we are to go out of the way to give a remedy of a different kind from that which the common law gives, in a proceeding which is merely an action against the person. It appears to me a most unjust thing to allow the action to be maintainable against any but the person who takes the interest in the land under the devise, and who takes it subject to the obligation of paying the money. If, therefore, Lord Holt's dictum is to have any effect at all, it can only be in a case where the devisee of the land is himself the defendant in the action, and where it should appear that all the other interests are duly satisfied, and there is sufficient to pay the particular charge out of the land. I must say, however, that I entertain very considerable doubt about the propriety of the dictum, taking it to the extent in which it is given in the different Reports. I do not apprehend it was the intention of the Statute of Wills, that all the interests mentioned therein as capable of being devised, were equally to be taken notice of at law; where the interest is such as the law notices, the law will give a remedy for it; but this is more like an equitable interest created in the nature of a mortgage. Where the owner of an estate, before the Statute of Wills, gave any interest of this nature, and by some instrument granted a remedy sufficient to enable the grantee to recover the proceeds against the land, as in the case of an annuity, a right of action might follow; but where it is merely a charge upon the land by will, it is difficult to say the party can have any other than an equitable remedy for it. Upon the whole, I am of opinion that the judgment in this case must be for the defendants.

PARKE, B. I am also of opinion that in this case the [324] defendants are entitled to our judgment, and that the declaration (without adverting to the other pleadings) is bad in substance, because it does not disclose a sufficient cause of action against the defendants. The cause of action stated arises out of the will of George Ellerson. [His lordship stated the material parts of the will.] The interest of the defendants then appears to be this:—after the making of the will, and after the death of the testator, George and Thomas Ellerson, his two nephews, dispose of their estate in reversion to the defendants William Skinner and George Skinner, for the term of 500 years. At the time the legacies became payable to the different children, it appears that the defendants were entitled to this property, one as the owner in fee of an undivided third part, and the other as termors of two other undivided third parts for the term of 500 years; and the question is, whether any action of debt will lie, founded upon the Statute of Wills, against these defendants. I should have had no difficulty in saying that no action of debt would lie under these circumstances, were it not for the opinion of Lord Holt, which has been reported in several cases, and was

cited in the case of *Webb v. Jiggs*, without any objection being stated to it as an authority. I apprehend, indeed, that, subject to a limitation, which however excludes this case, there is no objection to it. What Lord Holt says (extrajudicially) in the case of *Ewer v. Jones*, is this: "A devisee may maintain an action at common law against the terretenant for a legacy devised out of land. I make no question of it, for where a statute, as the 32 & 34 Hen. 8, of Wills, gives a man a right, he shall have an action to recover it of consequence; because his right is created by act of Parliament; and where an act of Parliament creates a right, or forbids a thing to be done, an action lies ex consequenti on the statute for the party grieved." Now with that doctrine I do not quarrel, with the qualification [325] which I will presently state. The Statute of Wills enables a party to dispose by will of the property which he might have disposed of during his lifetime, at his free will and pleasure. I think the meaning of Lord Holt is this—that if a person gives an interest which could be enforced by an action at law, the statute would give an action for it. Thus, if a person devised by will a right of common, the devisee would have a right of action for it; so if he devised a rent which was not a freehold rent, (which could not be the subject of an action at law), an action would lie for it. So if he devised a right of way, it could be enforced by action; or if he left a term, the right to it might be enforced by ejectment. So if the testator clearly meant to impose a duty upon another person, obliging him to pay a legacy, an action of debt would lie for it against the person on whom the duty of paying the money was imposed: as if the testator left an estate in fee to A., directing him to pay a sum of money to B.; I am not prepared to say that an action of debt might not lie, after A. had accepted the estate, founded upon the duty created by the testator of paying that sum. But it is going too far to say the statute would give a right of action for those things which are merely equitable interests; as, for example, if a testator had created a trust in favour of a person, it would be absurd to say that person could enforce the trust by an action at law. Looking, then, at this will, to see whether I can collect it to be the intention of the testator, that the persons who may happen to have the entire interest in fee, or a limited interest, in the lands devised, should pay this sum of money to the plaintiff six months after the death of the three nieces, I can collect no such intention; nor is it consistent with the provisions of the will that such duty or obligation should be cast upon the parties in possession of the land. If any duty is cast upon any one, it must be upon the person entitled to the fee-[326]-simple of the land, certainly not upon those who had a merely temporary interest, whether from year to year or for 500 years. It appears to me that the reason why this action cannot be maintained is this, that, admitting Lord Holt's dictum to be correct, that where the testator merely intended to create a duty from one person to another, the law would give a remedy, in this case no such duty is imposed upon the defendants towards the plaintiff. I cannot see that the plaintiff has any interest which he could enforce by an action of debt. Whether or not a special action, founded upon any right which the party may have acquired under the will, might be maintained, it is unnecessary to decide: it is enough to say in this case that no action of debt will lie; but it is extremely difficult to say that any other action would lie, founded upon such an instrument as this.

GURNEY, B. I concur in the opinions expressed by the Lord Chief Baron and my brother Parke, in what has been said in respect to the dictum of Lord Holt, and in the qualification which my brother Parke has put upon it, which I think is a reasonable one; and the very circumstance of no such action having been known from that time to this, is a strong confirmation of that being its true construction.

MAULE, B. I am also of opinion that the demurrer must be allowed. I think the declaration is bad, for not disclosing any grounds upon which the action can be maintained. I think it perfectly clear, if before the Statute of Wills, there had been a gift of this kind out of land, no action of debt could have been maintained; and the only ground for saying the action of debt can be maintained now, is this dictum of Lord Holt, which I conceive is perfectly correct, if properly understood; and I think the [327] application of it in the case of *Hopkins v. Mayor of Swansea* was a proper one. On what occasion it was said, is not mentioned in any of the Reports, but it probably arose in this way:—Some person in argument had said, "It is very true that [some] statute has given a right, but the remedy for that right cannot be at common law, but must be in equity, because the statute has not in express terms pointed out or given a remedy." To which Lord Holt answers, "That is not so; when

a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident." If a person by his will gives in express terms a right which in the ordinary course would be properly enforced in equity, but by express terms he gives a legal right, then Lord Holt's dictum would apply; but I do not think that here either the words or the spirit of the devise extend to that length, and I think, therefore, that no legal right exists, and that no action of debt can be maintained: and that is all which it is necessary for us to decide upon this occasion. In all probability no action at law could be maintained, but the proper remedy would be in equity. Some remedy, no doubt, belongs to the party interested under this devise, but that remedy is not an action of debt.

Judgment for the defendants.

IN THE MATTER OF THE HULL AND SELBY RAILWAY. Exch. of Pleas. 1839.—

If the sea, or an arm of the sea, by gradual and imperceptible progress, encroach upon the land of a subject, the land thereby covered with water belongs to the Crown.

[S. C. 8 L. J. Ex. 260. Adopted, *Foster v. Wright*, 1878, 4 C. P. D. 446; *Attorney-General v. Reeve*, 1885, 1 T. L. R. 675; *Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*, [1915] A. C. 614.]

By an order made on the Equity side of the Exchequer, the following case was stated for the opinion of this Court:—

On the northern side of the river Humber (which river [328] is an arm of the sea) there is an ancient artificial embankment, which was erected many centuries ago for the protection of the lands on the north of the embankment from the encroachments of the river at extraordinary high tides.

Between this ancient embankment and the foreshore of the river, there were in former times certain pieces of pasture land called Growths, extending from Lime-kiln Creek on the east to Gallow Creek on the west; which Growths were the property of the ancestors of Henry Broadley, Esq., in whom the rights and interests of such ancestors, in respect of such Growths, are now vested. The foreshore of the river, or the land lying between high and low water-marks at the ordinary tides, is the property of the Crown. The tides of the Humber have, in the progress of years, encroached upon and washed away the whole of the Growths, except two portions thereof at each extremity (which have of late years been protected by embankments from further encroachments); so that it is now, and has been for many years past, impossible to distinguish the part of the Growths so washed away from the mud and soil of the foreshore of the river. The river at the neap tides now overflows, and has for many years past overflowed at high water, the parts of the Growths so washed away; but they are uncovered by the river at low water.

The encroachment of the tides has been by slow and imperceptible progress, so that no particular period thereof can be ascertained; but, within living memory, there has been a much greater portion of the Growths unwashed away than there is at present.

"In the month of June, 1836, an act of Parliament was passed for making a railway from Kingston-upon-Hull to Selby.

The Railway Company constituted by this Act have, under the provisions thereof, taken for the formation of the railway a portion of the Growth so washed away as [329] aforesaid, and have protected the same from the tides of the river, and the Company have paid the money, assessed by a jury for the taking of such portion, into the Court of Exchequer.

The questions for the opinion of this Court are—

1st. Whether, at the time of the passing of the Act, the Crown or the said Henry Broadley was entitled to the lands taken by the Railway Company.

2ndly. Whether the Crown, or the said Henry Broadley, is entitled to the money paid by the Company into the Court of Exchequer.

The Solicitor-General, for the Crown. If the sea makes a sudden irruption into the land of a subject, the subject nevertheless retains his property in that land; and, on the same principle, if the sea suddenly recedes, the Crown does not lose its property

in the land that was before covered with water. But where, by the imperceptible recession of the water, the soil of a subject adjoining an arm of the sea is added to, the soil so added belongs to the subject, not to the Crown; *Rex v. Lord Yarborough* (3 B. & Cr. 91; S. C. in Dom. Proc. 2 Bligh, N. S. 147; 1 Dow, N. S. 178; 5 Bing. 163); and so, on the other hand, if the sea makes imperceptible advances upon the land, that portion of the land which is so overflowed must become the property of the Crown. The Court then called upon

Sir F. Pollock, *contra*. There is no doubt that the gradual accretion of the land upon the sea belongs to the subject, according to the decision in *Rex v. Lord Yarborough*; but there is nothing in that case to shew that any correlative right exists in the Crown as against the subject. The same law does not apply to the Crown and [330] to a subject; because the Crown is the trustee for the public of all its lands, and can have no rights opposed to those of an individual proprietor. In contemplation of law, all subjects hold their land by grant from the Crown; when, therefore, the Crown has granted to a subject land marked out by precise limits, that is, by the then existing boundary of high-water mark, can it be said that the Crown is entitled, on public grounds, afterwards to resume any part of the land so granted? As between the Crown and a subject, there can be no distinction, in principle, between a sudden and an imperceptible overflowing of the land. As between subject and subject it is otherwise, for the prevention of litigation, and the settlement of their mutual rights. Therefore, if a river which is the boundary between two estates gradually changes its course, the land also changes its ownership accordingly: but there is no reason for such a rule as to the encroachment of the sea; as long as the subject can by metes and bounds make out his title to the land originally granted, there is no interest, public or private, which requires that it shall be resumed by the Crown.

There is no positive authority on the subject, but there are dicta in the books in favour of the claimant. In 2 Roll. Abr. 168, *Prerogative le Roy*, by Coke & Foster, Mich. 7 Jac. B. pl. 2, (and 16 Vin. Abr. 374), it is said—"If the sea overflows my land for forty years, and then reflows again, I shall have my land, and not the King." The same is stated in Com. Dig. *Prerogative*, (D.), 61, 62. And this is not confined to the case of a sudden overflowing of the land; nor is there any reason why the same principle should not apply also to a gradual overflowing, if the land can be identified. Again, in Hale's *Treatise De Jure Maris*, it is said (Hargrave's *Law Tracts*, p. 15),—"If a subject hath land adjoining the sea, and the violence [331] of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if, by situation and extent of quantity, and bounding on the firm land, the same can be known, though the sea leave this land again, or it be by art and industry regained, the subject doth not lose his propriety." And again (p. 17),—"If it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time part of the sea, and within the Admiral jurisdiction while it so continues." There is nothing to point to any difference between a gradual and a sudden inundation. [Lord Abinger, C. B. The Crown represents the public: the public have rights of passage over navigable rivers. Suppose the river Humber were to change its course by gradual accretion, so that the north bank came to be where the south bank now is: according to your argument, the subject would gain the old bed by accretion, but the Crown would gain nothing by the recession—therefore the public would lose their right of passage. Alderson, B. Lord Hale, in his remarks on *The Abbot of Ramsey's case* (id. 29), seems to suppose the right reciprocal, and that the loss goes to the party to whom the benefit would go.] The Crown does not lose anything, but only has a little further to go to its domain. The right of the Crown merely is the boundary.

The Solicitor-General, in reply, having referred to *Scrutton v. Brown* (4 B. & Cr. 485; 6 D. & R. 536), was stopped by the Court.

LORD ABINGER, C. B. This case appears to me to be free from difficulty. If the Crown cannot adduce the authority of many decided cases in support of its claim, it is because in principle no doubt could be entertained upon [332] it. It is admitted, that as between subject and subject, the law as to gradual accretion is settled by the cause of *Rex v. Lord Yarborough*. The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property.

It is different, indeed, where the change occurs by a sudden advance or recession of the water. In Scotland, a river containing a valuable salmon fishery belonging to the present Lord Chief Commissioner Adam, was suddenly transferred to the land of his neighbour. Afterwards, by another equally violent effort of nature, the river returned to its former channel: but in neither case did the owner of the bed of the river lose his right to the soil. But in all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa. That is the rule as between subject and subject: but it is said to be different as between the Crown and subject. But Sir F. Pollock says we all hold by grant from the Crown: then the Crown holds by the same rights, and with the same limitations as its grantee. This being then the case of a gradual access of the water, it makes the land now between high and low water mark the property of the Crown. No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property. The money, therefore, must be paid to the Crown.

ALDERSON, B. I am of the same opinion. I think the question is precisely the same, whether the claim is made as against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the fore shore—that is, the space between high and low water mark—grants the adjoining soil to an individual; and the water gradually [333] recedes from the fore shore, no intermediate period of the change being perceptible: in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all.

GURNEY, B., and MAULE, B., concurred.
Judgment for the Crown.

CARWARDINE v. WATKINS. Exch. of Pleas. 1839.—Where, to a transitory trespass, the defendant pleads a local justification, the allegation of “*quæ est eadem*” is a sufficient traverse, without the addition of a special traverse *absque hoc* that he was guilty elsewhere than in the place mentioned in the plea: and if the plea contain both, it is bad on special demurrer, as containing two traverses of the same matter.—And *semble*, where the place mentioned in the plea does not vary from that stated in the declaration, the *quæ est eadem* is also unnecessary.

[S. C. 7 Dowl. P. C. 484.]

Trover for a sheep; the venue being laid in the county of Hereford, and no parish or place being specified in the declaration.

The defendant pleaded, (amongst other pleas), that one James Cheese was and is seised in his demesne as of fee of and in a certain manor called the manor of Kington, in the county of Hereford, and that he ought of right to have and hold, on a certain day in each year, to wit, on the 19th day of September, in a certain place called the common close, or cattle market, in the town of Kington, and within the said manor, a certain fair for the selling, amongst other things, of sheep; and that he the said James Cheese was and is entitled to take a toll of all sheep sold in the said market: that the sheep in the declaration mentioned was sold to the plaintiff within the said market and during the said fair, and that the defendant, as the servant of the said James Cheese, and by his command, dis-[334]-trained it for the payment of toll: “which is the same supposed conversion and disposal of the said sheep in the said declaration mentioned; without this, that the defendant is guilty of the said conversion and disposal of the said sheep, at any place out of the said common close or cattle market, or at any time except during the said fair.” Verification.

Special demurrer, assigning, amongst others, the following causes—that the plea traverses what could not properly be traversed, and contains two traverses of the same matter; that it concludes with a verification, and not to the country, although it contains a special traverse; and also that the said traverse in the plea ought to have been omitted. Joinder in demurrer.

R. V. Richards, in support of the demurrer. In the first place, the plea is bad

for concluding with a verification. The 13th rule of H. T., 4 W. 4, expressly requires that all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country; the other party not being precluded from pleading over to the inducement, when the traverse is immaterial.

Secondly, the plea is bad as containing two traverses of the same matter. This case cannot be distinguished from *Hembro v. Bailey* (1 C. & M. 204). There, to a count for trespass and assault, the defendant pleaded a justification in defence of the possession of his dwelling-house "in the county aforesaid," with an averment that the trespasses justified were the same as those complained of in the declaration, and a special traverse that he was guilty elsewhere than in the dwelling-house; and it was held that the special traverse was surplusage, and that the plea was therefore bad on special demurrer.

Greaves, contra. This plea contains new matter of jus-[335]-tification, and therefore properly concludes with a verification. And but for the decision in *Hembro v. Bailey*, no doubt could be entertained, upon the earlier authorities, that the traverse of *absque hoc*, joined with the allegation of *quæ est eadem*, is good: but it is submitted that that case was erroneously decided. The decision proceeded altogether upon the ground taken by Serjt. Williams in the note to *Mellor v. Walker* (ibid.), that since the statutes of 16 & 17 Car. 2, c. 8, and 4 Anne, c. 16, s. 6, by which the venue is extended to, and the jury taken from, the whole county, the special traverse of place has become unnecessary. But the ground on which the earlier authorities proceeded is that which is first alluded to by Mr. Serjt. Williams, viz. that it may clearly appear to the Court that the defendant acted under the authority of law in the commission of the alleged trespasses. The averment of locality was necessary not only in respect to the change of the venue, but also in order to render the justification complete:—see *Benjamin v. Howell* (1 Wils. 81), *Smith v. Hillier* (Cro. Eliz. 167), *Bullock v. Smith* (id. 174), *Cowleigh v. Edwards* (id. 184), *Thomson v. Clerk* (id. 504), *Peacock v. Peacock* (id. 705), *Purset v. Hutchings* (id. 842). In the last of these cases only is there any allusion to the jury. The same doctrine is stated in *Digby v. Fitzherbert* (Hob. 101), *Searle v. Darford* (2 Lutw. 1435; 1 Ld. Raym. 120), *Bridgwater v. Bythway* (3 Lev. 113), *Regina v. Lord Vaux* (1 Leon. 39), *Barber v. Warren* (2 Mod. 271), *Martin v. Wilsford* (Carth. 326), *Wadhurst v. Danne* (Cro. Jac. 45), *Bateman v. Woodcock* (id. 372). Here, the right to distrain for toll being local, within the market only, the plea would not present a complete justification, unless [336] it traversed the taking in any other place. Under the old form of pleading, if the place mentioned in the body of the declaration varied from that stated in the plea, it was necessary to traverse the taking in any other place; and although, since the new rules, it is unnecessary to state any venue in the body of the declaration, yet, as the declaration is now applicable to every place within the county, where the justification is local, in order to exclude the possibility of the taking having been at any other place but that to which the justification applies, the plea must still contain the special traverse. On the same principle, the affidavit to change the venue always alleges that the cause of action arose in the county to which it is sought to change it, "and not elsewhere." There are many other cases in which, although the point did not arise, the precedents are all framed with the special traverse: see *Leight v. Pym* (2 Lutw. 1329); *Brownl. Trespass*, 477, pl. 8; 448, pl. 30, 31; *Cole v. Mitchell* (Lev. Entr. 179), *Osborne v. Brookhouse* (id. 191) *Adncy v. Vernon* (id. 195), *Patrick v. Johnson* (id. 205), *Furston v. Weeks* (3 Lev. 61). The case of *Hembro v. Bailey*, therefore, which proceeded on the single ground that the traverse was no longer necessary with reference to the award of the venire facias, cannot be considered as a binding authority. The only two cases there cited in the argument against the sufficiency of the plea, *Hargrave v. Ward* (2 Lutw. 1457), and *Courtney v. Satchell* (1 Stra. 694), were cases relating to the allegation of time, and in which time was wholly immaterial.⁽ⁱ⁾

Richards, in reply. It is admitted that if *Hembro v. Bailey* was well decided, this plea is bad. That case was argued at considerable length, and fully considered by the [337] Court. According to the modern practice and authorities, the *quæ est eadem* amounts to a sufficient traverse. In almost all the cases cited on the other side, the *quæ est eadem* was not in the plea, and the decision proceeded on the

(i) The learned counsel in that case, however, referred particularly to the case of *Mellor v. Walker*, and the authorities there collected.

necessity of its containing a traverse. The question now is, whether that traverse is not sufficient.

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said, that the point was expressly decided in *Hembro v. Bailey*, and the Court were disposed to adhere to that decision.

PARKE, B. *Hembro v. Bailey* is precisely in point, and the same argument was used in that case by Mr. Erle as by Mr. Greaves in the present case: indeed, I doubt whether either the *quæ est eadem* or the special traverse be necessary in this case, because the place mentioned in the plea does not vary from that stated in the declaration. If the place varies, a traverse ought to be inserted; but that is not the case here.

The defendant had leave to amend on payment of costs; otherwise,
Judgment for the plaintiff.

TWIZELL v. ALLEN AND OTHERS. Exch. of Pleas. 1839.—In an action by a ship-owner against the owners of goods for their proportion of a general average loss, the Court refused to make an order for the defendants to inspect and take copies “of the protest, the account of expenses incurred which constituted the sums sought to be made the subject of general average, and other usual documents in which the general average was claimed.”

[S. C. 7 Dowl. P. C. 496; 8 L. J. Ex. 269; 3 Jur. 484.]

This was an action to recover the sum of 123l. 13s. 10d., as the defendants' proportion of a general average loss (in respect of certain linseed of the defendants) incurred [338] by the plaintiff, as owner of the brig “*Eliza Anne*,” on a voyage from Cronstadt to London in September, 1838. Wightman had obtained a rule to shew cause “why the defendants should not have leave to inspect and take copies of the protest, the accounts of expenses incurred, which constituted the sums sought to be made the subject of general average, and other usual documents in which the general average was claimed:” and that in the meantime proceedings be stayed. A summons, in the same terms, had previously been taken out before Parke, B., at chambers, who had made an order for the production of the statement of account of general average, but refused it as to the documents on which the account was made up. The affidavit in support of the present rule stated that the account was produced accordingly, and that it appeared thereby that the loss was incurred by reason of the ship having put into the port of Revel, and that the average consisted of the charges of protest, surveyors' fees, payments for landing and relanding the cargo, warehouse rent of the cargo, &c.; and that, in order to conduct their defence, it was necessary that the defendants' attorneys should have an opportunity of inspecting the protest, surveys, log-book, &c.

Channell shewed cause. This application is wholly unprecedented. No explanation is given of what is meant by the “usual documents” referred to. The defendants may make any application for particulars, as they may be advised; but they cannot compel the plaintiff to produce his evidence. [Lord Abinger, C. B. We understood it was an action on a policy against underwriters, but it now appears it is merely an action between individuals interested in the ship and cargo.]

Wightman, contra. The defendants are very much in the situation of underwriters; they cannot know, any more [339] than they, what occurred on board the ship; every thing is in the hands of the plaintiff. [Maule, B. Underwriters get something from the discretion of the Court, on application for the consolidation rule; but suppose they did not choose to apply for it, could the Court impose such terms?] The defendants might settle the dispute, and save expense, if furnished with the necessary information. These may fairly be considered documents for the benefit of both parties.

LORD ABINGER, C. B. Then you must file a bill: there is no law which yet enables us to give a discovery as in equity.

ALDERSON, B. It would not be just to do so, if we had the power: it would be a discovery without the statement of the parties.

MAULE, B., concurred.

Rule discharged, with costs.

SPURR v. RAYSON. Exch. of Pleas. 1839.—Where a plaintiff, under a peremptory undertaking to try at the Assizes, did not try pursuant to the undertaking, but, after the Assizes, the parties agreed to a reference, the award to be made on or before a certain day, which was after the time at which the defendant might have obtained a rule for judgment as in case of nonsuit absolute:—Held, that he had thereby waived his right under the peremptory undertaking, and was not entitled to judgment as in case of a nonsuit.

[S. C. 7 Dowl. P. C. 467; 8 L. J. Ex. 276; 3 Jur. 681.]

This was an action on a promissory note. The plaintiff, on a rule for judgment as in case of a nonsuit being discharged, in Michaelmas Term 1837, gave a peremptory undertaking to try at the Spring Assizes, 1838. The plaintiff did not try accordingly; but a short time after the Assizes, it was agreed that this action, and another on the same note against a different party, should be referred to arbitration, the award to be made on or before the 1st of July following. The arbitrator undertook the re-[340]-ference, but no award was made within the time limited. In the present term, the defendant applied for a rule absolute for judgment as in case of a nonsuit; but, by order of the Court, it was drawn up only as a rule to shew cause.

Hoggins shewed cause, and contended that the plaintiff had satisfied his peremptory undertaking by the agreement of reference, which was substituted by consent for the trial by the jury, and therefore that there was no second default.

Matthews, *contrà*. The defendant is entitled to the judgment. Where a plaintiff is prevented from trying by any matter over which he has no control, as by a remanet, judgment as in case of a nonsuit cannot be obtained; but here all was his own default, and the agreement to refer was entirely in mercy to him. [Parke, B. You agree to substitute one tribunal for another: how is the plaintiff liable for the neglect of that tribunal?] Where, after a peremptory undertaking to try at the Assizes, an order was obtained for trial before the sheriff, and the plaintiff neglected to try at the next sheriff's court, it was held that the defendant was entitled to judgment as in case of a nonsuit: *Williams v. Edwards* (3 Dowl. P. C. 660). So here, it is merely the substitution of one authority for another, which having failed of effect, the defendant is remitted to his original rights. The defendant did not give up his right to the performance of the peremptory undertaking, but only agreed that if the matter could satisfactorily be settled by other means, that should be done.

PARKE, B. I have some little doubt in this case, but on the whole, I think that if the parties agree to refer a cause, and that for a time long after that in which the rule [341] for judgment as in case of a nonsuit absolute could be obtained, the defendant must be taken to mean, *prima facie*, to waive that right. I think, therefore, that the rule should be discharged, on a peremptory undertaking to try at the next Assizes.

Rule discharged accordingly.

HALL v. POPPLEWELL. Exch. of Pleas. 1839.—The Court cannot compel a party to join in demurrer before the time allowed by R. G. H. T. 4 Will. 4, s. 3, although the pleading demurred to be clearly frivolous and for delay.

In this case, the *venire* having been sued out on the 31st of May, the defendant, on the 7th of June, at Nisi Prius, pleaded *puis darrein continuance* a bill in equity filed against him in the same matter, and a decree in his favour since the last continuance. On the 9th, the plaintiff delivered a demurrer to the plea. On the 11th, W. H. Watson obtained a rule to shew cause why the plea should not be set aside, unless the defendant agreed to join in demurrer, and set the demurrer down for argument on the 12th (the last day of term).

Humfrey shewed cause on the latter day. The defendant has, under the rule of H. T., 4 Will. 4, s. 3, until the 13th to deliver a joinder in demurrer, and the Court has no power to shorten that time without consent of the parties.

Watson, *contrà*. The Courts have a power to accelerate their proceedings in extraordinary cases. This is a plea clearly frivolous and for delay.

PARKE, B. The question is, whether I can shorten the regular time for joining in demurrer, or whether all that the Court can do is not, to set down a ripe demurrer

for argument forthwith. In *Fitch v. Toulmin* (1 Stark. N. P. C. 62), on a plea [342] *puis darrein continuance* being tendered under similar circumstances at *Nisi Prius*, Lord Ellenborough directed that the demurrer should stand for the first paper day in term: but it might be that, in regular course, the case would be ready for argument by that day. I do not think, as the time for joinder has not yet expired, that I can do this without consent.

Rule discharged, without costs.

JACKSON v. CUMMINS AND OTHERS. Exch. of Pleas. 1839.—No lien exists at common law for the agistment of milch cows.

[S. C. 8 L. J. Ex. 265; 3 Jur. 436. Followed, *Forth v. Simpson*, 1849, 13 Q. B. 680.]

Trespass for breaking and entering an outhouse and premises belonging to the plaintiff, and seizing and driving away ten cows, the property of the plaintiff, and converting and disposing of the same to the defendants' own use, &c.

The defendants pleaded, first, not guilty; secondly, as to taking &c. two of the cows, that the said cows, for the space of eight months before the said time when &c., had been depastured, agisted, and fed by the defendant Charles Cummins for the plaintiff, in and upon certain lands of him the said Charles Cummins, at the request of the plaintiff, for a certain reward and remuneration to be paid the said Charles Cummins by the plaintiff, and there was and still is due and owing to the said C. Cummins from the plaintiff the sum of 16l. 5s., for and in respect of the said agistment of the said two cows: and that it was agreed between the plaintiff and defendant Charles Cummins, that the said C. Cummins should retain, have, and take and keep the possession of the said two cows so long as the said sum of 16l. 5s. should remain unpaid: that the said two cows then and at the time of the said agreement were in the possession of the said C. Cummins, and so remained until the plaintiff fraudulently, unlawfully, and wrongfully took them out of the same as hereinafter mentioned; that afterwards, and after the said agreement, and whilst the said two cows [343] were in the possession of the said C. Cummins under the same, and whilst the said C. Cummins had a lien upon the same by law and by the agreement aforesaid, and just before the said time when &c., the plaintiff wrongfully, unlawfully, and surreptitiously, and contrary to the said agreement, with force and arms, broke and entered the said close of the said C. Cummins in which the said two cows were depasturing and agisting as aforesaid, and wrongfully, fraudulently, unjustly, and unlawfully took, carried, and drove away the same out of the said close of the said C. Cummins, and put and placed the same in the said outhouse and premises in the declaration mentioned, without paying the said sum so agreed to, and then due to the said C. Cummins. The plea concluded with a justification by the defendant Cummins in his own right, and by the other defendants as his servants, in peaceably entering the outhouse and premises, in order to retake the cattle, and retaking them accordingly.

The plaintiff took issue on the first plea, and to the second replied *de injuriâ*.

The cause was tried before Parke, B., at the last Assizes for Yorkshire, when it was proved that the cows had been depastured on land belonging to the defendant. The jury found that there was no such agreement as stated in the plea, that the defendant should retain and keep possession of the cows until the amount due for the pasturage was paid, and thereupon found a verdict for the plaintiff, the learned Judge reserving leave to the defendant to move to enter a nonsuit, in case the Court should be of opinion that a lien existed at common law for the agistment of cattle. Alexander having, in Easter Term last, obtained a rule accordingly,

Cresswell now shewed cause. The point that arises in this case involves the question whether the case of *Chapman v. Allen* (Cro. Car. 271) be now law. The first question is, whether a lien may be given in evidence under the general issue. [Parke, B. It certainly cannot be given in evidence under the general issue.] The next question is, whether the second plea is a good answer to the action. The plea begins by alleging that the cows had been agisted and fed by the defendant, and that a sum of money had become due; but it does not allege upon what contract the cows had been delivered to be depastured: it does not state when the money was to be paid, nor does it allege that the money was to be paid upon the redelivery of them. It therefore does not state circumstances which can confer a lien; and the jury have

negated the existence of the agreement that the defendant should keep possession of the cows until the money should be paid. The defendant cannot now avail himself of the argument that the plea is double, and that he meant it in two senses: a lien by common law, and a lien on the agreement. And there was no lien for agistment at common law. There is an ingenious argument, in *Scarfe v. Morgan* (4 M. & W. 270), that the case of *Chapman v. Allen* might be supported on the ground that the party had a right to go and milk the cows, and therefore a lien would have been inconsistent with the bailment. But the decision in *Chapman v. Allen* did not proceed on any such ground, but on the general principle. [Alderson, B. The owner must have a right to possession of the cows for the purpose of milking, as, in the case of a livery-stable-keeper, the owner has a right to the possession of his horse for the purpose of riding him. It must be admitted that the doctrine of lien has been considerably enlarged in modern times, but it must have some limit. It was formerly confined to cases where skill and labour were employed about the article. Another case was where [345] a party was bound by law to receive the article or the animal, as in the case of an innkeeper. The doctrine of lien must proceed on a presumed contract. The party might perhaps have had a right to take the cows away for the purpose of milking them. [Maule, B. That would be precisely the case of the livery-stable-keeper.] Certainly. The owner might find it more convenient to milk them in a shed adjoining the field. In *Chapman v. Allen* (Cro. Car. 273), it was held by Croke, J., and Jones, J., that the defendant, with whom the cows were depastured, might not detain the cattle until the money was paid, but that he was obliged to bring his action for the pasturage; and they said, "It is not like to the cases of an innkeeper or tailor; they may retain the horse or garment delivered to them until they be satisfied. But not where one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement between them." Nothing is there said about milking the cows, as suggested by Mr. Byles in the argument in *Scarfe v. Morgan*. That was the case of a special verdict, and it was not pursued further. In *Judson v. Etheridge* (1 C. & M. 473; 3 Tyrw. 954), it was held that a livery-stable-keeper had no lien on a horse delivered to him to be stabled and fed. There, to a count in detinue for detaining a horse, the defendant pleaded that the plaintiff had delivered the horse to him to be stabled and taken care of and fed, and kept by him for the plaintiff for reward; and that 10l. became due as a reasonable reward, and so justified the detainer for that sum; and it was held, on general demurrer, that the plea was bad, and that he had no lien. The plea did not state that the horse was delivered subject to the owner's right to use him. Lord Lyndhurst, C. B., says: "I am of opinion that he has no lien. The present case is distinguishable from the case of workmen and artificers, and persons carrying on a particular [346] trade, who have been held to have a lien by virtue of labour performed in the course of their trade, upon chattels bailed to them." In this case there is no application of labour—nothing but permission to turn the cows into the field, and allowing them to eat the grass. In *Scarfe v. Morgan*, where the Court held that the defendant had a specific lien for the price of covering a mare, the plaintiff had the use of the defendant's horse, and would have the produce, and he would have the mare back in an improved state. On these grounds it is submitted that no lien existed in the present case.

Alexander, in support of the rule. This case raises the question whether the case of *Scarfe v. Morgan* was properly decided, where all the older cases were cited, and *Chapman v. Allen* amongst the rest: and there this Court held that a lien existed. In *Chase v. Westmore* (5 M. & Selw. 180), the first glimmering of a more liberal mode of construing the doctrine of lien appeared. In that case it was held, that a workman, having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the owner, might detain the chattel until the price was paid. That was the case of a lien claimed by the defendants for wheat which they had ground, under a specific price for the grinding of it. Lord Ellenborough there says. (after stating that the question was, whether a workman, having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by agreement with the owner, at the time of its delivery to him, can by law detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement)—"We are all of opinion, that if a right to detain exists in the general case that I have mentioned, the present defen-

dants have a [347] right to detain the goods in question, for the money due to them for grinding the wheat. The general question is of very great and extensive importance. Several authorities were referred to against the right to detain; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires that our decision should not be governed by them; and we believe that the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price, and the implied contract to pay a reasonable price or sum; and that the right of detainer has been practically alike." His Lordship then goes through the cases, including, amongst others, that of *Chapman v. Allen*, with respect to which he says, "That case, however, does not appear to have been decided on the ground supposed, but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to a third person, on receiving from such third person the amount of his demand." And his Lordship concludes by saying, that the Court thought the supposed distinction was contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given. So, in *Bevan v. Waters* (Moo. & Malk. 236), it was held that a trainer had a lien on a race-horse for his charge in keeping and training him. It was there contended that no lien existed, and *Wallace v. Woodgate* (Ry. & M. 193) was cited; but Best, C. J., said, "It was certainly held in that case, on the authority of *Yorke v. Grenough* (2 Lord Raym. 866), that a livery-stable-keeper has no lien; but this case goes farther, and on the principle of the common law, that where [348] the bailee expends labour and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races." Perhaps, if that case had followed close upon the case of *Chapman v. Allen*, the decision would have been different; but it occurred at a time when the doctrine as to lien had become more enlarged. In *Scarfe v. Morgan*, all the cases were gone into, and this Court held that a lien existed for the price of covering mares. The observation of Mr. Byles upon the case of *Chapman v. Allen* was a very just one; and he adds, "There is no other authority to shew that there can be no lien for agistment; and whenever that question arises, it will probably be found that there may be." In that case, Parke, B., says, "The principle seems to be well laid down in *Bevan v. Waters* by Lord Chief Justice Best, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charges in that respect. Thus, the artificer, to whom the goods are delivered for the purpose of being worked up into form; or the farrier, by whose skill the animal is cured of a disease; or the horse-breaker, by whose skill he is rendered manageable; have liens on the chattels in respect of their charges. And all such specific liens being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases." That judgment proceeds upon the enlarged view of the doctrine of lien acted upon in *Chase v. Westmore*. Why should there be a distinction in natural equity between the case of a trainer, or the case of covering mares, and the improvement of the animal by feeding it? The case of *Judson v. Etheridge* is distinguishable. There, the horse is not only accessible to the owner, but he is entitled to take him away for the purpose of use; but in the case of agistment, though it must be understood that the owner has a right to milk the cows, yet it is the common under-[349]-standing in such cases that they are to be milked upon the spot within the limits of the pasture. If any doubt exists on the point, as the law favours the existence of liens for the purposes of natural equity, the Court will decide in favour of its existence in the present case.

PARKE, B. I am of opinion that this rule ought to be discharged. The first question is, whether it was competent for the defendant, under this plea, which speaks of a lien by agreement, to set up a claim for a lien at common law? If it were necessary to decide that question, I should say that I think it was competent for him to do so. The plaintiff, it is true, might have demurred specially to the plea for duplicity, in setting up two distinct grounds of lien, viz. by force of an agreement, and by the general law; but as it is, the averment of the agreement for a lien may be rejected, and the claim of lien under the general law supported, should such really

exist. I also think that, after the recent decision in *Owen v. Knight* (4 Bing. N. C. 54 ; 5 Scott, 307), as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows ; which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass. It is not, however, necessary to decide either of these points, because I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by Best, C. J., in *Bevan v. Waters*, and by this Court in *Searfe v. Morgan*, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any [350] skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Searfe v. Morgan* ; he simply takes in the animal to feed it. In addition to which, we have the express authority of *Chapman v. Allen*, that an agister has no lien ; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle, that no lien can exist in the case of agistment ; and it was so understood by this Court in *Judson v. Etheridge*. The analogy, also, of the case of the livery-stable-keeper, who has no lien by law, furnishes an additional reason why none can exist here ; for this is a case of an agistment of milch cows, and, from the very nature of the subject-matter, the owner is to have possession of them during the time of milking ; which establishes that it was not intended that the agister was to have the entire possession of the thing bailed : and there is nothing to shew that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner. As to the case of the training groom it is not necessary to say anything, as it has not been formally decided ; for in *Jacobs v. Latour* (5 Bing. 130 ; 2 M. & P. 201), the point was left undetermined. It is true, there is a *Nisi Prius* decision of Best, C. J., in *Bevan v. Waters*, that the trainer would have a lien, on the ground of his having expended labour and skill in bringing the animal into condition to run at races ; but it does not appear to have been present to the mind of the Judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right, during the continu[351]-ance of the process, to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right, which overrides it ; so that I doubt if that doctrine would apply where the animal delivered was a race-horse, as that case differs much from the ordinary case of training. I do not say that the case of *Bevan v. Waters* was wrongly decided ; I only doubt if it extends to the case of a race-horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply. But, at all events, I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established : in addition to which, such a claim would be inconsistent with the more general right exerciseable by the owner of the cattle.

ALDERSON, B. I agree that the agister has no lien in this case. On the first point, however, I give no opinion.

MAULE, B. I think the effect of this plea is to set up a claim of lien under the agreement only ; for, if understood in the sense which would make it not demurrable, it says, during the continuance of such a state of circumstances, these cattle were taken away. On the other point, I agree with the rest of the Court that no lien exists.

Rule discharged.

MARTIN v. PORTER. Exch. of Pleas. 1839.—Where the defendant, in working his coal mine, broke through the barrier, and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale:—Held, in trespass for such working, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it.

[S. C. 2 H. & H. 70. Followed, *Morgan v. Powell*, 1842, 3 Q. B. 284; *Wild v. Hort*, 1842, 9 M. & W. 674. Discussed, *Hilton v. Woods*, 1867, L. R. 4 Eq. 440; *Llynvi Coal and Iron Company v. Brogden*, 1870, L. R. 11 Eq. 188; *Jegon v. Firian*, 1871, L. R. 6 Ch. Ap. 760; *Trotter v. Maclean*, 1879, 13 Ch. D. 586. Applied, *Phillips v. Homfray*; *Fothergill v. Phillips*, 1871, L. R. 6 Ch. Ap. 780; *Whitwham v. Westminster Brynbo Coal and Coke Company*, [1896] 1 Ch. 894; [1896] 2 Ch. 538. Referred to, *Brown v. Dibbs*, 1877, 37 L. T. 171; 25 W. R. 776; *Dreyfus v. Peruvian Guano Company*, 1889, 42 Ch. D. 76.]

Trespass for breaking and entering the plaintiff's close, situate at Darfield, in the county of York, and breaking and entering a certain coal mine, &c., under the said close, and taking and carrying away the coal, and carrying it along and through levels and ways, and taking away other coals and converting and disposing thereof to the use of the defendant.

[352] Plea, payment into court of the sum of 133l., and no damages ultra. Replication, damages ultra.

At the trial before Parke, B., at the York Spring Assizes, it appeared that the plaintiff was a lessee of coal mines under the Duke of Leeds, and that the defendant was the owner of the adjoining estate. In the year 1838, in consequence of inquiries having been instituted, it was discovered that the defendant had worked the coal under the plaintiff's land, to an extent exceeding a rood. The defendant, by paying money into court, admitted the trespass; and the only question at the trial was, upon what principle the damages were to be assessed; the plaintiff contending that he had a right to hold the defendant liable for the value of the coal when gotten, and when first it existed as a chattel, without any deduction for the expense of getting it; that he ought also to pay for the under-ground way-leave, having carried coals from his own colliery through the plaintiff's bed of coal. The learned Judge was of opinion that the plaintiff would have been entitled in an action of trover to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; that, not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth; and that he was also entitled to compensation for the defendant's passing through his coal, with coals gotten from his own mines, and ought to pay as for a way-leave, which, in the neighbourhood of Leeds, was proved to be 2d. per ton. The jury adopted the above principle, and found the value of the coals, when got, to be 25l. 9s. 6d.; and they also gave 50l. for the use of the [353] way-leave, making together 301l. 9s. 6d. The learned Judge gave the defendant leave to move to reduce the damages to 16l., if this Court should be of opinion that the proper measure of damages was the value of the coal in the bed, which the jury estimated at 149l.

Alexander, in Easter Term, moved accordingly. The damages ought to be estimated by the average value of the coal as lying undisturbed within its native bed. The plaintiff had incurred no expense or risk in the necessary preparations for its working. As far as he was concerned, it might still have lain undisturbed, and probably would have done so, as the evidence shewed that the expense to him of working out so small and detached a bed of coal as the one in question (altogether containing little more than two acres and a half) would be double its saleable price. Had he contracted to sell it ungotten, the average price of coal per acre in that neighbourhood being (as proved) only 300l., the price for the coal in question would have been much below the sum paid into court. To allow of any other estimate of damages, would be to confer on the plaintiff a large profit, in the absence of anything

either done or suffered by him upon the occasion. That he should not lose anything by the unauthorized act of the defendant, is just; and the proposed reduction of the damages would be consistent with that view: but if he retain the amount given, on the principle laid down by the learned Judge at the trial, he is paid, not merely the value of his coal, but a doubled value, to which he has in no respect, by any acts of his own, entitled himself, and which cannot be created by any tortious act of another. Whether the defendant approached the coals without or with the sanction of the plaintiff, cannot alter their intrinsic worth; and what that worth was when the defendant commenced his workings, ought to be the proper test of this part of the damages. It must not be forgotten, that the sum claimed by the plaintiff, as the additional price of the coals, is pre-[354]-cisely the amount actually paid by the defendant himself to the workmen before the coals were brought from their original situation to the bottom of the pit; and which must equally have been paid by the plaintiff, had he been working with the same object.

LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. If the plaintiff had demanded the coals from the defendant, no lien could have been set up in respect of the expense of getting them. How, then, can he now claim to deduct it? He cannot set up his own wrong. The plaintiff had a right to treat these coals as a chattel to which he was entitled. He did so, and the only question then was their value. That the jury have found. It may seem a hardship that the plaintiff should make this extra profit of the coal, but still the rule of law must prevail.

PARKE, B. I remain of the same opinion as I entertained at the trial. The plaintiff is entitled to be placed in the same situation as if these coals had been chattels belonging to himself, which had been carried away by the defendant, and must be paid their value at the time they were begun to be taken away. He had a right to them, without being subject to the expense of getting them, which was a wrongful act by the defendant, and for which the defendant cannot claim to be reimbursed. I am not sorry this rule is adopted; as it will tend to prevent trespasses of this kind, which are generally wilful.

ALDERSON, B. I am of opinion that the plaintiff is entitled to damages, as for a trespass to his goods, the same as he would to any other description of goods belonging to him. The proper estimate is the value of them when gotten, and when the defendant took them away.

MAULE, B. I concur with the rest of the Court, and think the plaintiff had his claims assessed in a manner which he was entitled to.

Rule refused.

[355] LAWRENCE v. WYNN. Exch. of Pleas. 1839.—A local act, for enabling a Company to sue and be sued in the name of their secretary, contained a clause enacting, that it should not be lawful for the Company to increase their capital, or extend their works, beyond the sum of 5000*l.*, otherwise so much of the privileges given by the act as referred to the power of suing in the name of the secretary, should be void. By a subsequent act, for enabling the Company to raise a larger sum of money, the above clause was repealed; and the Company were empowered at a general meeting to direct that all their debts for the time being should be apportioned among the shareholders, and paid by them at such time and place, to such persons, and in such manner, as the general meeting should order: and the secretary was authorized to sue the shareholders for such sums, or the part thereof remaining unpaid:—Held, that an action might be maintained by the secretary against a shareholder for his proportion of debts incurred by the Company in extending their works and increasing their capital, before the passing of the latter act of Parliament.—Held, also, that the Company might order payment of such proportionate parts of the debt by instalments.

[S. C. 8 L. J. Ex. 237.]

Debt, by the Secretary of the Birmingham Coal Company, (under the 7 & 8 Geo. 4, c. xxiv.), to recover certain instalments due from the defendant, a shareholder in the Company. The declaration stated, that the defendant, being the proprietor of two shares in the said Company, was indebted to the said Company in the sum of 40*l.*, for his liability to the payment of four equal instalments, to wit, the 5th, 6th, 7th, and

8th instalments of 5l. each, in respect of each and every such share, under a division of a portion of the debts for the time being due and owing to the said Company, by virtue of an act of Parliament made and passed in the 6th and 7th years of William the Fourth, &c. Breach, in nonpayment of the said sum of 40l.

The defendant pleaded (amongst other things) that the said divisions in the said declaration mentioned were and each of them was made after the passing of the said act in the said declaration first above mentioned (7 & 8 Geo. 4, c. xxiv.): that at the time of the passing of the last-mentioned act, the capital of the said Company was and amounted to a small sum of money, to wit, the sum of 5000l. only, and no more, and that the works of the said Company did not then extend beyond that sum: that after the passing of the said last-mentioned act, and before the passing of the said act in the declaration secondly mentioned (6 & 7 Will. 4, c. lvi.), and before the making of the said divisions in the said declaration respectively mentioned, or either of them, and before the commencement of this suit, to wit, on the 1st day of January, 1836, and on other [356] days and times between that day and the passing of the said last-mentioned act, the said Company did wrongfully and illegally, and contrary to the form and effect, true intent and meaning, of the statute in such case made and provided, by subscription among themselves, and by creating new and additional shares in the said undertaking, and by mortgages and other loans, and by extension of their works, and by divers other ways and means, increase their capital, and did extend their works in amount and value to a large sum, that is to say, to the sum of 200,000l. beyond the said sum of 5000l., and did thereby increase their capital beyond the amount of the said capital as it stood at the time of the passing of the said act in the declaration first mentioned, to a very large amount, that is to say, to the amount of 250,000l., being and entering into the composition of the said several debts for the time being due and owing by the said Company, as in the said declaration mentioned: that at the time of the making of the said several divisions in the declaration mentioned, and each of them, the said capital and works were and continued, and still remain and continue, so increased and extended as aforesaid; and that the said several divisions in the said declaration mentioned, were divisions of portions of the said debts for the time being due and owing by the said Company as aforesaid, and which had been and were incurred in manner and under the circumstances aforesaid, contrary to the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that the said first-mentioned act of Parliament not having prohibited the Company from increasing their capital, they were entitled so to increase it; and that as the said secondly-mentioned act recognised the said Company and its then existing debts, and repealed the clause in the first act, which took away the privilege of suing in the event of the Company [357] increasing their capital beyond 5000l., the Company are now entitled to sue the defendant under the first-mentioned act, in the name of their secretary; and the more especially as by the said secondly-mentioned act the secretary is expressly authorized to sue for and recover the sums due from proprietors of shares in respect of the said division by the said act authorized. Joinder in demurrer.

The following are the material provisions of the acts in question:—The 7 & 8 Geo. 4, c. xxiv., intituled “An act to enable the Birmingham Coal Company to sue and be sued in the name of their secretary, or one of the members of the said Company,” by sect. 1, enabled the Company in all actions, suits, and proceedings, at law or in equity, to sue and be sued in the name of their secretary for the time being, or in the name of any one member, to be appointed as nominal plaintiff or defendant. Sect. 4 enacted, that no person or persons, &c., having or claiming to have any demand upon the Company, should bring more than one action or suit, in case the merits should have been tried in such action or suit, in respect of such demand; and enabled the nominal defendant to plead the proceedings in such action or suit in bar of any other action or suit for the same demand. Sect. 11, after reciting “that it was expedient, in consideration of the powers granted by that act, that the Company should not be empowered to increase their capital or extend their works beyond the sum of 5000l.,” enacted, “that it shall not be lawful for the said Company or co-partnership, at any time after the passing of this act, either by subscription among themselves, or by creating any new or additional share or shares in the said undertaking, or by mortgage of any description whatever, or by extension of their present works, or by purchase or erection of any new or other works, or by any

other ways or means whatsoever, to increase their capital or extend their works in amount or value beyond the sum of 5000l., other-[358]-wise so much of the privilege conferred by this act as refers to their power of suing in the name of their secretary, or one of the members of the said Company, shall be for ever void and of none effect."

The 6 & 7 Will. 4, c. lvi., intituled "An act to amend an act to enable the Birmingham Coal Company to sue and be sued in the name of their secretary, or one of the members of the said Company, and to authorize the said Company to borrow a further sum of money, and for other purposes relating to the said Company," (the preamble of which stated that the Company had discovered new mines, and for the purpose of enabling the Company to carry on their works with benefit and advantage to themselves and the public, it was necessary that the committee of the said Company should be empowered to raise a further sum of money, and it was desirable that the powers and provisions contained in the recited act should in some respects be repealed, altered, amended, and enlarged),—repealed (by sect. 2) the 11th section of the act of 7 & 8 Geo. 4, and empowered the Company to raise any sum not exceeding 60,000l. by issue of new shares, or by bond or mortgage. Sect. 9 also repealed the 4th section of the 7 & 8 Geo. 4, c. xxiv., except as to actions pending. Sect. 15 empowered the Company, at a general meeting of the partners, to divide the debts for the time being due and owing by the Company, proportionably amongst the partners for the time being, in proportion to their shares; and sect. 16 enacted, that in case any person &c. should at any time refuse or neglect to pay the sum which he or they should under any such division be liable to, or any part of such sum, at such time and place, and to such person, and in such manner, as the said general meeting should order, it should be lawful for the secretary for the time being to sue for and recover such sum, or the part thereof remaining unpaid, by action of debt or otherwise, &c.

[359] Adams, Serjt., in support of the demurrer. The question raised by this plea is, whether the effect of the 11th section of the act of 7 & 8 Geo. 4, is to prevent the Company from suing for and recovering debts contracted between the passing of the two acts, they having increased their capital beyond the amount limited by the first act. But the only consequence of that was to deprive the Company of the privilege of suing and being sued in the name of their secretary; and this clause being repealed by the later act, the Company are now clearly entitled to sue for the debts divided and apportioned according to the provisions of that act.

M. D. Hill, *contrâ*. These private acts of Parliament are to be considered as contracts between the parties obtaining them and the public. By the 11th section of the act of 7 & 8 Geo. 4, this Company agreed absolutely to surrender the right of increasing their capital, in consequence of two privileges: one, that of suing and being sued by their secretary; the other, that of having only one action brought against them for the same matter. Then the clause affixes also a specific penalty upon their so increasing their capital, viz. the forfeiture of the former of those privileges. Then, when by the later act they are expressly permitted to extend their capital, the other privilege is taken away from them. The language of the 11th section is strongly prohibitory:—"It shall not be lawful for the said Company," &c.; and the question is, whether it was not the intention of the legislature absolutely to prohibit the Company from extending their capital by their own act. The addition of a specific penalty cannot legalize that which the legislature has previously forbidden by negative words: *Cope v. Rowlands* (2 M. & W. 149). There Parke, B., [360] says—"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only: because a penalty implies a prohibition." The second act, which in express terms gives the Company the power of extending the capital, and repeals the prohibitory clause, confirms the argument that the former act intended absolutely to prohibit it. Then, does the 15th section of the 5 & 6 Will. 4, apply to these debts? It is submitted that it does not. The words are prospective, and the general rule is, that acts of Parliament shall not have a retrospective operation, unless by express words: *Hitchcock v. Way* (6 Ad. & Ell. 943; 2 N. & P. 72). Taking the two acts together, the existence of these debts does not appear to have been brought to the knowledge

of the legislature. The power of suing in the name of the secretary is treated in the second act as a power then existing, without any intimation that it had been forfeited by the extension of the capital. The legislature cannot be supposed to have contemplated that the parties had committed an illegal act, or to have intended to give them new powers in respect of it. The words of the 15th section, "the debts for the time being due and owing," cannot be extended to sanction the suing for debts illegally contracted: *Stratford Railway Company v. Stratton* (2 B. & Adol. 518), *Lees v. The Manchester and Ashton Canal Company* (11 East, 645). [He contended also, that the Company had no right, under sect. 15, to make the debts payable by instalments; and also that they could not sue in debt until the last instalment was payable—citing *Rud-der v. Price* (1 H. Bl. 547); and that the declaration was therefore bad, for not shewing that the eighth instalment was the last.]

Adams, in reply, was stopped by the Court.

LORD ABINGER, C. B. It appears to me that this case is perfectly plain; that the plea is clearly bad, and the declaration good. It is unnecessary to decide whether there be a prohibition or only a penalty; but even supposing that the limitation imposed by the first act of Parliament absolutely prevented the Company from extending their capital beyond the sum of 5000l., the amount of the capital in the first instance, the second act distinctly repeals the prohibition contained in the first; and it also provides that all the debts of the Company for the time being, shall be paid by a subscription or division among the shareholders; that is, by allotting so much of the debt of the Company to each shareholder as was proportioned to his interest, to be paid at such time and place, and to such person, and in such manner, as the Company, at a general meeting of the partners, should resolve. Nothing can be more clear than that this provision recognises the debts due by the Company, whatever they were, at the time the act passed; and the repeal of the prohibition contained in the former act shews, I think, pretty clearly that the legislature did know that the Company had exceeded the powers before given to them: but whether this was the case or not, at all events the legislature never could have meant to give them facilities for abstaining from the paying their debts altogether. It seems to me that the Company clearly had a right to resolve what portion of the debts should be paid, at what times, and in what manner, and whether by instalments or otherwise. The case ap-[362]pears to me to be a very simple one, and the demurrer must be allowed.

ALDERSON, B. I am of the same opinion, that the plea is bad. It only states that these were debts incurred at a time when the capital was unlawfully increased, during the period between the passing of the two acts of Parliament. The question arising on the plea is, therefore, whether it was unlawful to divide the debts so incurred among the partners, to be paid by instalments. It seems to me that the only effect of the 11th clause of the 7 & 8 Geo. 4 is to prevent the Company, in case they increase their capital, from suing for their debts in the name of the secretary; but it would be a strange construction to say that the consequence was that their debtors should not be sued at all, i.e. that the debts were not to be considered due and owing. Then, at the passing of the second act, these debts were actually due; and the protection from being sued once only for the same claim being taken away by the 9th section, the 15th provides for the liquidation of all the debts of the Company, whether incurred by the extension of the capital or not, in a certain manner. [His Lordship read sect. 15.] That clause certainly enables the Company, after apportioning the debts, to say that the shareholders shall pay their proportions by instalments. Then the 16th section gives the secretary right of action against those who do not pay as directed by sect. 15. It seems to me that the plain construction of these enactments is such as to get rid of all the objections taken by Mr. Hill.

GURNEY, B., concurred.

MAULE, B. I am of the same opinion. It seems to me that, by the 11th section of the first act, the power of extending the capital is not absolutely prohibited, but only subjects the Company to the forfeiture of their privilege of [363] suing by the secretary. That view is confirmed by the 2nd section of the 6 & 7 Will. 4, which, in repealing the 11th clause of the former act, does not state simply that so much thereof as declares that it shall not be lawful for the Company, &c., to increase their capital, shall be repealed, but that so much of the former act shall be repealed as provides that it shall not be lawful for the Company to extend their capital, otherwise the privilege of suing in the name of their secretary shall be void:—treating it, there-

fore, as one provision, and not as two, as Mr. Hill contends it should be construed. If his construction were correct, the latter act would have repealed the first provision only. It seems to me, therefore, that this is not an absolute prohibition, but a penalty only. As to the other point, I cannot see what other construction can reasonably be put upon the 15th section, than that the general meeting may direct payment at once or by instalments, as they shall think fit: it seems to me the very thing that was intended.

Judgment for the plaintiff.

DOE D. SIMON HISCOCKS v. JOHN HISCOCKS. Exch. of Pleas. 1839.—A testator devised lands to his son John H. for life; and, from his decease, to the testator's grandson John H., eldest son of the said John H., for life; and on his decease, to the first son of the body of his said grandson John H. in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married; by his first wife he had one son, Simon, by his second wife an eldest son, John, and other younger children, sons and daughters:—Held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to shew which of these two grandsons was intended by the description in the will.—Quære, whether the devise were not void for uncertainty.

[S. C. 2 H. & H. 54; 9 L. J. Ex. 27; 3 Jur. 955. Distinguished, *Lindgren v. Lindgren*, 1846, 9 Beav. 365; *Doe v. Palmer*, 1851, 16 Q. B. 762. Not applied, *Gillett v. Gane*, 1870, L. R. 10 Eq. 35. Applied, *Charter v. Charter*, 1874, L. R. 7 H. L. 364. Referred to, *Doe d. Allen v. Allen*, 1840, 12 A. & E. 451; 4 P. & D. 320; *Doe d. Guins v. Roast (or Rouse)*, 1848, 5 C. B. 422; *Hart v. Tulk*, 1852, 2 De G. M. & G. 314; *Douglas v. Fellows*, 1853, Kay, 120; *Bernasconi v. Atkinson*, 1853, 10 Hare, 349; *In re Feltham's Trusts*, 1855, 1 K. & J. 528; *Grant v. Grant*, 1870, L. R. 5 C. P. 388; *Sullivan v. Sullivan*, 1870, Ir. R. 4 Eq. 461; *Allgood v. Blake*, 1873, L. R. 8 Ex. 163; *Bunbury v. Doran*, 1874, Ir. R. 8 C. L. 523; *Healy v. Healy*, 1875, Ir. R. 9 Eq. 423; *Sugden v. Lord St. Leonards*, 1876, 1 P. D. 227; *Andrews v. Andrews*, 1885, 15 L. R. Ir. 209; *Paton v. Ormerod*, [1892] P. 252; *Findlater v. Lowe*, [1904] 1 Ir. R. 527; *In the Estate of Hubbuck*, [1905] P. 133.]

Ejectment for lands in the county of Devon. At the trial before Bosanquet, J., at the Devonshire Spring Assizes, 1838, it appeared that the lessor of the plaintiff claimed the premises in dispute under the will of Simon Hiscocks, the grandfather of both the lessor of the plaintiff and the defendant, dated 7th of July, 1822, whereby the testator devised the premises in question to his son John Hiscocks, to [364] hold the same unto him his said son, John Hiscocks, and his assigns, for and during the term of his natural life; and immediately on the decease of the said John Hiscocks, the testator gave and devised all and singular the said last described hereditaments and premises unto his grandson John Hiscocks, eldest son of the said John Hiscocks, and his assigns, for and during the term of his natural life; and immediately on his decease, the testator gave and devised the same hereditaments and premises unto the first son of the body of his said grandson John Hiscocks, and the heirs male of his body lawfully issuing; with remainders over. At the time of making the will, John Hiscocks, the son of the testator, had issue, by a first marriage, Simon Hiscocks, the lessor of the plaintiff; and by a second marriage, John Hiscocks the defendant, and several other younger children, sons and daughters. It appeared also, that the estate had come to the testator from the father of John Hiscocks', the son's, second wife. Under these circumstances, neither of the parties in the cause answering fully the description given in the will (inasmuch as the lessor of the plaintiff, though the eldest son of John Hiscocks the elder, bore the name of Simon, not John, whereas the defendant, though his name was John, was only his father's eldest son by a second marriage), the plaintiff's counsel proposed to give in evidence the instructions given by the testator for his will, and also declarations made by him after its execution, to shew that the lessor of the plaintiff was really the person in his contemplation as the object of his bounty, at the time of making the will. This evidence was objected to by the defendant's counsel, but received by the learned Judge, leave being reserved to the defendant to move to enter a nonsuit, if the Court should think it inadmissible:

and evidence of this nature having been adduced on both sides, the jury found a verdict for the plaintiff.

In the following term, Erle obtained a rule nisi for a nonsuit or a new trial, on the ground that this evidence [365] was improperly received; against which, in last Michaelmas Term,

Crowder and Bere shewed cause,^(a) and contended that this was a case of latent ambiguity, which did not arise until the state of the family was proved, and it appeared that the testator had made a mistake in the name of the intended devisee; and the case therefore fell within the established principle, that a latent ambiguity, where no uncertainty appeared on the face of the will itself, might be holpen by extrinsic evidence; and they cited or referred to the following authorities:—*Chyne's case* (5 Rep. 68), *Cownden v. Clarke* (Hob. 32), *Jones v. Newman* (1 W. Bl. 60), *Day v. Trigg* (1 P. Wms. 286), *Beaumont v. Fell* (2 P. Wms. 141), *Hampshire v. Peirce* (2 Ves. sen. 216), *Dowset v. Sweet* (Ambl. 175), *Bradwin v. Harper* (id. 374), *Thomas v. Thomas* (6 T. R. 671), *Price v. Page* (4 Ves. 680), *Smith v. Coney* (6 Ves. 42), *Careless v. Careless* (19 Ves. 604; 1 Meriv. 384), *Doe d. Orenden v. Chichester* (3 Taunt. 147), *Goodtitle v. Southern* (1 M. & Sel. 342), *Doe d. Le Chevalier v. Hudwaite* (3 B. & Ald. 632), *Doe d. Morgan v. Morgan* (1 C. & M. 235), *Richardson v. Watson* (4 B. & Adol. 787; 1 Nev. & M. 567), *Miller v. Travers* (8 Bing. 244; 1 M. & Scott, 342), and *Doe d. Gord v. Needs* (2 M. & W. 129).

Erle and Butt, contra, argued—First, that as soon as evidence of the state of the family had been given, all the words of the devise were capable of an application, which the judge ought then to have made without receiving further [366] parol evidence: viz. by construing the words “eldest son of the said John Hiscocks,” to mean the eldest son by the second venter; in support of which argument they cited *Steede v. Berrier* (1 Freem. 292), *Foster v. Ramsay* (8 Vin. 310, pl. 9; 2 Sid. 149), *Wilkinson v. Adam* (1 Ves. & B. 422), *Beachcroft v. Beachcroft* (1 Madd. 430), *Gill v. Shelley* (2 Russ. and M. 336), *Frazer v. Piggott* (1 Younge, 354), *Lewis v. Lewellin* (1 Turn. & Russ. 104), and *Davis v. Williams* (1 Ad. & E. 588; 3 Nev. & M. 821).

Secondly, that the evidence of the testator's intention was not admissible in this case, because it went to shew an intention contradictory of one which was plainly expressed in the will, and was capable of an application; or, if not applicable by inquiry into the surrounding circumstances, that the devise was altogether void. In this part of the argument, besides the cases referred to by the plaintiff's counsel, the following were mentioned:—*Parsons v. Parsons* (1 Ves. jun. 266, n.), *Baylis v. Attorney-General* (2 Atk. 239), *Herbert v. Reid* (16 Ves. 489). Thirdly, that at all events the declarations of the testator, being made subsequently to the will, could not be received: *Doe d. Morgan v. Morgan*, *Harris v. Bishop of Lincoln* (2 P. Wms. 135), *Rachfield v. Careless* (id. 158).

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon [367] for life, and from and after his death to his grandson Henry Hiscocks in tail male, and making, as to certain other estates, an exactly similar provision in favour of his son John for life; then, after his death, the testator devises those estates to “my grandson John Hiscocks, eldest son of the said John Hiscocks.” It is on this devise that the question wholly turns.

In fact, John Hiscocks the father had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was John Hiscocks the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son.

The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the county of Devon, 1838, and that learned Judge admitted evidence of the instructions

(a) The subject is so fully discussed in the judgment of the Court, that it is not considered necessary to report the arguments, which ran to great length, in detail.

of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts ; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a nonsuit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject ; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting [368] his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements ; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words.

Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as [369] to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express.

Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," i.e., the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity ; for the intention shews what he meant to do ; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing ; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe v. Huthwaite* and *Bradshaw v. Bradshaw*, the only thing decided was, that, in a case like the present, some parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in

order to shew that in some secondary sense of the words—and one in which the testator meant to use them—the de-[370]-vise may have a full effect. Thus, again, in *Cheyney's case*, and in *Counden v. Clarke*, “the averment is taken” in order to shew which of two persons, both equally described within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe d. Morgan v. Morgan*, and *Doe d. Gord v. Needs*, both in this Court, are to the same effect. So, in the case of *Jones v. Newman*, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of their being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation.

The cases of *Price v. Page*, *Still v. Hoste* (6 Madd. 129), and *Careless v. Careless*, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price v. Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood v. Mildmay* (3 Ves. jun. 306), evidence of instructions for the will was received. That case was doubted in *Miller v. Travers*; but perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal in *Miller v. Travers*, be considered as being only a [371] wrong application to the facts of a correct principle of law. Again, in *Hampshire v. Peirce*, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to shew that by the words, “the four children of my niece Bamfield,” she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont v. Fell*, though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received at Nisi Prius in *Thomas v. Thomas*, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in *Miller v. Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of shewing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of [372] *Miller v. Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial.

Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they

cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty.

Rule absolute for a new trial.

THE ATTORNEY-GENERAL v. SMITH AND ANOTHER. Exch. of Pleas. 1839.—An information in rem may be amended by the Crown, after plea pleaded by adding additional counts, although a recognisance has been entered into by the bail to pay the costs occasioned by the claim; such recognisance having been entered into before the information filed.

In this case an information in rem had been filed respecting certain British spirits, in respect of a certain duty by law imposed, which, it was alleged in the indenture of [373] appraisement, had been deposited and concealed by the defendants, “with intent to defraud her Majesty of such duty, whereby the same became forfeited; and for other cause or causes of forfeiture.” The defendants came in and claimed the property, and gave bail in two recognisances; one for the restoration of the goods, and the other for the payment of the costs. The condition of the latter was as follows:—“That whereas certain officers of excise have lately seized, as forfeited to the use of her Majesty, a certain number of gallons of British spirits and certain parcels of machinery, which were afterwards claimed by T. S. and G. S., who have entered their claims thereto; if the said T. S. and G. S. shall pay, or cause to be paid, such costs as shall be occasioned by the said claim, to be taxed by her Majesty’s Remembrancer of this Court, and in case the said spirits or machinery, or any part thereof, shall be adjudged to be forfeited, then this recognisance to be void.” The information in rem originally contained three counts, charging the defendants with a fraud, which the defendants by their plea denied. After the defendants had pleaded, the Attorney-General, having obtained a side-bar rule for that purpose, had added two counts to the information, charging certain irregularities only.

Sir F. Pollock now moved to discharge the order for the amendment. He submitted, that in a case where bail had been given, the Crown was not entitled to amend, as it might prejudice the bail, and would be a great hardship on the defendants, who were brought into court on a charge of fraud, and pleaded to that charge, to have afterwards a new charge set up against them. He cited a case from the records of this Court, where, in the year 1788, a defendant had obtained a rule calling upon the Attorney-General to shew cause why an order for amending the information should not be set aside: cause was shewn against [374] the rule, but it was made absolute, on the ground that, the amended information going further back than three years, the bail would become security for a different offence. Now, here the recognisance in respect of the costs would be affected by the amendment, because the tendency of it would be to increase the costs; and, as against the bail, that amendment ought not to be allowed.

LORD ABINGER, C. B. The recognisance is to pay the costs occasioned by the claim, and that is entered into before the information is filed. Then the amendment makes no difference, because the bail must take the chance of what the Crown may do.

PARKE, B. In the indenture of appraisement, which is taken before the recognisance is entered into, there is one particular cause of forfeiture mentioned, and it adds, “and for other cause or causes of forfeiture” that the Crown may maintain. Then the Crown may amend. Even if your motion were well founded in other respects, the Attorney-General might amend. The only objection is, that the bail would not be liable on the remaining recognisance: then you should apply to the Court on your recognisance only. In this case you are entitled to no such relief, because the recognisance goes upon the ground of the goods having been concealed, or any other cause or causes of forfeiture.

Motion refused.

[375] BRIDGLAND AND OTHERS v. SHAPTER. Exch. of Pleas. 1839.—By a private act of Parliament, passed in 1835, the market of Devonport, belonging to A., was enlarged into a market for cattle, sheep, &c., and A. was empowered to let the erections, buildings, &c. on the ground whereon the market should be held, and to demand and take certain tolls of and from any person or persons bringing any goods or articles to the market. There was also a clause providing that if the owner should demise or lease the market, or the site thereof, and all or any of the erections or buildings thereon, the lessee should, subject to such exceptions or restrictions as might be expressly contained in the lease, take and enjoy the rents and tolls authorized to be taken by the act, as the owner would have been entitled to do if the lease had not been made:—Held, that a lessee of the market, under a parol demise, was entitled to demand and receive the tolls.—A person brought sheep to a public-house forty yards out of the limits of the market, left them there, went into the market in search of customers, whom he brought back to the public-house, and there sold the sheep to them:—Held, that this was a fraud upon the market, for which the seller was liable to an action on the case by the lessee of the market.

[S. C. 8 L. J. Ex. 246. Approved and distinguished, *Brecon Corporation v. Edwards*, 1862, 1 H. & C. 51.]

Case for disturbance of a market. The declaration stated, that the plaintiffs were possessed of a certain close called Devonport Market, for the sale therein, amongst other things, of sheep, and that they were entitled to and ought of right to have a certain toll from any person bringing any sheep within the said market: that the defendant, on divers market days, to wit, on &c., exposed for sale, in certain public-houses and premises near and adjoining to the said market, certain sheep; and did at the said several times go into the said market, and publicly offer the said sheep for sale in the said market, the said sheep then being near to the said market, whereby the plaintiffs were prevented from enjoying their said market, and taking the tolls thereof in so ample and beneficial a manner as they ought to and otherwise would have done &c.

The defendant pleaded, first, not guilty; secondly, that the plaintiffs were not possessed of the said market in the declaration mentioned; thirdly, that the plaintiffs ought not as of right to have the said tolls in the declaration mentioned; on which issues were joined.

At the trial before Gurney, B., at the last Devon Assizes, it appeared that the plaintiffs were the lessees of Sir John St. Aubyn, Bart., of a market called Devonport Market, within the borough of Devonport, under a written agreement not under seal. The defendant, a cattle-jobber at Ugborough, had been in the habit, on several market days, of bringing sheep to the premises of a public-house about forty yards beyond the limits of the market, where he [376] left them while he went into the market in quest of customers, whom he brought back to the public-house, and there bargained with them for the sale of the sheep: and he refused to pay any tolls in respect of such sales.

A private act of Parliament, passed in 1835, was put in, whereby the market of Devonport, being then the property of Sir John St. Aubyn, was enlarged into a market for cattle, horses, sheep, grain, corn, and other commodities: and he was empowered "from time to time to let" the erections, buildings, shops, &c. on the ground whereon the market should be held, and was authorized to demand and take certain tolls "of and from any person or persons bringing any goods or articles to the said market." There was also a power to the owner or his lessees to distrain the goods of such person or persons as "should bring to the said market any waggon or cart, or any article or thing whatsoever liable to pay tolls," and should refuse to pay the toll. The 21st section was as follows:—"Provided always, that if the said Sir John St. Aubyn, his heirs or assigns, or the owners or owner for the time being of the said market, shall at any time or times demise or lease the said market, or the site thereof, and all or any of the erections or buildings erected and built or to be erected or built on the said site, to any person or persons, the lessee or lessees thereof, and his, her, or their executors, administrators, or assigns, shall, during the term of his, her, or their lease (but subject to such exceptions or restrictions, if any, as may

be expressly contained in any such lease), have and enjoy the respective rents and tolls authorized to be taken by this act, as the said Sir John St. Aubyn, his heirs or assigns, or the owner or owners for the time being of the said market, would have been entitled to do if such lease had not been made; and shall also, during the term of his or her lease, have and enjoy all or any of the powers, privileges, and advantages demised by such lease, and be subject to all the obligations in respect [377] of such market, which the said Sir John St. Aubyn, his heirs or assigns, or the owner or owners for the time being of the said market, would have had and enjoyed, or been subject to, by virtue of this act or otherwise, if such lease had not been made."

The defendant's counsel, at the trial, applied for a non-suit on two grounds: first, that the market, being an incorporeal hereditament, could only be leased by deed; secondly, that the defendant had not been guilty of any disturbance of the market for which he was liable in this action, the right to toll being only in respect of articles brought to the market. The learned judge overruled the objections, and under his direction a verdict was found for the plaintiffs with nominal damages, leave being reserved to the defendant to move to enter a nonsuit, or a verdict in his favour. In Easter Term, Crowder obtained a rule nisi accordingly, against which

Erle and Smirke now shewed cause. The plaintiff is entitled, on both grounds, to retain his verdict. First, although in general a demise of market tolls, as of other incorporeal hereditaments, must be by deed, in this case the owner of the market is expressly empowered by the act of Parliament to let the buildings in which the market is held—nothing being said as to the necessity of the demise being by deed—and by the 21st section, the lessees under such letting are to have and enjoy the same tolls, and all other privileges and profits incident to the market, as the owner himself would have had if such lease had not been made. Here the plaintiffs held under a written agreement amounting to a present demise, which was sufficient to satisfy the act of Parliament. The object of the act probably was to prevent the necessity of having a lease by deed in every case, for which purpose it empowers the owner to let, not the market itself, but the buildings, erections, &c. on the ground whereon it should be held,—coporeal, not incorporeal objects, which may be made the subject of a lease by parol. But further, the plaintiffs being actually in possession, that is sufficient as against a mere wrong-doer, and he has no right to set up this defence.

Secondly, the defendant was guilty of a fraud upon the market, for which he is liable in this action. The general principle of law is, that if a man bring his commodities for sale so near a market as to obtain the benefit of it without paying the toll, that is fraud upon the market, for which an action on the case will lie at the suit of the lord of the franchise or his lessee. All the authorities establish the proposition that the lord of a market has a right to prevent the sale of goods without payment of toll, either within the market, or so near to it that the party thereby obtains the benefit of the market: *Termes de la Ley*, "Tolle"; *Com. Dig. Market* (F.), 2; the case of *Newington Fair* (2 Roll. Abr. 123 (B.), pl. 1), *Bennington v. Taylor* (2 Lutw. 1519), *Bluekey v. Dimsdale* (Cowp. 664), *Bailiffs of Tewkesbury v. Diston* (6 East, 438), *Bailiffs of Tewkesbury v. Bricknell* (2 Taunt. 120), *Duke of Bedford v. Emmett* (3 B. & Ald. 366), *Mosley v. Walker* (7 B. & Cr. 40; 9 D. & R. 863), *Mayor of Macclesfield v. Pedley* (4 B. & Adol. 297; 1 N. & M. 708). In *Prince v. Lewis* (5 B. & Cr. 363; 8 D. & R. 121), the defendant would clearly have been held liable, although it was not the case of an immemorial market, but for the circumstance of the lessee of the market having encumbered the space. Here it is clear upon evidence, that the defendant who sought and found his customers in the market, has obtained all the benefit of the market, and yet has evaded the payment of the toll: he is therefore liable in this action.

Crowder and Butt, contra. First, the plaintiffs did not acquire, by the parol demise to them, any title to the [379] market or the tolls. All that the act says is, that, by the lease of the market, the right to tolls and the other profits of it shall be vested in the lessees; but there is nothing to exclude the operation of the common law as applicable to the subject-matter of the demise, viz. an incorporeal hereditament. When a statute says that an incorporeal hereditament is to be demised, that must be construed to mean that it shall be demised by the instrument proper in such case, viz. by lease under seal. The mention of "exceptions expressly contained in the lease" shews that, at least, it is to be in writing.

Secondly, this case is distinguishable from those which have been cited on the

other side, and rests upon a different principle. They were cases of ancient fairs or markets incident to a manor or town, where the right of the lord (although for convenience the market was erected in some particular spot) being co-extensive with the limits of the manor or town, he would have a right to remove the market if he thought fit, to any other part of the manor or town; and therefore a person selling in his own house or shop within the limits of the lord's right, although not within the actual site of the market, was held liable. By means of the market, the seller of goods had the benefit of a public sale, and the testimony of witnesses to it: for which the lord was held to be entitled to a reasonable compensation in the shape of toll, even though the party might not choose to avail himself of the benefit of the market. This case differs from those in two respects. In the first place, this is a new grant of a market, limited to a particular part of the town of Devonport; and in consideration of its establishment, the act gives a power of erecting shops and other buildings within its limits, and of taking certain tolls on commodities brought to the market—not, as in the case of prescriptive markets, from the buyer upon a sale, but from the seller, whether the goods be sold or not; but there is nothing in terms to exclude persons from [380] selling out of the limits of the market, or to impose a toll upon them if they do so. Where the market was co-extensive with the ambit of the vill, it might be supposed that the market existed before the town was built: therefore the custom to exclude persons from selling in their own homes was only this—that from time immemorial the lord had received toll within certain limits, viz. those limits within which the town was afterwards built. This is rather a right to receive a payment of the same kind as stallage or pickage, which are a species of rent for the use of the soil within the market, and are payable by the seller (2 Inst. 220). In the case of *The Bailiffs of Tewkesbury v. Bricknell*, the goods were to be sold, before the lord had the benefit of the toll. In *Mosley v. Walker*, the Court expressly avoids saying what would be the effect of the grant of a new market, without the proof of custom, in excluding persons from selling in private houses. And in *Mayor of Macclesfield v. Peddy*, Littledale, J., observes that no case has decided that such an act, simply, would be an injury to the market in point of law. If this claim can be enforced, the owner of this market may exclude from the rest of the town of Devonport all commodities for which he has room in the market. But it is submitted that the clear intention of this act of Parliament was, that those persons only who did in fact make use of the market for the sale of their goods within its limits, should pay the toll. The defendant is not liable merely because he has some benefit from the market, but only if he makes the use of it expressed in the act of Parliament.

LORD ABINGER, C. B. Two points have been made in this case. The first, which goes to a nonsuit, is, that there is no demise by deed of the tolls claimed by the plaintiffs. It is admitted that tolls, being an incorporeal hereditament, cannot in general pass except by deed; but the answer to [381] this objection is contained in the 21st section of the act of Parliament. [His Lordship read that section.] It is said this must be a lease in writing. There is nothing in the act which says so; the word "lease" does not in law import a written instrument. It is said that the mention of "exceptions expressly contained in such lease" imports it; but that is not so; there may be express exceptions out of a parol demise. The probable object of the act was to prevent the necessity of granting a lease by deed; it gives the lord a power to let the buildings, without any reference in terms to the tolls; and the probable intent was to vest the right to receive the tolls in the party who might be the tenant of the corporeal part of the premises. The plaintiffs, therefore, being in possession of the premises, which they occupied under a parol agreement, amounting to a demise, had a right to take the tolls.

We come, then, to the second point,—that, under the circumstances, the defendant has not been guilty of any disturbance of the market. It is true that, upon the words of the act of Parliament, no toll was due on the sale of these sheep, because they were not brought to the market; but the question is, whether the object of the defendant was not to obtain the benefit of the market, and to evade the tolls. Mr. Crowder says there was no evasion of the tolls under this act of Parliament, and that the defendant had a right to do what he did; but it has been settled by a series of cases, that where a party has a franchise of this nature, he may bring an action against a party who disturbs it by an evasion of the obligation which it imposes on other persons: and on this ground the action on the case for disturbance of a market is founded. This

act of Parliament gives the right, without defining the particular circumstances under which it shall be enforced; and any attempt to evade the tolls imposed by the act, particularly under a claim of right, will be a fraud in law, as being a disturbance of the right of the owner of the market. It is [382] argued that there is nothing in this act to extend the right beyond the limits of the market. If the defendant were a shopkeeper in Devonport, selling in his shop, this argument would be correct, because he could not be excluded from doing so, unless by prescription. But this is not such a case: but is one where the party brings his cattle from a distance to within forty yards of the market, and makes use of the market itself to obtain customers. It seems to me that it is a strong case of evasion of the market, and that if this were allowed, a party might in every case bring his goods within ten yards of the market, make a bargain in the market, and then go out and deliver the commodity; and so entirely destroy the market. In a legal sense, therefore, this is a fraud upon the market, and an action lies for it, by the general principle of law, that whenever a person seeks to take the benefit of a market without payment of the toll, that is a fraud upon the market, for which an action on the case will lie. The rule must therefore be discharged.

ALDERSON, B., GURNEY, B., and MAULE, B., concurred.

Rule discharged.

KILNER v. CHARLES BAILEY, W. H. POTTER, AND KENSINGTON LEWIS. Exch. of Pleas. 1839.—Where the plaintiff in an action of assumpsit claimed by his bill of particulars the sum of 36l. 2s. 4d., being the balance of a certain account, to which the defendant pleaded the general issue, payment and a set-off, except as to the sum of 5s. (which was paid into Court); and at the trial proved payment to the amount of 29l. 17s. 3d., and a set-off to the amount of 16l. 10s. 7d.:—Held, that the defendant was not entitled to have a verdict entered for him on those pleas, for the amount proved under them.

[S. C. 7 Dowl. P. C. 803; 9 L. J. Ex. 37; 3 Jur. 894.]

This was an action of assumpsit, in which the following particulars of the plaintiff's demand had been delivered: "This action is brought to recover the sum of 36l. 2s. 4d., being the balance of an account, &c., and for money found to be due from the defendants to the plaintiff on an account stated."

[383] Judgment was signed for want of a plea against the two first-named defendants: the other defendant, Kensington Lewis, pleaded, first, *nunquam indebitatus*; secondly, payment: on both of which issue was joined. The defendant afterwards obtained an order for leave to amend his pleas, and the pleas were amended accordingly, the defendant pleading, first, except as to 5s., parcel &c., the general issue; secondly, except as aforesaid, payment; thirdly, except as aforesaid, a set-off; fourthly, as to the sum of 5s. so excepted, payment of that sum into Court. The defendant afterwards delivered the following particulars of set-off:—"The defendant K. Lewis seeks to set off in this action the sum of 19l. 1s. 10d. for goods sold and delivered by the defendants to the plaintiff, and also the sum of 36l. 2s. 4d., for money paid on or about the 10th of May, 1838, for principal money and expenses, to the holder of a bill of exchange for the sum of 35l. 18s. 10d., dated 7th of February, 1838, drawn by the defendants upon one A. Keith, payable three months after date, and indorsed by the defendants to the plaintiff for his accommodation." Issue was joined on all the pleas except the last, the plaintiff having accepted and taken out of Court the said sum of 5s. in satisfaction of so much. The cause was tried at the sittings in last Easter Term, when a verdict was found for the plaintiff for the sum of 35l. 17s. 4d., which, added to the 5s. paid into court, made together the sum of 36l. 2s. 4d., being the amount claimed by the plaintiff in his particulars of demand; but the jury found that the defendant had paid to the plaintiff a sum of 29l. 17s. 3d., and had a set-off to the amount of 16l. 10s. 7d. Afterwards, by an order of Gurney, B., it was ordered "that the verdict on the issue on the plea of payment, so far as related to the sum of 29l. 17s. 3d., and the verdict on the issue on the plea of set-off, so far as related to the sum of 16l. 10s. 7d., be entered for the defendant, and that the *postea* be amended accordingly." [384] The affidavit of the plaintiff's attorney stated, that the plaintiff in his particulars did not claim the said sum of 29l. 17s. 3d. and 16l. 10s. 7d. or either

of them, or any part thereof, but, on the contrary, gave the defendant Lewis full credit for the same, and claimed the said sum of 36l. 2s. 4d. independently of the said sums for which the verdict was ordered to be entered as aforesaid. After the plaintiff's costs had been taxed, the attorney for the defendant Lewis tendered a bill of costs, which he claimed to have allowed against the plaintiff, and to have deducted from the damages and costs due to the plaintiff; and the Master, after discussion and deliberation, proceeded to tax the last-mentioned bill accordingly. A rule having been obtained, to shew cause why the order of Gurney, B., should not be rescinded, and all the issues entered for the plaintiff,

Platt shewed cause, and relied upon *Moore v. Bullin* (7 Ad. & Ellis, 595; 2 N. & P. 436), and *Tuck v. Tuck* (ante, 109). In the latter case it was held, that where a defendant, under a plea of set-off to the whole declaration, proves a sum of money owing to him from the plaintiff, less than the amount of the claim which the plaintiff has established, the defendant is not entitled to have a verdict entered for him on that issue for the amount which he has so proved; but the issue must be found for the plaintiff; unless where the defendant, by all his pleas taken together, covers the whole cause of action.

Kelly, contra. The pleas of set-off and payment cannot be taken distributively. They are governed by the general rule relative to pleas pleaded in bar of a whole action or count; and if not proved in part, they fail altogether. [Maule, B. In *Cousins v. Paddon* (2 C. M. & R. 547), it was held that such pleas must be taken distributively.] That case is [385] in this respect inconsistent with *Moore v. Bullin*, and must be taken to be overruled by it. As to *Tuck v. Tuck*, it only lays down the rule that the plea of set-off is divisible when, taken together with other pleas, it forms an answer to the action. Besides, the plaintiff has already given the defendant credit for the sum which he now seeks to set off, and only goes for another balance. [Alderson, B. You cannot give credit for a set-off, as it is impossible to know whether the defendant will plead one or not. On the defendant's doing so in this case, you ought to have applied to amend your particulars by adding that sum. Lord Abinger, C. B. I do not see how the particulars of demand can be looked to with a view to construe the pleadings. We will consider the matter.]

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said,—In this case an application was made to rescind an order of Gurney, B., for amending the postea. The Court have looked into the cases, and they find that the point has been decided by this Court last term in the case of *Tuck v. Tuck*. We have however some difficulty in making this rule absolute, as we cannot alter the order of my Brother Gurney as to the entry on the postea; and we think the parties ought to go before him, to induce him to rescind his own order.

ALDERSON, B. In *Tuck v. Tuck*, the Court took into consideration the cases of *Cousins v. Paddon* and *Moore v. Bullin*, and from them they have deduced this rule: that where several pleas are pleaded, which altogether cover the whole cause of action, there the verdict should be entered for the defendant. In this case they do not do so. Here the pleas are (except as to the 5s. paid into Court, which may be laid out of consideration) payment to the whole, and set-off to the whole; but they did not cover the whole demand established in evidence.

[386] PARKE, B., who was not present at the argument, added—In *Tuck v. Tuck*, the whole subject was gone into, and that case is precisely in point.

Rule accordingly.

BARTHOLOMEW v. STEPHENS AND EDWARDS. Exch. of Pleas. 1839.—Where two defendants in trespass appear by different attornies, but are defended by one counsel only, and one obtains a verdict and the other is found guilty, the former will be entitled to a moiety only of the costs of the brief, counsel's fees, &c.

[S. C. 7 Dowl. P. C. 808; 8 L. J. Ex. 250; 3 Jur. 753.]

Trespass for shooting the plaintiff's dogs.

The defendants appeared by separate attornies, and pleaded not guilty; but on the trial one counsel only was engaged in the defence of both, but the retainer was

by Stephens alone. At the trial a verdict was found in favour of the defendant Stephens, and against Edwards. The Master, on taxation, allowed full costs to the plaintiff against the defendant who failed, and to the defendant who succeeded his separate costs, and also one moiety of the costs of the brief, &c.

Ludlow, Serjt., now moved for a review of the taxation. This action may be considered as a separate action against Stephens alone, and if it had been so brought he would have been entitled to the costs of the whole brief, counsel's and Court fees &c. ; and no reasonable ground is here shewn for making him a defendant at all.

PARKE, B. The rule as laid down by Bayley, B., in *Griffiths v. Kynaston* (2 Tyrw. 757), and acted upon by the Court of Queen's Bench in *Gambrell v. Lord Falmouth* (5 Ad. & Ellis, 403), is the correct rule. In the latter case Lord Denman, C. J., says : "We have considered the matter, and think ourselves bound by the rule laid down by Mr. Baron Bayley in *Griffiths v. Kynaston*, and afterwards confirmed in *Griffith v. Jones* (2 C. M. & R. 333), viz. that the successful defendant is to be allowed all his separate costs, and *prima facie* an aliquot part of the joint costs, unless the Master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances." Here the [387] Master has acted on that rule, and I think his taxation was right.

Rule refused.

LOSH v. HAGUE. Exch. of Pleas. 1839.—The certificate given by a Judge under the Patents Act, 5 & 6 Will. 4, c. 83, s. 5, should be as to the determination of each objection of which notice has been given, and not as to the issues.—Where a defendant, in an action for the infringement of a patent, succeeds on a plea which goes to the whole action, he will be entitled to the general costs of the cause, deducting the costs of the objections on which the plaintiff has succeeded, and of the issues found for him.

[S. C. 7 Dowl. P. C. 495 ; 8 L. J. Ex. 251 ; 3 Jur. 409.]

Case for the infringement of a patent. The defendant pleaded, first, the general issue ; secondly, that the invention was not new ; thirdly, that the plaintiff was not the first inventor ; fourthly, no specification ; and in pursuance of the provisions of the statute 5 & 6 Will. 4, c. 83, s. 5, delivered notice of seven objections on which he meant to rely.

At the trial, the defendant succeeded in establishing one of the objections, which was applicable to the third plea, and a verdict was found for him on that plea, and for the plaintiff on the other issues. The learned Judge certified, under the 6th section of the above statute, as to the issues so found, but not as to the objections. The Master having, on taxation, allowed the defendant the general costs of the cause,

Bayley now moved for a rule to shew cause why he should not review his taxation. The defendant was not entitled to the general costs of the cause. Under the rule of Court as to the taxation of costs on several issues, the defendant would no doubt be entitled to the whole costs, deducting the costs of the issues found against him, unless the recent statute 5 & 6 Will. 4, c. 83, operated as a repeal of the rules ; but it is submitted that it did. Admitting that the general result of the cause was against the patent, the defendant has driven the plaintiff to trial on the other objections, and as the latter succeeded on six out of the seven objections, he is entitled to a portion of the general costs.

PARKE, B. The effect of the statute is to make the objections separate issues ; and the Judge's certificate ought [388] to have been as to the determination of each objection : that is the meaning of the act of Parliament. The act seems to have been framed under a supposition that the objections would be taken under the plea of the general issue, and the legislature appear to have forgotten the new rules as to pleading, which remain unaltered. As to the plaintiff's proportion of the costs of the objections, he may in strictness be entitled to six-sevenths of them, and you may take a rule to review the taxation to that extent if you think it worth while. It seems to me that the act makes no difference except as to the costs of copying the objections ; the costs as to the issues remain the same as before.

Bayley declined to take the rule.

CHEW v. LYE. Exch. of Pleas. 1839.—The statute 1 & 2 Viet. c. 110, s. 41, does not operate to prevent a prisoner from being discharged out of custody under 48 Geo. 3, c. 123, s. 1, but applies only to cases of supersedeas at common law.

[S. C. 7 Dowl. P. C. 465; 8 L. J. Ex. 273.]

Godson had obtained a rule to shew cause why the defendant should not be discharged out of custody under the 48 Geo. 3, c. 123, s. 1, having lain in prison more than twelve months for a debt not exceeding 20l.

The affidavit in answer to the application stated that the detaining creditor had applied to the Insolvent Debtors Court under the statute 1 & 2 Viet. c. 110, s. 36, and obtained an order vesting the prisoner's effects in the provisional assignee of that Court.

Hodges shewed cause, and contended that this application being in the nature of a supersedeas, the 41st section of the last-mentioned act operated to prevent the defendant's discharge. Sed

Per Curiam. That statute only applies in cases of supersedeas at common law, which this is not, and therefore the power of discharging a prisoner under the 48 Geo. 3, c. 123, is not affected by it.

Rule absolute.

[389] **SOLOMONS v. NAINBY.** Exch. of Pleas. 1839.—The omission or imperfect description of the year in the date of a summons is immaterial; it is sufficient if the day and month be properly stated.

[S. C. 7 Dowl. P. C. 459; 8 L. J. Ex. 267; 3 Jur. 682.]

In this case the time for pleading expired on the 31st of May. On the 30th a summons was taken out for a month's time to plead, bearing the date "30th of May, 183 " (omitting the figure 9). On the 31st the defendant took out a second summons, returnable on the 2nd June. The plaintiff treated it as a nullity, and signed judgment on the 1st of June as for want of a plea.

A rule nisi having been obtained for setting aside the judgment for irregularity, Petersdorff appeared to shew cause, but

PARKE, B., said,—It is quite clear this was no irregularity in the summons. The Master says that in a summons of this nature it is sufficient to specify the day of the month, and that the year need not be mentioned at all. Then it follows that an imperfect designation of the year will not vitiate the whole. The parties cannot suppose they are living in the year of our Lord 183. The rule must be absolute.

Rule absolute.

KNIGHT AND ANOTHER, Assignees of John Barrow, an Insolvent v. FERGUSON. Exch. of Pleas 1839.—B., being in insolvent circumstances, and having several executions in his house, to satisfy which all his goods must have been sold, at the suggestion of one of the execution creditors, assigned to him all his effects, in trust for the general benefit of his creditors who should come in and sign the deed. The deed recited that B. "had proposed" to execute such assignment. The assignee paid the sheriff's officer the amount of the executions, and he withdrew from possession. Several of the execution creditors signed the deed. Within three months after the assignment, B. went to prison, and subsequently was discharged under the Insolvent Act:—Held, that the assignment was not voluntary, within the meaning of the 7 Geo. 4, c. 57, s. 32.

[S. C. 2 H. & H. 59.]

Assumpsit for money had and received to the use of the plaintiffs as assignees. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the Berkshire Summer Assizes, 1838, the following facts appeared.

[390] The insolvent Barrow had kept a public-house at Bracknell, in the county of Berks. Towards the end of the year 1836, he became involved in debt, and in

November and December in that year several executions were levied in his goods, one of which was at the suit of the defendant Fergusson, for the sum of 51l. 10s. 3d. : the whole amount of the executions being 256l. 12s. 6d. The insolvent was also indebted to his landlady, a Mrs. Long, for rent, and to the Crown for taxes ; and it appeared that his goods, if sold, would not have been sufficient to satisfy all these claims. Under these circumstances, Barrow, on the 8th December, 1836, at the defendant's suggestion, executed an assignment of all his effects to the defendant and Mrs. Long, in trust for the benefit of all his creditors who should come in and sign the deed. It recited that Barrow "had proposed" to make the assignment for the security of the creditors. The sheriff's officer remained in possession under the executions, until the 12th of December, when the assignees paid him the amount of the levies, and he withdrew from possession ; and the money was afterwards paid over to the execution creditors. Several of those creditors had signed the deed. Barrow went to prison on the 24th of January, 1837, presented his petition to the Insolvent Debtors Court on the 11th of March, and was discharged on the 20th of June ; and the plaintiffs were duly appointed his assignees. The defendant and his co-assignee under the trust deed carried on the business of the public-house for some time under the assignment ; and it appeared from an admitted account put in by the plaintiffs, that, on the 4th of April, 1837, the defendant received, on a sale of Barrow's goods, the sum of 445l. 5s. 6d. ; but it was alleged that he was also chargeable with further sums received in the meantime from the profits of the trade, and the whole amount claimed by the plaintiffs was 590l.

Upon this state of facts, the Lord Chief Baron expressed [391] his opinion that there was no evidence to shew that the assignment of the defendants was voluntary, within the meaning of the Insolvent Debtors Act, 7 Geo. 4, c. 57, s. 32. He however offered to leave the question to the jury, if the plaintiff's counsel required it. The learned counsel did not require that this should be done, and his Lordship then directed a verdict for the defendant, giving the plaintiffs leave to move to enter a verdict for such sum as an arbitrator agreed on between the parties should find to be due.

In Michaelmas Term, Talfourd, Serjt., obtained a rule nisi for entering the verdict accordingly ; against which, in Hilary Term,

Ludlow, Serjt., and Tyrwhitt shewed cause. There are several grounds on which this rule ought to be discharged. In the first place, according to the opinion expressed by this Court, in *Davies v. Acocks* (2 C. M. & R. 461), an assignment by a debtor, although in a state of insolvency, of all his property for the benefit of all his creditors, does not fall within the prohibition of the 32nd section of the Insolvent Debtors Act. There Alderson, B., doubted upon that point, but said that the inclination of his mind was that the deed was good ; and the other judges, Lord Abinger, C. B., and Bolland, B., expressed a clear opinion to that effect. [Alderson, B. The case of *Binns v. Towsey* (7 Ad. & E. 869 ; 3 N. & P. 88) appears hardly to be reconcileable with that decision.] That case is distinguishable on the ground that there the assignment was made after the commencement of the imprisonment, and was wholly without new consideration. Lord Denman, C. J., at Nisi Prius, had expressed an opinion in accordance with the decision in *Davies v. Acocks* ; and, though he departs from it in banc, it is only on the ground that the assignment was wholly without any new consideration ; [392] and the same ground of decision is taken by the other judges. But here there was an adequate consideration for the assignment, in the release of the insolvent's goods from the pressure of the executions, and the agreement by the creditors who came in under the deed, to accept a part in satisfaction of their whole debts, and release him from the residue. Any bonâ fide consideration is sufficient to give validity to the assignment—it need not be a full consideration : *Doe v. Routledge* (Cowp. 710). But, further, this deed was at all events not voluntary within the meaning of the act, being made under the pressure of, and for the purpose of obtaining a release from, several executions, and at the suggestion of an execution creditor. The cases of *Arnell v. Bean* (8 Bing. 87 ; 1 M. & Scott, 151), *Doe d. Boydell v. Gillett* (2 C. M. & R. 579), and *Mogg v. Baker* (4 M. & W. 348), have fully established that the meaning of a "voluntary transfer or conveyance," within the 32nd section, is, a transfer or conveyance executed spontaneously, suo motu, by the insolvent ; and that if it originate in the bonâ fide request of the creditor, that is sufficient, without circumstances of actual fear or pressure, to prevent its being voluntary. The

recital in this deed, that the insolvent "had proposed" to execute it, cannot preclude the parties from shewing with whom the proposal originated. It is no more than saying, that the deed being prepared, he was ready to sign it.

Talfourd, Serjt., W. J. Alexander, and Bros., in support of the rule. The simple question here is, whether there was sufficient evidence to shew that this deed, though made *bonâ fide*, was a voluntary conveyance, and therefore fraudulent, within the statute. The fact that at the time of the assignment there were executions in the house of the insolvent, cannot entitle him to make such a conveyance, [393] whereby the general body of his creditors are placed in an entirely different position. The policy of the law requires that in such circumstances the disposition of his property shall be taken out of the hands of the insolvent, and vested in those in which the law places it. The Insolvent Debtors Act was not passed for the remedial benefit of the insolvent alone, without an equivalent compensation to his creditors. There is a great difference between the circuitous equitable process of distribution among the creditors under a deed of this nature, and the summary common law process of distribution under the Insolvent Act. Here the insolvent is availing himself of the protection of the deed, without giving his creditors a corresponding benefit. In some composition deeds there is a provision, that if the creditors do not come in within a certain time, the deed shall be inoperative; but there is no such clause in this deed, which may therefore be considered as a fraudulent preference of those creditors who do sign it against those who do not. The opinion expressed by Lord Abinger, C. B., and Bolland, B., in *Davies v. Arocks*, is undoubtedly adverse to the plaintiffs; but it was not necessary for the decision of that case, and *Binns v. Towsey* appears to contravene it. Littledale, J., there says, "The word 'creditors' [in s. 32] is not confined to the case where a part only of the creditors are benefited, but extends also to an assignment for the benefit of all: therefore, by the enacting part of the section, the deed is void." In *Arnell v. Bean*, there clearly was a new consideration, in the present advance of money by the assignee to the insolvent. In *Doe v. Gillett* and *Mogg v. Baker*, the deed was executed on the demand of the creditor; here, according to the recital, it was proposed by the debtor himself. It is said there is a new consideration, in the release of the debts by the creditors parties to it; but that is no more a new consideration than a receipt in full from one creditor; it is merely the consequence which results from the discharge so made. [394] They referred also to the judgment of the Court in *Becke v. Smith* (2 M. & W. 191).

Cur. adv. vult.

In this term, judgment was delivered by

LORD ABINGER, C. B. This was an action tried before me at the last Summer Assizes at Abingdon.

The insolvent, John Barrow, kept a public-house at Bracknell. He went to prison on the 24th January, 1837, presented his petition on the 11th of March, and was discharged on the 20th of June. The plaintiffs were duly appointed his assignees. The claim of the plaintiffs was for a sum of 590l., as it was said; but this was supported only upon the admission of an account, by which it appeared that the defendant had, on the 14th of April, 1837, received, on a sale of Barrow's goods, the sum of 445l. 5s. 6d.; but it was said that he was chargeable for further sums received as profit in the trade of the house for some months before; and it was agreed that if the plaintiffs were entitled to a verdict, the amount should be referred.

The defence was, that the defendant and a lady of the name of Long were the owners of the goods, under an assignment made by the insolvent on the 8th of December, 1836. It was stated by Serjeant Ludlow, that the insolvent had several executions in his house, which had been brought in between the middle of November and the 8th of December, under which his goods had been seized, and were then in the hands of the sheriff; that there was also rent due to the landlord, and taxes to the Crown; and that had his goods been sold by the sheriff, there would not have been sufficient to satisfy the creditors who had their executions: whereupon it was suggested by the defendants, one of whom was the landlady, and the other one of [395] the principal of the execution creditors, that, if Barrow would assign over the property to them, for the benefit of all the creditors, they would pay off the execution creditors, and prevent the sale of the goods, to a great loss, by the sheriff, and would keep on the public-house till the time came for renewing the licenses, when the whole concern might be sold together to some advantage; that this was accordingly done, and that

the money sought to be recovered was the result of that arrangement, under which the defendant and his co-assignee had actually paid the execution creditors, and saved the insolvent's estate from immediate ruin. To prove this case, the learned Serjeant commenced by putting in the deed, the execution of which was admitted. Upon the deed being read, it appeared on the recital that the assignment was proposed by Barrow. Upon this, Serjeant Talfourd objected to the defendants' proceeding any further. He said that the deed stating the proposal to come from Barrow not only proved that it was a voluntary assignment, but that it estopped the defendants from shewing the contrary: therefore, the deed being voluntary, and within three months of the imprisonment of Barrow, was fraudulent and void within the 32nd section of the Insolvent Debtors Act. I was of opinion that the defendant was not estopped, by the recital in the deed, from shewing the real facts of the case, but saved that point for Serjeant Talfourd. Upon which, Serjeant Ludlow proceeded to call Thomas Goodchild, a sheriff's officer, who proved that he had several executions, one of which was at the suit of the defendant Fergusson for 51l. 10s. 3d., and that the whole amounted to 256l. 12s. 6d.; that he was in the possession of all the insolvent's goods till the 12th of December, when the assignees, that is, the defendant and the landlady, paid him the full amount, which was afterwards paid to the several creditors, some of whom, besides Fergusson, the assignee, had signed the deed. The [396] sheriff's officer, when he received the money on the 12th, had notice not to pay it over to the parties. At this part of the case, I intimated my opinion to Serjeant Talfourd, that I did not think the jury, as the case then stood, could find this deed fraudulent under the clause in the Insolvent Debtors Act he had referred to, as the circumstances spoke for themselves, and shewed that the deed was a measure submitted to by him in order to prevent the sale of his goods, which was otherwise inevitable, and that there could not be a greater pressure upon a man than the pressure of five or six executions in his house, which, if levied, must effect his immediate ruin. I however stated that this was a question for the jury, and that, if the Serjeant pleased, the case should go on, and he might go to the jury upon it. The Serjeant then said, that, after that intimation of my opinion, he would not go to the jury, but would rest upon his first objection.

The case here stopped, and the jury, by my direction, found for the defendant.

In using the word "fraud" in my note, I must desire to state that it was used with reference to the language of the statute, and that it meant, in that sense, no more than voluntariness. It is true, however, that I expressed my opinion that there was no other fraud, and that the deed was meritorious on all sides, as it gave to the other creditors a chance of some surplus, out of which they might have a dividend, of which there was no chance if the goods had been sold by the sheriff. This more clearly appears from the account put in evidence by the plaintiff, which I have since desired should be sent to me, and which shews that the goods, when sold on the 13th of April to a purchaser who took the premises on a valuation, were valued only at 369l. Now, when it is considered that the executions amounted to 256l. 12s. 9d., besides the taxes and the rent, it cannot be doubted that the sale by the sheriff would [397] not have realized the amount of the charges then on the goods.

I am also of opinion that this deed of assignment was upon a consideration paid by the defendant and his co-assignee. It is true, it is not mentioned in the deed that they are to pay the sheriff, but it is manifest that they could not have the goods without paying him, and that it was the necessary consequence of the arrangement, and plain understanding of all parties, that they were to pay him. Moreover, the defendant Fergusson, and such of the execution creditors as signed the deed, as well as the landlady, must be considered as waiving their full rights, and coming in *pro rata* with the other creditors. In either of these views, they gave a consideration for the assignment. It is clear that the defendant might have taken an assignment from the sheriff of all the goods seized, upon paying him the sum of 256l. 12s. 9d., together with the rent and taxes due. It could not have made the assignment less valid, if he had made a declaration of trust that he would hold the goods for the benefit of all such creditors as chose to come in *pari passu* for dividends on their debts, after paying himself his advances to the sheriff. Now, what is this deed but the same transaction in substance, in another form?

I therefore retain my opinion that the deed was not voluntary, and therefore not fraudulent, within the statute for the relief of insolvents; and moreover, that it was

a deed for a valuable consideration paid by the defendant and his co-assignee: and that the rule should be discharged.

The rest of the Court expressed their concurrence, and the rule was Discharged.

[398] WELCOME v. UPTON. Exch. of Pleas. 1839.—A plea, that before and at &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres &c. of a certain open field, called &c.,—was held to be disproved by shewing a grant to the defendant's ancestor eighty-one years before for a valuable consideration; and such a plea is not aided by the stat. 2 & 3 Will. 4, c. 71, s. 1.—A claim to a profit a prendre in gross, ought to be set forth in pleading, under the stat. 2 & 3 Will. 4, c. 71, s. 1, as having been enjoyed for the periods mentioned in that section, according to the provisions contained in the 5th section of the act.

[S. C. 7 Dowl. P. C. 475; 8 L. J. Ex. 267. See further, 6 M. & W. 536.]

Trespass for taking and seizing the cattle, horses, and cows of the plaintiff, then depasturing in a certain close, and impounding the same &c. The defendant, in his first plea, justified under a demise from the Rev. J. R. F. Billingsley, the lord of the manor, and claimed the sole and several pasturage in the locus in quo as appurtenant to the manor. The second plea was as follows:—That, before and at the said several days and times when &c. in the declaration mentioned, the said Rev. J. R. F. Billingsley, and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and have been used and accustomed to have, and of right ought to have had, and the said J. R. F. Billingsley still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217a. 2r. 3p. of the said open field, called Port and Gnilton Field, in the said declaration mentioned, in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, unto the 5th day of April next following the same respectively: and that before the said several days and times when &c., to wit, on the 1st day of March, A.D. 1836, the said Rev. J. R. F. Billingsley demised to him, the defendant, a certain other messuage, land, and premises, with the appurtenances, situate and being in the parish of Osing aforesaid, in the county aforesaid; to hold the same to him, the defendant, as tenant thereof to the said Rev. J. R. F. Billingsley thenceforth from year to year, for so long a time as they should respectively please; and also the said sole and several herbage and pasturage of and in the said [399] 217a. 2r. 3p. of the said last-mentioned open field, called Port and Gnilton Field, for all manner of his, defendant's, cattle to feed and depasture thereon, from the 4th day of September in each and every year of his said tenancy, unto the 5th day of April then next following the same respectively: by virtue of which said demise, the defendant afterwards, and long before the said several days and times when &c., to wit, on the day and year last aforesaid, entered into the said messuage, land, and premises, with the appurtenances, and became and was possessed thereof, and of the said sole and several herbage and pasturage of and in the said 217a. 2r. 3p. of the said open field, in manner as the same were respectively demised to him as aforesaid, and so remained and continued thenceforth until and at and after the said several days and times when &c.: and because the said cattle in the said declaration mentioned, at the said several days and times, between the said 4th day of September, in the year in the declaration mentioned, and the 5th day of April then next following, were in and upon divers parts of the said 217a. 2r. 3p. of the said open field, wrongfully treading down and feeding and depasturing on the said herbage and pasturage thereof, and doing damage there to the defendant: he, the defendant, then drove the same cattle from and off the said 217a. 2r. 3p. of the said open field, and impounded and kept the same until the plaintiff paid the sum of money in the said declaration in that behalf mentioned, to have the same released and restored to him, as he the defendant lawfully might for the cause aforesaid. Verification.

The replication to the second plea stated, that the cattle, to wit, the horses and cows of the plaintiff in the said declaration mentioned, at the said times when &c., were seized and taken by the defendant in and upon a certain part of the said open field in the declaration mentioned, and of 217a. 2r. 3p. thereof in the said last plea [400] mentioned, that is to say, in and upon a certain close (being the said close in which &c.) abutting on the east, south and west sides thereof respectively on land then in the occupation of one Charles Ewens, and on the north side thereof partly on lands then in the occupation of one Charles Parvin Hogler, and partly on land then in the occupation of the said Charles Ewens: and the plaintiff further saith, that the defendant, at the said time when &c., of his own wrong seized and took the said cattle, then being and depasturing in and upon the said part of the said open field, and of the said 217a. 2r. 3p. thereof in his replication mentioned, and drove the said horses and cows from and off the said part of the said open field, and impounded them and kept the same for the said space of time in the said declaration mentioned, in manner and form as therein alleged; without this, that the said J. R. F. Billingsley, and all his ancestors whose heir he is, from time whereof the memory of man is not to the contrary, have had and have been used and accustomed to have, and of right ought to have had, and the said J. R. F. Billingsley still of right ought to have for himself and themselves, the sole and several herbage and pasturage of and in the said part of the said open field, and of the said 217a. 2r. and 3p. thereof in this replication mentioned, in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, unto the 5th day of April next following the same respectively, in manner and form as the said defendant hath above in his said last plea in that behalf alleged: concluding to the country.

At the trial before Littledale, J., at the last Assizes for the county of Sussex, the defendant gave in evidence a conveyance of the right of pasturage, in the year 1755, from a Mr. Brereton to Samuel Billingsley, an ancestor of the Mr. Billingsley mentioned in the pleadings, and also several mesne conveyances proving Mr. Billingsley's title. Several [401] leases were also produced, under which the different parties had let the pasturage, and the rents received for the same were shewn by the steward's accounts. It was objected on the part of the plaintiff, that there was no proof of the immemorial right alleged to be enjoyed by Mr. Billingsley and his ancestors, for his and their cattle to feed and depasture on the land, and that such personal right could not be assigned, but must be used by Mr. Billingsley alone. A verdict was entered for the plaintiff on the first issue, and for the defendant on the second issue, subject to the opinion of the Court above.

Platt, in Easter Term, obtained a rule to shew cause why the verdict found for the defendant on the second issue should not be set aside, and a verdict entered for the plaintiff thereon; or why the plaintiff should not be at liberty to enter judgment for the plaintiff non obstante veredicto on the second issue.

Dowling and Busby now shewed cause. The verdict found for the defendant on the second issue was correct, as that issue was proved. This was not a claim of a profit appendant or appurtenant to land, but the claim of a profit in gross, which may be supported either by prescription or by deed: Com. Dig. Common (D.); Co. Lit. 122 a. The right was clearly shewn to be in the ancestor of Mr. Billingsley; and, though it was shewn to have had its origin by the deed in 1755, yet, since the statute 2 & 3 Will. 4, c. 71, s. 1, a right of common or other profit arising out of land, which shall have been enjoyed by the person claiming right thereto without interruption for thirty years, cannot be defeated by shewing that such profit or benefit was first enjoyed at any time prior to such period within legal memory. [Parke, B. If you rely upon that statute, you ought to have pleaded it. This plea claims the right immemorially, and that is disproved.] The first [402] section of that act requires no alteration in the mode of pleading; and the 5th section, which does so, does not apply to the present case. The words of the latter section expressly mention the form of the plea: "That in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done." That section appears to be

confined to a claim appendant or appurtenant. This plea could not have been very well framed otherwise than it is, since a person claiming a right in gross is obliged to prescribe in himself and his ancestors. In *Littleton*, s. 183, it is said, "That such things which cannot be granted nor aliened without deed or fine, a man which will have such things by prescription cannot otherwise prescribe but in him and in his ancestors whose heir he is, and not by these words, 'in him and them whose estate he hath,' for that he cannot have their estate without deed or other writing, the which ought to be shewed to the Court if he will take any advantage of it." And Lord Coke, in his *Commentary* on the 184th section (*Co. Litt.* 122 a.), in speaking of the different kinds of common of pasture, says: "The last is common in gross, which is so called here; it appertaineth to no land, and must be by writing or prescription." But it is submitted that the conveyance of 1755 did not shew a right inconsistent with the right claimed by the plea. In *Addington v. Clode* (2 W. Bla. 989) it was held that an ancient grant, without date, does not necessarily destroy a prescriptive right, for that it might be either prior to the time of memory, or in confirmation [403] of such prescriptive right, which is matter to be left to the jury; and here they have found in favour of the defendant. [Parke, B. That question was not left to them; neither did you desire it. Alderson, B. In the case you cite, it was possible that it might have been antecedent to the time of legal memory, but here it is clearly not so.]

Platt, contra, was stopped by the Court.

PARKE, B. I am of opinion that the rule must be absolute to enter a verdict for the plaintiff, unless application be made to amend on payment of costs. The defendant ought to have pleaded this right in a different mode. It has been urged in argument that this is not, strictly speaking, a claim of a profit à prendre, but an interest in the land itself; if that view is correct, the case would not fall within the 2 & 3 Will. 4, c. 71. But whether that be so or not, there is no question that the plea is not proved; it claims an immemorial right in Billingsley, but the evidence at the trial was of a conveyance in 1755 from Brereton to an ancestor of Billingsley. It is idle to suppose that the conveyance was a confirmation of any existing right, for it appears to be a purchase, for which a large sum of money was given. Independently of the late act, the plea should have alleged the right in Brereton and his ancestors from time immemorial, and that he, in 1755, conveyed to Billingsley's ancestors, and so have deduced the title to Billingsley. If then this case be not within the late act, the plea is not made out. The only question upon which there seems to be any doubt is this: whether, supposing it to be a profit to be taken out of the land, the defendant can plead in the old form, claiming the right from time immemorial; because the first section of the 2 & 3 Will. 4, c. 71, prevents such right, when enjoyed for thirty years, from being defeated by shewing that it first existed prior to that time. I think, however, that under this section the proper mode is to [404] plead the enjoyment of the right for the periods therein mentioned. It is true that the 5th section does not appear to be worded so as to embrace the present case, and Lord Tenterden, who framed the statute, seems to have drawn that section under the idea that a profit à prendre could not be claimed except as appendant or appurtenant. I think, however, that, by the general rules of law, the claim ought to be pleaded according to the fact. I am not sure that by putting a liberal construction on the 5th section, it might not be made to include the present case; but, assuming that Lord Tenterden has by mistake omitted to consider this particular case, that is no reason why the established rules of pleading should be departed from. It appears to me, however, that the first section of the 2 & 3 Will. 4, c. 71, has no bearing on the present case. The objection is not that the right first began to exist within the time of legal memory, but that there is a misdescription of the right in the plea. The jury might be warranted in coming to the conclusion that Brereton had the right, and transferred it to Billingsley; then the evidence shews, not that the right was not immemorial, but only that it did not exist in Billingsley but in Brereton, and was transferred by him. That being so, it ought to have been so pleaded.

ALDERSON, B. I also think that a verdict should be entered for the plaintiff unless the plea is amended. The defendant has failed to make out the prescription he has pleaded. I also think this case does not fall within the 2 & 3 Will. 4, c. 71, s. 1, for the reasons given by my Brother Parke.

Leave to amend the plea on payment of costs, otherwise

Rule absolute to enter a verdict for the plaintiff.

[405] DIXON v. SADLER. Exch. of Pleas. 1839.—To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded, that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having, at the trial, found a verdict for the defendant, the underwriter, on this issue:—Held, on a motion for judgment non obstante veredicto, that the plea was bad, and that the underwriters were liable for the consequences of the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast.

[S. C. 9 L. J. Ex. 48: affirmed, 8 M. & W. 895. Applied, *Davidson v. Burnand*, 1868, L. R. 4 C. P. 121; *The Duero*, 1869, L. R. 2 Adm. & E. 397; *Quebec Marine Insurance Company v. Commercial Bank of Canada*, 1870, L. R. 3 P. C. 241; *West India Telegraph Company v. Home and Colonial Marine Insurance Company*, 1880, 6 Q. B. D. 58; *Hedley v. Pinkney & Sons Steamship Company*, [1894] A. C. 222; *Trinder v. Thames and Mersey Marine Insurance Company*, [1898] 2 Q. B. 114; 8 Asp. M. C. 313. Referred to, *Dudgeon v. Pembroke*, 1875, 1 Q. B. D. 124; *The Vortigern*, [1899] P. 140; 8 Asp. M. C. 523.]

Assumpsit on a policy of insurance, dated 22nd of January, 1838, on the ship "John Cook," and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The declaration averred the loss of the ship to have taken place on the 19th of May, 1838, by perils of the sea. The defendant pleaded, first, that the vessel was not lost by perils of the sea; secondly, the following special plea:—"That, though true it is that the said vessel was by the perils of the sea wrecked, broken, damaged, and injured, and became and was wholly lost to the plaintiffs, for plea nevertheless the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct [the same not being barratrous (a)] of the master and mariners of the said ship, whilst the said ship was at sea as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost as therein mentioned, to wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly [but not barratrously] throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, crank, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she [406] might and would otherwise have been able to have safely encountered and endured, and by means and in consequence of the said wilful, wrongful, negligent, and improper [but not barratrous] conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost as in the said first count is mentioned. Verification.

There were other pleas, but the question turned alone on the issue raised by the second plea. The plaintiff replied to it, "that the said wrecking, breaking, damaging, injuring the said vessel, or the loss of the same by the perils of the sea as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged," &c.

At the trial before Parke, B., at the last Spring Assizes for Northumberland, it appeared that the plaintiff was a ship-owner residing at Sunderland, and was the owner

(a) The words within brackets were inserted in the plea during the argument, at the suggestion of the Court.

of the "John Cook," and had effected the policy in question with the defendant, an underwriter at Lloyd's. The vessel left Rotterdam for Sunderland properly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasions. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on from the southeast, the ship was upset on her broad-side, and her masts lay on the water. Every endeavour was made to right her, but in vain. She afterwards sunk off Ryhope, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. [407] It was objected at the trial, that this was not a risk which the underwriters had undertaken to indemnify against. The learned Judge was of opinion that the word "wilful" in the plea meant that the ballast was knowingly thrown overboard, and in a negligent manner, but said he would reserve that question for the opinion of the Court. And his lordship left two questions to the jury: first, was it negligent conduct to throw the ballast overboard before arriving in harbour? secondly, did they think the master exercised a reasonable discretion in throwing overboard? They found, as to the first question, that they did think it negligent generally to throw over the ballast; secondly, that the master did right, supposing the practice itself authorized him. A verdict was thereupon entered for the defendant on the second issue, the learned Judge giving the plaintiff liberty to move to enter a verdict on that issue, if the Court should be of opinion that his construction of the meaning of the word "wilful," as used in the plea, was incorrect.

Alexander having, in Easter Term last, obtained a rule to enter a verdict accordingly, or for judgment non obstante veredicto,

Cresswell and S. Temple shewed cause. The second plea is a good answer to the action, as shewing that the vessel was rendered unseaworthy by the act of the master and crew. It must be admitted that there have been cases which shew, that, where a vessel sails in a seaworthy state, but becomes unseaworthy afterwards, the policy attaches, and the insurers are liable; but that law only applies to particular voyages, not to the case of a time policy like the present. It could not apply to a case where the master might set sail again without proper hands or ballast. No office would insure if that were the law. The owner must not cause the vessel to be put out of repair. [Maule, B. What the assured undertakes is, that the [408] vessel shall be seaworthy at the commencement of the voyage.] The case of *Law v. Hollingsworth* (7 T. R. 160) decides that it is not enough that a ship sails on a voyage in a seaworthy state for that voyage; she must continue so. There, the pilot was dismissed in the port of London, and the vessel, after entering it, was lost in the Thames; and it was held that the plaintiff could not recover against the underwriter. On the same principle, the assured is prohibited from doing any act that may do harm to the vessel, and render her unseaworthy. Suppose a fresh supply of anchors and cables were not obtained, in order to make up for articles of that description worn out, would the underwriters be liable? In *Phillips v. Headlam* (2 B. & Adol. 380), where the underwriters were held liable, the captain had made a signal for a pilot, and used due diligence to get one. That was not a case where the loss arose from the negligence of the master. *Clifford v. Hunter* (Moo. & M. 103) shews that the owners are bound to equip the ship with every thing necessary for the voyage; and the ship having sailed in a seaworthy condition, they are bound to keep her so. In *Phillips v. Headlam*, Parke, J., says—"The assured is bound to have the vessel seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, and a master of competent skill and ability to navigate her, at the commencement of the voyage; and if she sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. So, if, in the course of her voyage, the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased." Lord Kenyon, C. J., says, in *Law v. Hollingsworth*, "The assured cannot recover on a policy of insurance, unless they equip the ship with every-[409]-thing necessary to her navigation during the voyage; the ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot, qualified according to the act of

Parliament referred to." This was not mere negligence; it was an act proceeding from the volition of the captain. In *Busk v. Royal Exchange Company* (2 B. & Ald. 73), the underwriters were held liable for a loss by fire occasioned by the negligence of the master and mariners. As far as the master was concerned, the ship there was seaworthy; it was a case of mere negligence by absenting himself from the ship for a few hours. The throwing over the ballast is not a risk incident to a marine adventure. This was not a mere want of skill, but a voluntary proceeding on the part of the master, to avoid the inconvenience of sending out the ballast in a lighter. It is admitted that mere negligence might not discharge the underwriters; but this was done from volition on the part of the captain; a deliberate exercise of his own will, whereby a loss was occasioned. The word "wilful" does not necessarily mean barratrous. A barratrous throwing overboard means a throwing overboard with a particular object in view. [Parke, B. The rule is, that a loss by barratry must be so described.] Yes: if the parties mean to charge barratry, they must so plead it. [It was then suggested by the Court, that, in order to avoid this difficulty, it would be well to insert in the plea the words "not barratrous," which was accordingly done (see ante, p. 405).] They further cited *Hollingsworth v. Brodrick* (7 Ad. & E. 40; 2 N. & P. 608). There is an implied contract to keep the ship in a seaworthy state, which extends to every portion of the voyage.

[410] Alexander and W. H. Watson, contra. The question is, whether this plea is a good answer to the action, and whether the underwriters are discharged in consequence of the negligence of the master and crew. It is submitted that they are not, but that they remain liable notwithstanding. There is no distinction by reason of this being a time policy, and not a policy on a particular voyage. Had it been a voyage policy, the owner would clearly be entitled to recover, and would not be affected by the conduct of the master and crew; and there can be no distinction in principle between the one case and the other. The cases establish distinctly that the owner is not prejudiced by the conduct of the captain and crew. In *Busk v. Royal Exchange Assurance Company*, where, in an action on a policy on ship, by which, amongst other risks, the underwriters insured against fires and barratry of the master and crew, they were held liable for a loss by fire occasioned by the negligence of the master and mariners; and it was also held, that, where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty that the ship should be properly manned. That case is identical with the present, the only difference being that the one was negligence in not taking proper care of the fire, the other misconduct in throwing over the ballast. That decision was much relied on in *Walker v. Mailland* (5 B. & Ald. 171), where it was held that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. There Abbott, C. J., says: "I cannot distinguish this case from that of *Busk v. The Royal Exchange Assurance Company*: there the immediate cause of the loss was fire produced by the negligence of one of the crew: yet the underwriters were held to be liable. Here the winds and waves caused [411] the loss, but they would not have produced that effect unless there had been neglect on the part of the crew." And Holroyd, J., says: "The underwriters engage to be responsible for the barratry of the master; they therefore engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence." So, in *Bishop v. Pentland* (7 B. & C. 219; 1 Man. & R. 49), where the vessel was stranded through having an insufficient rope, it was held that the underwriters were liable, although the stranding was occasioned remotely through the negligence of the crew, in not providing a rope of sufficient strength to fasten the vessel to the shore. *Fletcher v. Inglis* (2 B. & Ald. 315), which was the case of a time policy, was cited, but no such distinction was attempted to be taken as in the present case. Holroyd, J., there says: "It seems to me that in this case there was a stranding within the meaning of the policy. It is clearly established that if there be an actual stranding, although it arise from the negligence of the master and crew, the underwriters are liable." So in *Shore v. Bentall*, cited in a note to *Holdsworth v. Wise* (7 B. & Cr. 798; 1 Man. & R. 11), Lord Tenterden said: "We are all of opinion that underwriters are responsible for the misconduct

or negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill." The case of *Law v. Hollingsworth* has been relied upon, but that stands on a different footing from the present case. It is an implied condition that the owner shall have a pilot on board whenever necessary, the same as a competent captain and crew. It is very doubtful on what ground the judgment in that case proceeded. In *Busk v. The Royal Exchange Assurance Company*, it was put by counsel that it proceeded [412] on the ground that the ship had not on board the pilot required by the Pilot Act; and that view is adopted by Bayley, J., in giving his judgment in that case (p. 83): it is so treated also in *Abbott on Shipping*, 148, and by Lord Tenterden and Parke, J., in giving judgment in *Phillips v. Headlam. Hollingworth v. Brodrick* (7 Ad. & Ell. 40; 2 Nev. & P. 608) does not apply. [Alderson, B. That was a case where the unseaworthiness was not known to the party; how can that apply to a case where it is the act of the party knowing and wilfully doing the act; even though the word wilful is now to be taken in an innocent sense?] In that case, however, the Court disclaimed any distinction between a time policy and any other. In *Eden v. Parkinson* (Dougl. 732), Lord Mansfield says: "By an implied warranty every ship insured must be tight, staunch, and strong, but it is sufficient if she is so at the time of sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriters will continue liable." *Bermon v. Woodbridge* (ibid. 780) is to the same effect. In *Park on Insurance*, 99, it is said, "In the construction of policies of insurance for time, which are very frequent, the same liberality, equity, and good sense have always prevailed, as in all other insurances." *Hucks v. Thornton* (Holt's N. P. C. 30) is another authority that there is no distinction between a time and a voyage policy. It is sufficient in either case that the ship shall be seaworthy at the commencement of the voyage. [Alderson, B. What do you call the commencement of the voyage—sailing from the port?] Yes—sailing from the port. It was so held in *Graham v. Barras* (5 B. & Adol. 1011; 2 N. & M. 125). A ship may be seaworthy for the harbour and not for the voyage. The ballasting being a matter in the conduct of the master, it is within his discretion; and the underwriters are not discharged by the manner in which he may exercise it.

Cur. adv. vult.

[413] The judgment of the Court was now delivered by PARKE, B. In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly throwing overboard so much of the ballast, that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for judgment non obstante veredicto, it occurred to the Court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration; and, as the fact certainly was, that the crew were not guilty of barratry it was very properly agreed that the plea should be amended by inserting the words, "but not barratrously," after the words, "negligently and improperly." And the plea, therefore, in its present shape, raises the question, whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my Brothers Alderson, Gurney, Maule, and myself. We have considered it, and we are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict. The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured [414] and the underwriter, on a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the

then risk; (a) and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of *Busk v. Royal Exchange Company* (2 B. & Ald. 72), *Walker v. Maitland* (5 B. & Ald. 171), *Holdsworth v. Wise* (7 B. & Cr. 794), *Bishop v. Pentland* (id. 219), and *Shore v. Bentall* (id. 798, note); nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper [415] act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences. The only case which appears to be at variance with this principle is that of *Law v. Hollingsworth*, in which the fact of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought, (under what circumstances is not distinctly stated), appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions, is, that, if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a time policy makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the sea-[416]-worthiness or navigation of the vessel, is settled; but it may be safely laid down, that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises, on the ground of seaworthiness of the vessel, until that unseaworthiness was caused by the throwing overboard a part of the ballast, by the improper act of the master and crew; and, as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

Rule absolute to enter judgment for the plaintiff non obstante veredicto.

LAMONT AND ANOTHER v. SOUTHALL. Exch. of Pleas. 1839.—A party making a distress for two causes, as to one of which he is justified and entitled to notice of action, is nevertheless liable in trespass as to the other.

[S. C. 7 Dowl. P. C. 469.]

Trespass for seizing and taking the plaintiff's goods. Pleas; first, not guilty; secondly, that the goods were not the property of the plaintiff.

(a) *Annen v. Woodman*, 3 Taunt. 30; *Hibbert v. Martin*, Park on Insurance, vol. 1, p. 299, n., 6th edition.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Term, it appeared that the defendant, who was a broker, had seized the goods as a distress for a highway rate and a poor rate, due from one Seager, who had formerly occupied the same premises, and had sold the goods to the plaintiffs. No notice of action had been given. It was contended at the trial, that there ought to have been notice of action under the 5 & 6 Will. 4, c. 50, s. 109, and also under the Poor Law Act, 4 & 5 Will. 4, c. 76, s. 104. The learned Judge was of opinion that the defendant was entitled to notice of action under the Highway Act, and therefore that the plaintiffs could not support that part of their case; but he directed a verdict in their favour for the value of the goods seized for the poor rate, with liberty to the defendant to move to enter a nonsuit, in case the Court should be of opinion that he was entitled to notice under the Poor Law Act.

[417] Bayley now moved accordingly. The defendant was entitled to notice of action under the provisions of the New Poor Law Act. It must be admitted that that Act does not apply expressly to the levying of rates; but it refers to acts which contain such powers. The 17 Geo. 2, c. 38, s. 7, gives a power to distrain for poor's rates: s. 8 provides, that the distress itself shall not be deemed trespassers ab initio; and the 10th section enacts, that no plaintiff shall recover in any action for any such irregularity, if tender of amends has been made. The legislature must have contemplated that the parties were to have notice, otherwise how were they to tender amends? Secondly, here the party was going to levy under the Highway Act, for which he had a protection, and although he also went to levy under the Poor Law Act, he was protected by the other warrant, and could only be guilty of an excessive distress, which could not be the subject of an action of trespass.

LORD ABINGER, C. B. There is no ground for this application. It is not like the case of a man coming with one good warrant and one bad warrant; for there he could justify under the good one. Suppose the defendant had pleaded specially a justification under warrants both for highway rate and poor rate, that issue must have been found against him. He could not justify both the takings. He could not have made a tender of amends under the Poor Law Act; at least he would not be entitled to notice.

GURNEY, B. The plaintiffs complain that the defendant has wrongfully taken their goods for poor rate; the defendant cannot justify that taking, because he has also taken goods for another cause for which he is protected.

Rule refused.

[418] BURGH v. LEGGE. Exch. of Pleas. 1839.—Assumpsit on two bills of exchange by indorsee against his immediate indorser, averring notice of dishonour, to which was added a count upon an account stated. The defendant, by his plea, traversed the notice of dishonour of the bills as alleged. The plaintiff, in order to support that issue, proved that on the day when the first bill became due, the defendant called upon him and told him that he knew neither of the bills would be paid; that it was no use sending him a twopenny-post letter next day to give him notice, as it was not worth the money; and that he would send the plaintiff money in part payment of the bills on a future day:—Held, that this was not evidence of notice of dishonour, but of a dispensation with it, and that it ought to have been so alleged in the declaration.—Held, also, that it was not sufficient evidence to support the count upon the account stated.

[S. C. 7 Dowl. P. C. 814; 8 L. J. Ex. 258; 3 Jur. 823.]

This was an action of assumpsit by the indorsee against the next immediate indorser of two bills of exchange. There was also a count upon an account stated.

The defendant, to the two counts on the bills, pleaded that he had no notice of dishonour as alleged in the declaration; and to the third count, non assumpsit.

At the trial before Parke, B., at the London Sittings after last term, it appeared that one of the bills in question was drawn upon one Williams, and the other upon one Ralfe, and that they became due, one on the 4th, and the other on the 5th of April: that on the 4th of April the defendant called on the plaintiff with a view to make some arrangements with respect to other bills, and then stated that Ralfe's bill

would not be paid, as Ralf had become a bankrupt; and that Williams's bill would not be paid, as he the defendant had some pictures as a security to sell to take it up, but which he had not been then enabled to sell, and that Williams had no other means of raising the money. He also said that it was not worth while to trouble him with a twopenny post letter to give him notice, as it was not worth the money, and that he would bring the plaintiff some money on the Monday following in part payment of the two bills. The learned Judge being of opinion that this conversation did not dispense with notice of dishonour, nor furnish evidence of an account stated, nonsuited the plaintiff, but gave him liberty to move to enter a verdict.

Kelly now moved accordingly. This nonsuit ought to be set aside, and a verdict entered for the plaintiff. First, the evidence amounted to sufficient proof of notice of dishonour by the defendant's own admission. Where a party admits [419] that he knows the bills on which he is liable will not be paid, it dispenses with the necessity of a formal notice of dishonour. In *Cory v. Scott* (3 B. & Ald. 621), Holroyd, J., says: "I think that where a person draws on his own account, and at the same time knows that the bill, when presented, will be dishonoured, the general allegation of notice, as in the declaration, would be sufficient." [Parke, B. But Bayley, J., there says: "If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances which excuse the giving of notice does not seem to be ad idem with such an averment."] But the learned Judge adds, "Possibly, however, it might be considered that such circumstances would be evidence of notice, inasmuch as they would be evidence that the party knew the bill would be dishonoured." [Parke, B. The case of *Solarte v. Palmer* (1 Bing. N. C. 194; 1 Scott, 1), and numerous others, appear to shew that the law intends an actual notification, and that the bare fact of knowledge is not sufficient.] Those cases are distinguishable; where there is some party to the bill who is entitled to notice, it must be given to him in due form; but the observations of Holroyd, J., point to the distinction between such cases and that of parties who, from their very situation as drawers upon their own account, must be taken to have had notice of dishonour, and who have admitted that they knew the bill would not be paid. Besides, a promise to pay a bill after it has become due, is sufficient, without notice having been given, to render a party liable. [Parke, B. That is because such a promise amounts to presumptive evidence that the party has had notice.] If the Court be of opinion that the evidence is insufficient in support of the issue as it now stands, perhaps they will allow the pleadings to be amended, and a new trial to be had on payment of costs. But, secondly, the plaintiff has at all events proved enough [420] to entitle himself to a verdict upon the count upon an account stated; here the giving of the bill amounted to an admission of an antecedent debt being due from the defendant to the plaintiff. [Alderson, B. How do you shew that the bills have not been paid?] That is a question on another part of the record; each issue must be considered separately.

PARKE, B. I am of opinion that there is no ground for a rule on either of the points moved. As to the variance between the allegation in the special counts and the evidence, it seems to me to be perfectly clear, although the point has not been hitherto expressly decided, that, under the allegation that a party has received notice of the dishonour of a bill, after the dishonour has taken place, an actual notice to that effect must be proved; and that shewing the party's knowledge of the fact that it will not be paid at maturity, is not sufficient. There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence. That is the true meaning of the word "notice," when used in declarations of this kind, and the mere knowledge of a party is not enough. Now, in the present case, there is no proof of any such notice, but rather the contrary; for the defendant applies to the plaintiff for more discount, and says the other bills would not be paid; and as to notice, that it would not be worth while to give it, for the drawer had since become bankrupt. The meaning of this rather is that the plaintiff did not send notice of the dishonour, than the contrary. In the case of *Cory v. Scott*, which has been referred to, there seems to have been a little discrepancy of opinion between the Judges whose names have been mentioned,—one of them considering the allegation not sufficient, and the [421] other inclining to a contrary opinion; although it is somewhat remarkable that Bayley, J., himself, in his *Treatise on Bills of Exchange*, p. 407, states that he and Holroyd, J., agreed, in that case, that the evidence would not be

sufficient, and intimates a rather strong opinion that the allegation of notice must be proved; and that if, either from want of assets on the part of the drawer, or any other cause, it should become unnecessary, the fact should be so stated. For my own part, I am not at all taken by surprise by this question. I always thought, that if presentment or notice was to be excused on the ground of want of effects, &c., that fact ought to be stated in the declaration. Reason points out, that where the fact of notice is averred, it must be proved; and so I have always understood it. I was of opinion, at the trial, and think so still, that, although the evidence adduced did not amount to proof of notice having been actually given, it was good evidence of a dispensation with notice: and on that point, the plaintiff may, if he chooses, have a rule nisi for a new trial on payment of the costs of the day, and be allowed to amend his declaration by alleging a dispensation with notice, instead of the averment of notice having been actually given. The special counts, however, having failed, there still remains the question on the account stated. The evidence adduced is not the admission of any certain or specific debt being due; it only amounts to the expression of a strong impression that the bills would be dishonoured when at maturity; and that, in that event, the defendant would send and take them up. It has been argued that that is evidence of an account stated: but I think it is not; for it affords no evidence of the existence of any debt due before that time. So that, although this conversation amounts to an admission that perhaps there will be a certain sum of money due to the plaintiff, it is only provided the bills be dishonoured, and notice of the [422] dishonour given. Consequently, it is only in a certain qualified event that any money will be due, and until those consequences occur, there can be no account stated. The plaintiff ought, however, to be allowed to amend on the terms suggested.

ALDERSON, B. I am of the same opinion. As to the first point, I think we ought to construe the word "notice" as meaning notification of the fact of the bill having been dishonoured after the presentment took place; and it is far better, for the advancement of justice, to adhere to this simple meaning, than to confound notice with knowledge. The real question before the jury in such cases is, not whether a certain fact occurred, but whether it was notified to a certain party. Then, secondly, as to the question upon the account stated, the conversation proved amounts to this: In case certain events occur, which probably will occur, I will pay you some money on Monday, in part payment of the two bills. Now, could any action have been maintained on that promise before the bill became due? The plaintiff could not have sued out a writ previously to the presentment and dishonour of the bill. That evidence does not, therefore, admit a present debt; had it been shewn that the bill had been presented, and that notice of dishonour had been dispensed with, that might, perhaps, have been evidence to shew an account stated; but this is clearly not sufficient.

GURNEY, B., concurred.

MAULE, B. I quite agree with the rest of the Court, that the word "notice" here means some communication from the party; and I doubt very much, if the fact alluded to by my Brother Alderson had been added to the evi-[423]dence, whether there would even then have been sufficient proof given to support an account stated. The case of *Irving v. Feitch* (3 M. & W. 90) appears to be an authority on this point.

Rule to enter a verdict refused.

HOPKINS v. SALEMBIER. Exch. of Pleas. 1839.—Where a defendant has been arrested by a Judge's order, under 1 & 2 Vict. c. 110, s. 3, obtained upon insufficient affidavits, the application for his discharge should be by motion to set aside the Judge's order, not the *capias*.

[S. C. 7 Dowl. P. C. 493; 3 Jur. 872.]

This was an action by the indorsee against the drawer of a bill of exchange, and in which the defendant was arrested by a *capias* issued under a Judge's order, made in pursuance of the 1 & 2 Vict. c. 110, s. 3. One of the affidavits on which the order was obtained stated that "the defendant was justly and truly indebted to the deponent in the principal sum of 489l. 13s., as indorsee of a bill of exchange bearing date &c., and drawn by the defendant upon and accepted by F. S., for the payment

of 489l. 13s. four months after the date thereof, and by the defendant indorsed to the plaintiff, and which said bill is still due and unpaid." There was another affidavit, to the effect that the defendant had said that he would not pay the bill, and that, rather than do so, he would go and travel in Scotland or Ireland. The defendant having given bail,

Theobald, on a former day, obtained a rule to shew cause why the *capias* should not be set aside, and the bail-bond delivered up to be cancelled, on the ground that the affidavits were insufficient, and also upon affidavits denying that the defendant was about to leave the country.

Platt shewed cause, and urged that the affidavits were sufficient. [Lord Abinger, C. B. They are clearly insuffi-[424]-cient. The first does not aver any presentment to, or dishonour by, the acceptor: and it is quite consistent with it that the bill was never presented at all. The other affidavit does not shew that the defendant was legally liable on the bill, or had made any subsequent promise to pay it. There may, however, be a doubt whether the application should not have been to set aside the Judge's order, instead of the *capias*.]

Theobald, *contra*. The same object would be attained by the one course as by the other. The words of the 6th section are, "That it shall be lawful for any person arrested upon any such writ of *capias*, to apply to a Judge or to the Court for an order or rule calling on the plaintiff to shew cause why the person arrested should not be discharged out of custody: and that it should be lawful for such Court or Judge to make absolute or discharge such rule or order," &c. As the defendant has given a bail-bond, he is constructively in the custody of his bail.

LORD ABINGER, C. B. If we were to set aside the *capias*, we should make the sheriff a trespasser. In cases of this nature, the application should be to set aside the Judge's order.

ALDERSON, B. It is of great importance that the application should be to set aside the Judge's order, as otherwise the party may be misled.

Rule discharged.

[425] PUTNEY v. TRING AND OTHERS. Exch. of Pleas. 1839.—Semble, that a party is entitled to the protection of the Interpleader Act, though the adverse claim be of an equitable as well as a legal nature.

[S. C. 7 Dowl. P. C. 81; 8 L. J. Ex. 271; 3 Jur. 872.]

This was an application by the sheriff under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6. It appeared that a levy having been made on the goods of the defendants, four notices of claims were served on the sheriff, two of which were unimportant; a third was by the landlord for 5l. rent; and the fourth was by the personal representatives of one Mrs. Edmonds, and arose in the following manner:—The property in question had been originally, on the marriage of a person of the name of Edmonds, conveyed to trustees to the use of and in trust for his wife for life, and after her decease, to the use of and in trust for the now claimants, the four daughters of Mrs. Edmonds, one of whom was the wife of the defendant Tring, who was in possession of the whole property. On the marriage of Tring, the undivided fourth to which his wife would become entitled by the death of Mrs. Edmonds (who was then living), was settled to her sole and separate use. The property, however, was mere personalty.

Whateley, for the execution creditor. It has been expressly decided that a sheriff is not entitled, under this act, to apply to the Court for protection on account for a landlord's claim for rent: *Clarke v. Lord* (2 Dowl. P. C. 55), *Haythorn v. Bush* (2 C. & M. 689). Then, with respect to the other parties, their claim is entirely of an equitable nature: the sheriff is only entitled to be relieved in this summary way when he could not sell the goods without subjecting himself to an action at law. In *Holmes v. Mentze* (4 Ad. & Ell. 127; 5 Nev. & M. 563), where a claim was made by a party who stated himself to be the defendant's partner, and that, on the settlement of their accounts, a large balance would be due to him from the defendants, it was [426] held that the sheriff ought to sell the defendant's interest in the property,—thus making the purchaser and the claimant tenants in common,—and that the accounts should be adjusted afterwards between them. And in *Sturgess v. Claude* (1 Dowl. P. C. 505), Patteson, J., says, "I do not think the act applies to claims set up in conse-

quence of proceedings in equity." [Alderson, B. A party may set up as a legal claim what is in reality only an equitable one. The sheriff would in that case be exposed to an action, and ought to be protected.] As to one fourth of the property, the claim of the execution creditor cannot be disputed, for the settlement on the marriage of Mrs. Tring was inoperative, as the property was only personalty, and consequently her fourth share became the property of her husband, and liable to his debts.

ALDERSON, B. I entertain great doubt whether the principle laid down in *Sturges v. Claude* be a correct one. The act speaks of a party "having no means of relieving himself from certain adverse claims but by a suit in equity, usually called a bill of interpleader," and then goes on to give power to the courts of law to administer relief in a more summary way, without compelling him to have recourse to proceedings in equity. Now, I take it, a bill of interpleader may be filed where one of the claims is of a legal and the other of an equitable nature. Suppose, for instance, the property of a cestui que trust were to be seized by a third party whilst in the hands of his trustee, could it be said that the cestui qui trust would be without remedy?

No decision was given, the rule being enlarged to chambers, to allow the parties to come to some arrangement.

[427] DUCKWORTH v. HARRISON. Exch. of Pleas. 1839.—The declaration on an agreement of reference, stated that the costs of the reference and the award were to abide the event. At the trial, however, it appeared that the agreement also provided for the costs of making the agreement a rule of Court:—Held, first, that this was a variance; secondly, that it was a variance which might be amended under 3 & 4 Will. 4, c. 42, s. 23.

[S. C. 7 Dowl. P. C. 463; 8 L. J. Ex. 266.]

This was an action upon an agreement of reference. The agreement, as set out in the declaration (see ante, vol. 4, p. 432), stated that the costs of the reference and award should abide the event of the award. At the trial before Parke, B., at the last Liverpool Assizes, the plaintiff proved an agreement of reference, by which the costs of the reference and award, and also the costs of making the agreement a rule of Court, were to abide the event of the award, and in which there was a provision for making the submission a rule of Court. The submission under this agreement not having been properly enlarged, the plaintiff proved attendances by the defendant and his attorney on the arbitrators, after knowledge by the defendant of the mistake; and he relied on the agreement arising from his proceeding with the reference with such knowledge, as being a new submission, incorporating the terms of the former one. It was objected for the defendant, that the declaration should have contained the whole of the agreement contained in the original submission; and that there was a variance, as the declaration did not state either an agreement to make the submission a rule of Court, or that the costs of the original agreement should abide the event of the award. The learned Judge overruled the first objection, on the ground that so much only of the first agreement as was applicable to the case of a parol submission was incorporated in the new submission by parol, and that an agreement in writing was now necessary in order to make a submission a rule of Court. As to the second objection, he proposed to amend the record, but entertained some doubt whether he ought to do so in a case where a demurrer had been argued, [428] the argument upon which, it was objected, would have been affected, if the record had then stood as it was now proposed to alter it. His Lordship then directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, and saving the question as to the propriety of amending for the consideration of the Court.

Crompton having obtained a rule accordingly,

Warren shewed cause. First, this was no variance; but secondly, if it was, it was a matter which a judge or the Court had power to amend; thirdly, this amendment could not affect the decision upon the demurrer. [Parke, B. The introduction of the provision as to the costs of the agreement would have made an end of Mr. Crompton's

argument on the demurrer. The rule laid down in *Duckworth v. Harrison* might be questioned in a Court of Error. Alderson, B. Look at the 23rd section of the Amendment Act, 3 & 4 Will. 4, c. 42; it gives the judge power to cause the record in any matter in which parties cannot have been prejudiced in the conduct of his action or defence, to be forthwith amended.] The Court then called on

Crompton, contra. There can be no doubt that this is a variance. If the case had stood on the general issue, it would have been properly amended; but as a matter of discretion the Court will not interfere with the subject's merit to a writ of error. [Alderson, B. The difficulty with you is as to prejudicing the writ of error; but the act has nothing to do with the writ of error.] Here the defendant had been prejudiced by having been led into the demurrer. [Alderson, B. How prejudiced by having had the chance of a judgment on a demurrer?] The legal merits are affected by the amendment: and if it may have prejudiced them, it is sufficient. [Alderson, B. The words are, "prejudiced in the conduct of his action;" that means at the [429] trial at Nisi Prius. Parke, B. You appear to contend that it is the conduct of the party in pleading or any other matter. Alderson, B. If you waive your objection, you preserve your writ of error untouched. The word "merits" means such as you require in an affidavit of merits.] It is always dangerous to amend at Nisi Prius in cases where a demurrer has been argued.

PARKE, B. The first question is, is this a variance? and we think it is, and that such variance would be fatal unless we have the power of amendment. The parties incorporated into the new agreement the terms of the old submission. It seems to me that this is a case in which we should amend; except for the demurrer, there could have been no doubt of it. In order to see whether that affects the case, we must look to the terms of the act of Parliament. The 23rd section enacts, "that it shall be lawful for any Court of Record, holding plea in civil actions, and any judge sitting at Nisi Prius, (if such Court or such judge shall see fit so to do), to cause the record, writ, or document on which any trial may be pending, before any such court or judge in any civil action, or in any information in the nature of a quo warranto, or proceeding on a mandamus, when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars, in the judgment of such Court or judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended," &c. It is a condition precedent that the matter should not be material to the merits of the case, nor the opposite party prejudiced in his defence. Now what is the meaning of the term defence? If it meant the defence of the action generally, there would be some weight in Mr. Crompton's argument; but in order to ascertain its right meaning, we must look at the context, and then it will be clear that it means the defence at Nisi Prius. The alternative given to the judge to postpone the trial shews this is its meaning. Then is this a matter material to the merits of the case? I think not. Is it a matter which can prejudice the opposite party in the conduct of his defence at Nisi Prius? I think certainly not. If there had been no demurrer, the proper course would have been to have allowed the amendment on payment of the costs of the amendment and the application. The only question is as to the terms upon which it ought now to be done. As that is a matter of equity, we must not deprive the defendant of any benefit which he may have had: therefore he must be paid the costs of coming here. The rule will therefore be discharged upon payment by the plaintiff of the costs of the amendment and of this application; or if Mr. Crompton should not choose to have the amendment, the record may remain in its present state, and he may have his writ of error.

Rule accordingly.

CHIPP v. HARRIS. Exch. of Pleas. 1839.—The 1 & 2 Vict. c. 110, s. 9, requiring the presence of an attorney on behalf of a defendant executing a cognovit or warrant of attorney, does not apply where the defendant is himself an attorney.—The provision in the statute is for the benefit of the defendant only; and therefore a third party, who may be prejudiced by a judgment against his debtor,

cannot object that no attorney attested the execution of the warrant of attorney on which such judgment is founded.

[S. C. 9 L. J. Ex. 64.]

R. V. Richards had obtained a rule to shew cause why the warrant of attorney given by the defendant, and the judgment and execution thereon, should not be set aside with costs, on the ground that the warrant of attorney was executed without the presence of an attorney to attest the execution on behalf of the defend[431]-ant. The application was made at the instance of a third party, who claimed under another judgment and execution against the defendant.

Jervis shewed cause, upon an affidavit which stated that the defendant Harris was himself an attorney; and he therefore contended, that the warrant of attorney was not avoided by the want of another attorney's attendance on his behalf. He argued, that the provision in the 9th section of the 1 & 2 Vict. c. 110, was but a re-enactment of the pre-existing rule of the Court; and that the 10th section did not carry the intent further. He referred to the case of *Walton v. Stanton* (Barnes, 37). Secondly, he contended, that the provision in the statute was for the benefit of the defendant himself only, and that it was not competent to a third party, even although he might be prejudiced by a judgment against his debtor, to object that no attorney attested the execution of the warrant of attorney upon which such judgment was founded.

Richards, contra, admitted that he had been answered as to the latter ground. On the former, he contended that the words of the act were plain and imperative; that if there was any difficulty on the 9th section taken by itself, the intention of the legislature was clearly indicated by reference to the 10th, by which it is enacted that a warrant of attorney "shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect of it." That section would apply to the case of an attorney as well as any other person. No such provision as this was to be found in the rule of Court.

LORD ABINGER, C. B. The object of the statute, as well as of the rule, was the protection of the debtor: but, [432] as Harris was himself an attorney, it appears to me that the act does not apply to such a case. The second ground also fails. This is not an application on behalf of Harris himself, but of a third party; and I think on that ground also the case is not within the intention of the act of Parliament.

The rest of the Court concurred.

Rule discharged, with costs.

HARRIS AND ANOTHER, Assignees of Carter v. LOYD, ESQ. Exch. of Pleas. 1839.—

C., a trader, on the 5th of June, 1838, assigned his effects in trust for the benefit of creditors. On the same day (but before the execution of the assignment) a fi. fa. against C. was delivered to the sheriff's agent in London, under which a sheriff's officer levied upon his goods on the 6th. The trustees under the assignment paid him the amount of the levy under protest, and he withdrew from possession. It afterwards appeared that C. had committed an act of bankruptcy on the 2nd of June, upon which a fiat issued on the 18th:—Held, that the trustees could not recover back from the sheriff the money so paid by them to the officer, as having been paid under a mistake of fact.

[S. C. 8 L. J. Ex. 279.]

Assumpsit for money had and received. Plea, non assumpsit. At the trial before Lord Denman, C. J., at the last Warwick Assizes, the plaintiffs, who sued as assignees of Carter under a trust-deed for the benefit of creditors, sought to recover from the defendant, the sheriff of the county of Warwick, the sum of 57l., being the amount of an execution levied on the goods of Carter. It appeared that the assignment to the plaintiffs was executed on the 5th June, 1838. On the same day, but before the execution of the assignment, a writ of fi. fa. against the goods of Carter was delivered to the sheriff's agent in London, and a warrant granted thereon, under which the officer took possession on the 6th. The plaintiffs, in order to release the goods, paid the officer the amount of the levy, under protest, and he thereupon withdrew from possession. It subsequently turned out that Carter had committed an act of bank-

ruptcy on the 2nd of June, on which a fiat issued on the 18th, and the plaintiffs thereupon brought [433] this action to recover back the money so paid to the sheriff's officer, as having been paid under a mistake of fact, they not having at the time had any knowledge of the act of bankruptcy. The Lord Chief Justice was of opinion that this was not such a mistake of fact as entitled the plaintiffs to recover back the money, and accordingly directed a nonsuit, but gave leave to the plaintiffs to move to enter a verdict for 57l.

In Easter Term, Balguy obtained a rule nisi accordingly, against which

Humfrey and Hayes now shewed cause. The plaintiffs are not entitled to recover in this action. The goods were bound by the fi. fa. from the time of its delivery to the sheriff, which was antecedent to the execution of the assignment, and thereby any subsequent transfer of the goods, except for valuable consideration in market overt, was invalidated. The plaintiffs were mere strangers; the goods never belonged to them by reason of any relation from the fiat to the act of bankruptcy: but by the payment of this money they obtained possession of the goods, and kept them until the fiat issued. At the time of the seizure, the plaintiffs had the option either to suffer the sheriff to sell the goods or to pay him the amount of the levy that he might withdraw. They voluntarily chose to do the latter. Nor was the money paid by them under any mistake of fact. It does not appear that in point of fact they did not know of an act of bankruptcy having been committed: indeed, the assignment to the plaintiffs themselves appears to have been one. They did not indeed know that a fiat would afterwards be issued upon such act of bankruptcy; but ignorance of a future event is very different from mistake of fact. [Alderson, B. Mistake of fact is where the party takes the fact to be one way, but it turns out to be the other.] The moment the money was [434] paid into the hands of the sheriff, it became money had and received to the use of the execution creditor: *Morland v. Pellatt* (8 B. & C. 722; 2 Man. & R. 411). Could this action have been brought immediately after the payment? there was clearly no mistake then. And when received, it became the duty of the sheriff to pay it over to the execution creditor, which it must be assumed that he did; the plaintiffs therefore cannot be entitled to sue him for money had and received, because the parties cannot be placed in statu quo: *Hunt v. Silk* (5 East, 449), *Atlee v. Backhouse* (3 M. & W. 633). The plaintiffs rely on the doctrine of relation; but if it applies as against the defendant, so does it equally as against the plaintiffs. Besides, non constat that the fiat would have issued if the goods had been removed by the sheriff. Suppose the sheriff had applied under the Interpleader Act, and the Court had directed an issue, and the plaintiffs had brought the money into Court to abide the event, they clearly could not have got it out of court, on its afterwards turning out that the goods belonged to the assignees in bankruptcy by relation. *Bucker v. Booth* (Moo. & M. 518) was a much stronger case than the present. There the goods of the debtor were discharged from an execution, by payment of the levy money by a creditor, after a docket struck against the debtor; and it was held that the assignees subsequently chosen could not, by repaying the money, maintain an action for money had and received against the sheriff, because it was no longer the bankrupt's money, but that of the execution creditor.

Balguy and Flood, contra. The mistake of fact, which entitles the plaintiffs to maintain this action, was this: that when they paid the money to the sheriff's officer, they supposed that no act of bankruptcy had been com-[435]-mitted; but that the goods then belonged to them as trustees under the assignment. It is said the assignment itself would be an act of bankruptcy; if it were so, that would be a mistake of law: but there might be no good petitioning creditor's debt to support a fiat. No doubt, the assignees under the fiat could not maintain this action, because the money was never theirs nor the bankrupt's. But if the sheriff had sold, he would have been liable to the assignees in bankruptcy: *Balme v. Hutton* (1 C. & M. 262; 3 M. & Scott, 1; 9 Bing. 471; 2 Tyr. 620), *Garland v. Carlisle* (4 Scott, 587; 3 M. & W. 152). By this payment, the plaintiffs prevented him from doing so. [Alderson, B. How did it appear that the plaintiffs did not know of the act of bankruptcy on the 2nd of June? It was for you to make out the mistake.] The money was paid by them as trustees, under protest, and clearly on the supposition that they were entitled under the assignment. [Lord Abinger, C. B. They paid their money because they thought their assignment was good, and now they seek to recover it back because they find it is bad.] If the sheriff was a wrong-doer, and had no right to receive the money, his

payment of it over to the execution creditor would not make him the less liable: *Young v. Marshall* (8 Bing. 43; 1 M. & Scott, 110).

But it may be doubted whether the delivery of a writ to the sheriff's agent in town is, for the purpose of binding the goods, the same as a delivery to the sheriff or under-sheriff. In the Statute of Frauds, the under-sheriff is specifically mentioned, and is to indorse on the writ the time when he receives it. There is no such direction in the 3 & 4 Will. 4, c. 42, s. 20.

LORD ABINGER, C. B. I am of opinion that this rule ought to be discharged. The plaintiffs appear to have [436] been mere volunteers. Suppose the friends of the debtor had paid the money, and the possession of the goods had been thereupon delivered back to him; could they have recovered it back, upon its afterwards turning out that he had previously committed an act of bankruptcy? The plaintiffs claim under a deed of assignment, and pay the money, supposing that under it they have a right to the goods: in that they are mistaken. But the goods were liable to seizure; the property in them was not indeed divested by the writ, and the trustees might take them, but only subject to the right of the execution creditor. Then it is said the delivery of the writ was not to the sheriff, but only to his agent in London; I think that makes no difference whatever. The short answer, however, to the action is, that the money was not paid under a mistake of fact, but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back.

ALDERSON, B. This is money paid, not under a mistake, but under a bargain. True, it turns out to be a bad bargain; but that will not affect its validity. But further, the money is paid to the sheriff for the purpose of being paid over to the execution creditor, subject only to the plaintiffs' supposed right under the deed. By the delivery of the writ to the sheriff the goods are bound, and the property in them cannot afterwards be transferred by the debtor, except subject to the interest of the execution creditor. There can be no doubt that the delivery to the deputy in London is a delivery to the sheriff; the deputy is appointed for that very purpose. The plaintiffs were wrong, and the sheriff right, at the time of the payment, and it was the duty of the sheriff to pay over the money to the execution creditor. Can it be argued, that after such payment over, he can be compelled to refund it? I [437] think not. I am of opinion, therefore, that the rule ought to be discharged.

GURNEY, B., and MAULE, B., concurred.

Rule discharged.

HUDSON v. NICHOLSON. Exch. of Pleas. 1839.—When the declaration states a wrong which is the subject of an action of trespass, it is a good count in trespass after verdict, although it contains no allegation of *vi et armis*, and is, in point of form, framed in case for the consequential injury.

[S. C. 9 L. J. Ex. 71.]

The declaration stated, that the plaintiff, before and at the time of the committing of the grievance by the defendants, as hereinafter mentioned, was and from thence hitherto hath been and still is lawfully possessed of a certain close, situate in the city of London, and the defendants, during the time aforesaid, and at the time of the committing of the said grievance, were and still are possessed of a certain building and premises near to and adjoining thereto. Yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and deprive him of the use, benefit, and enjoyment of the said close, and to annoy and incommode him in the use, possession, and enjoyment of the same, to wit, on &c., and on divers other days and times afterwards and before the commencement of this suit, wrongfully and injuriously kept and continued, and caused to be kept and continued, for a long and unreasonable time, to wit, from thence hitherto, in and upon and over the said close of the plaintiff, divers, to wit, nine shores and nine timbers, before then, and before the plaintiff became possessed of the said close as aforesaid, by the defendants and others whose names to the plaintiff are unknown, wrongfully and injuriously put, placed, fixed, and erected in, upon, and over the said close of the said plaintiff; and the defendants so kept and continued the said shores and timbers in, upon, and over the said close, although they [438] were, to wit, on the day and year first aforesaid, requested by the plaintiff to remove, take, and carry

away the same from and off the said close. By means of which premises, and by reason also of the plaintiff being unable to remove and take away the said shores and timbers without causing the said building and premises of the defendants to tumble and fall, the plaintiff has been deprived of the use and enjoyment of his said close, and also thereby the plaintiff hath been and still is hindered and prevented from building and erecting a certain dwelling-house, buildings, and premises on the said close, which he intended to do and otherwise would have done, and thereby the plaintiff hath lost and been deprived of all the benefits, rents, profits, and advantages he would have derived and acquired from the said dwelling-house and premises, had the same been built and erected as aforesaid. And also by means of the premises the plaintiff hath been hindered and prevented from perfecting, fulfilling, and carrying into force and effect a certain contract and agreement which he, to wit, on &c., made and entered into with one G. H. for the building and erecting of the said dwelling-house, buildings, and erections so by him intended to have been built and erected as aforesaid, on his said close, at a certain time before the commencement of this suit elapsed, and whereby the plaintiff hath become liable in damages to the said G. H. for his the plaintiff's non-performance of that contract and agreement, and hath lost and been deprived of all the benefits and advantages he the plaintiff would have derived and acquired from the completion and fulfilment of the same, and thereby also the plaintiff hath lost and been deprived of the use of divers plans and specifications for the building and erecting of the said dwelling-house, buildings, and erections, and the expenses by him incurred thereon, amounting, to wit, to 50l., have been lost and thrown away and rendered useless by reason of the premises aforesaid, and the plaintiff hath been and is, by [439] means of the premises, otherwise much injured and damnified.

Pleas, first, not guilty; and two other special pleas of license.

At the trial before Lord Abinger, C. B., at the London Sittings after last Hilary Term, the jury found a verdict for the plaintiff.

In Easter Term, Sir F. Pollock obtained a rule to shew cause why the judgment should not be arrested, on two grounds: first, that the action was not maintainable, because the facts stated in the declaration were committed before the plaintiff became possessed of the premises, and the right of action was wholly vested in the plaintiff's predecessor, and could not be assigned; secondly, that the action should have been trespass and not case.

Thesiger and Rawlinson shewed cause. The facts stated on the face of the declaration clearly disclose a sufficient cause of action; and case was the correct form of it. This rule appears to have been obtained on the supposition that the action was brought for not removing the shores and timbers. And the cases put by Sir F. Pollock, in moving for this rule, shew that such was his view; such as where a man builds a wall on another's land, or shoots a load of rubbish on to another man's tulip-bed,—no action can be maintained by a purchaser who comes in subsequently to the commission of the injury. It is true that a chose in action is not assignable, and the same rule applies doubtless to injuries *ex delicto*, either to the person or to real property. The true test is, whether the injury be determined by the act itself, such as cutting down and carrying away a tree, knocking down a wall, &c. Such cases are distinguishable from those in which the injury does not cease with the act itself, and where, in its nature, it may be continuing. Thus, it is stated in *Com. Dig., Action on the Case for Nuisance (B.)*, that, for nuisance created in the lifetime of [440] the testator, and continued afterwards, the devisee shall have his action. And in *Some v. Barwish* (Cro. Jac. 231), *Westbourne v. Mordaunt* (Cro. Eliz. 191), and *Beswick v. Hill* (Cro. Eliz. 402), the same doctrine is laid down. Here the charge is for wrongfully keeping and continuing, and causing to be kept and continued, the timber, &c. And after verdict, when any intendment is to be made in support of the declaration, the Court will intend that such act was proved. [Lord Abinger, C. B. Then, if such act be proved, should not the form of action have been trespass?] It is submitted not: at all events case is sufficient. Lord Ellenborough, in *Laurence v. Obce* (1 Stark. N. P. R. 22), which was an action for driving holdfasts into the plaintiff's wall, the plaintiff having recovered once for the trespass,—inclined to the opinion that case was the proper form of action for the continuance. At all events, the trespass may be waived, and case maintained for the continuance of the injury. Some of the oldest, as well as the later authorities, shew that the actions are con-

current. It was conceded in *Harker v. Birkbeck* (3 Burr. 1556), that both actions, viz. trespass and case, may lie, where there is both an immediate and also a consequential injury done. And in accordance with this, Holroyd, J., in delivering his judgment in *Moreton v. Hardern* (4 B. & C. 223; 6 D. & R. 275), observed, "In cases where there is no ground of action except the trespass, perhaps case will not lie; but where an actual damage has been sustained, the trespass may be waived, and action is maintainable on the special circumstances of the case, as in *Pitts v. Guinee*" (1 Salk. 10). In that case, the declaration stated that the plaintiff was master of a ship, which was laden with corn, and that the defendant entered and seized the ship, and detained it, per quod impeditus &c. in his voyage. An exception was taken, that the action should have been [441] trespass: but it was held well for the special damage, though he might have maintained trespass. These cases are recognised by Tindal, C. J., in *Williams v. Holland* (10 Bing. 112; 3 M. & Scott, 540). [Lord Abinger, C. B. All these cases are such as involve injury to personal chattels; and no case has ever yet gone the length of deciding, that for trespass to land case may be sustained for the injury consequential on it.] The authorities cited lay it down generally that the trespass may be waived. But an old case, in Roll's Abr. 104, Action sur Case (K.) 2, appears to go that length:—"En action sur le case, si le plaintiff declare que le defendant diruit et prostravit unum murum que divide le mese del plaintiff and defendant, et auxi divel les tiles del message del plaintiff, per quod le eau vient en le message del plaintiff, et rott le timber de ceo, l'action gest, car coment que il puissent aver action de trespass pur diveller del tiles, uncore cest action gest auxi, entant que est allege que per reason de ceo le timber del mese fuit rott." *Leuson v. Kirk* (Cro. Jac. 266), *Smith v. Goodwin* (4 B. & Ad. 413; 1 N. & M. 371), and *Branscomb v. Bridges* (4 B. & C. 145; 2 D. & R. 256), and the dictum of Blackstone, J., in *Scott v. Sheppard* (2 W. Bl. 895), were also referred to in support of this argument. This being a motion in arrest of judgment, every presumption will be made in favour of the verdict: every thing shall be intended which the allegations on the record required to have been proved. Lord Eldon's observation in *De Costa v. Clarke* (3 Bos. & P. 259) is, "The Court will infer almost anything after verdict." The doctrine was thus laid down by the Court in *Hanred v. Banks* (2 Burr. 1114), (which is recognised by Lawrence, J., in *Oyle v. Barnes* (8 T. R. 188)):—"The plaintiff describes in his declaration a fact which, as it comes out at the trial, may or may not be a proper strict trespass; it might, at the trial, be proved to be [442] either trespass or case. If it had been proved to be trespass vi et armis, the plaintiff in that case must have been nonsuited. Before the trial, it stood indifferent whether it would come out to be the one or the other." As this is a case in which the consequential damage may have and is actually stated to have accrued, the declaration is sufficient. [Lord Abinger, C. B. But this is not a case of consequential damage; the action is brought for a clear continuing trespass, with a statement of special damage. Can the Court intend that an action on the case can be maintained for such an injury, without confounding all the distinctions between the different forms of action?] If the Court are of opinion that a clear act of trespass is stated on the face of the declaration, then it is submitted that the count is sustainable after verdict, as a good count in trespass. On this motion, being one in arrest of judgment, no objection will be available to the defendant, unless it be one which he could have supported in case of general demurrer. The omission, therefore, of the words "vi et armis," &c., are immaterial after verdict, being matters only of special demurrer: 4 Ann. c. 16. The commencement also, "for that whereas," &c., which can only be taken advantage of on special demurrer, affords no ground of objection. The rule as to what is cured by verdict, is clearly stated in the notes to *Stennel v. Hogg* (1 Wms. Saunders, 227):—"It is to be observed, that where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured [443] by the verdict by the common law." *Smith v. Goodwin* (4 B. & Adol. 413), which was an action on the case for an irregular distress, is a strong authority in support of the present point. There the judgment was attempted to be arrested on the ground of misjoinder of case and trespass. The seventh count stated a wrongful, injurious, and

vexatious taking of goods a second time for the same rent, and a conversion of them by the defendant: and the Court held, that though the count disclosed a cause of action in trespass, yet it might be considered "an informal count in trover—setting forth specially circumstances which it was unnecessary to state, but which are the subject of such an action." Besides, nothing defective will appear on this record—all the cases which are to be found, in which judgment has been arrested, have been cases of misjoinder. Here there is only one count, and therefore they are not applicable. [Maule, B. But will not the very commencement of the record shew, that the defendant was summoned to answer the plaintiff in an action on the case?] It is submitted not; for no such words would appear on the *Nisi Prius* record. According to the form given by the New Rules, the issue, when made up, would merely state that the defendant was summoned to answer the plaintiff on a writ issued on the day of &c.; and even if it did appear by mistake, it has been decided in *Marshall v. Thomas* (2 Dowl. P. C. 208), that if the form of action is misdescribed at the commencement of the declaration, it is only an irregularity, and not even a ground of special demurrer. And further, after verdict all variance between the declaration and writ, whether in form or substance, is aided by the 5 Geo. 1, c. 13. But reliance can be safely placed on the form of the issue and the *Nisi Prius* record given by the rules of H. T., 4 Will. 4, on which only the date, and not the nature of the writ, appears.

[444] R. V. Richards and Swann, contra, were directed to confine their attention to this last point, namely, that this was a good count in trespass after verdict. It is the duty of the plaintiff to make up the issue, and when it was so made up, it would state that the defendant was summoned to answer the plaintiff in an action on the case, and having chosen to make up the issue in that form, he cannot afterwards turn round and say it is an action of trespass. [Lord Abinger, C. B. If the declaration should afterwards turn out to be in trespass, though commenced in case, the only remedy the defendant has is to move to set it aside for irregularity, according to the authority which has been cited. If you waive the irregularity, and go on and plead to it, and it is a clear declaration in trespass, you cannot take advantage of it afterwards.] But secondly, this is not a good declaration either in case or trespass. [Lord Abinger, C. B. Mr. Rawlinson says, upon the face of this declaration a charge of trespass is shewn, though according to the formal part of it it is in case, and that after verdict it is a good count in trespass.] If it be so, it is a misjoinder. [Lord Abinger, C. B. Not of counts, for there is only one. Misjoinder is the joinder of counts in different forms of action.] Such an objection may equally be taken distributively as to the different parts of a count, and where the concluding part of a count is in trespass and the commencement is in case, it is a misjoinder. The intention was to complain of the consequential injury, yet the facts stated constitute a trespass. It is alleged that the defendants kept and continued the shores and timbers in and upon and over the plaintiff's close, although they were requested to remove them. [Lord Abinger, C. B. The request is only aggravation.] The trespass being commenced upon the plaintiff's close, the defendants had no right to go upon the close to abate it, and he ought to have done so himself: *Patrick v. [445] Colerick* (3 M. & W. 483), *Anthony v. Harvey* (8 Bing. 186; 1 M. & Scott, 300). [Lord Abinger, C. B. That might have been so: but here he goes on to shew that he could not remove the shores without bringing down the defendant's buildings upon him.] It is submitted that the very circumstance of the defendant not doing this upon request, shews that it is only a ground for maintaining an action upon the case. [Lord Abinger, C. B. If so, it is a good count in case.] It may be very much doubted whether any right of action at all is disclosed. The declaration states that poles and timbers having been placed in the plaintiff's land, the defendant continued them afterwards, although requested to remove them. This was a mere nonfeasance. There was no duty on the part of the defendants to remove them; the plaintiff might have removed them himself: *Peyton v. Mayor of London* (9 B. & C. 725; 4 Man. & Ry. 625).

LORD ABINGER, C. B. I was at first disposed to think that the judgment ought to be arrested in this case, on the ground I have already stated in the course of the argument. I still adhere to the opinion that this is properly the ground of an action of trespass, and not of case. It is not similar to those cases that have been cited, of trespass to a personal chattel, where trespass and case are concurrent remedies, and where a party may waive the trespass and go for the consequential damage; as for

instance in the case of an asportation of goods, where trover may at all times be maintained. A party may even bring trover to try the right to coal mines: but those cases contain distinct causes of action, and are not analogous to an action brought for a trespass to the soil, which is continued. The whole of this declaration shews that these timbers were put into the soil of the plaintiff for the purpose of supporting the defendant's house, and they were continued there [446] by the defendant himself, rendering him substantially a trespasser, as much as if he had stuck a pole in the land of the plaintiff. It is specially assigned as ground of complaint that the plaintiff could not remove the shores without pulling down the defendant's house; but it is for the defendant to shew that his house would be thereby injured. I think, therefore, that this is substantially a trespass. Then it is ingeniously argued by Mr. Rawlinson, that this count is a good count in trespass after verdict: that the declaration, although not in artificial language a declaration of trespass, yet contains in reality a charge of trespass. Then the only difficulty on this point is the writ of summons being described on the record as being in an action on the case. I am not, however, aware of any case in which this has been considered at all material; and I think a variance between the writ and declaration is no ground for arresting the judgment. In practice it is well known that such objections are cured by the subsequent pleadings. That being so, and no authority being cited for the defendant which bears upon the point, we may treat this declaration as what it really is, viz. a declaration in trespass without the words "vi et armis." After verdict, the omission of those words is of no importance. We must now look to the substance; and, substantially, this is a count in trespass. The rule must therefore be discharged

GURNEY, B., concurred.

MAULE, B. I am of the same opinion, and think that this declaration states a continuing act of wrong by the defendant, and not such an injury as is the subject of an action upon the case, but of trespass. The only objection is, that the issue calls it an action on the case. I think that might be ground of special demurrer, but it is no objection after verdict.

Rule discharged.

[447] VACATION SITTINGS AFTER TRINITY TERM.

WILLIAMS v. BRYANT. Exch. of Pleas. 1839.—In debt on bond, the plaintiff, by his declaration, complained against W. F. B., sued by the name of W. B. The defendant pleaded non est factum. At the trial, it appeared that the defendant did in fact execute a bond agreeing with that described in the declaration, by the name of W. B., and that, at the time of the execution, he was known by that name:—Held, 1st, that the proof was sufficient to sustain the issue, and that it was no variance; 2ndly, that even if the objection were valid, it was not one of which the defendant could avail himself under the plea of non est factum.

[S. C. 7 Dowl. P. C. 502; 9 L. J. Ex. 47; 3 Jur. 632.]

Debt on bond for 5000l. The plaintiff by his declaration complained against "William Francis Bryant, sued by the name of William Bryant." The defendant pleaded non est factum, and the cause was tried before Maule, B., at the last Assizes for the county of Somerset. It appeared in evidence that the defendant did in fact execute a bond agreeing with that described in the declaration, by the name of William Bryant, and that at the time of the execution he was known by that name; but it was objected that the issue was not maintained, and that the plaintiff ought to be nonsuited. The learned Judge directed a verdict for the plaintiff, but reserved to the defendant's counsel liberty to move to enter a nonsuit.

Erle, in Easter term last, obtained a rule nisi accordingly, citing *Field v. Winlow* (Cro. Eliz. 897), *Clark v. Istead* (Lutw. 894), and *Gould v. Barnes* (3 Taunt. 504).

Crowder and Jardine shewed cause. The objection rests entirely upon an assumed variance in the Christian name; but there is nothing in the case, either in the way of averment, proof, or admission on the record, to shew that the name of Francis, introduced for the first time in the declaration, is not a surname. The Court will make every reasonable intendment for the purpose of meeting an objection of this nature; as in *Scott v. Soans* (3 East, 112), it was [448] presumed, where nothing

appeared to the contrary, that Jonathan otherwise John, was all one name of baptism. Here it is quite a reasonable presumption, that ten years ago, when this bond was made, the proper name of the defendant was William Bryant, by which it is proved that he was known at that time, and by which he describes himself in the instrument, and that he has since assumed the surname of Francis, either by license from the crown, or of his own authority: *Barlow v. Buteman* (3 P. Wms. 65). If so, the declaration is regular in giving him the surname he had assumed, and which is in fact his true name at the time of declaring upon the bond. By tracing the principle upon which the decision in the case of *Gould v. Barnes* (3 Taunt. 504) is founded, through the earlier authorities, it will be seen that the objection applies to the mistake of a baptismal name only; and it will also appear that, if that principle is applicable at all at the present day, a bond in which the Christian name of the obligor is falsely stated, is wholly void, and consequently that the objection cannot, since the rule of H. T., 4 Will. 4, Reg. 21, be available to the defendant upon the plea of non est factum.

The principle is, that in obligations, as well as in all deeds which operate per se by way of grant, without livery, or any act in pais to be done upon them, there must be a designation of the party to be charged,—not by extrinsic averment, or anything beside the deed,—but on the face of the instrument itself.^(c) And this demonstratio personæ must be effected by the true statement of the name of baptism, which, in early times, was the real name of designation, and which, for that reason, is, in ancient authorities, usually called the proper name, to distinguish it from a surname. It is a sensible rule, that the name of the party charged should appear with certainty in all solemn instruments, [449] and especially in those which bind lands; for otherwise heirs and purchasers might, as Lord Stowell says in *Wakefield v. Wakefield* (1 Hagg. Cons. Rep. 401), “be for years at hide-and-seek about identity;” but it may be reasonably doubted, whether, at the present day, when surnames have been in general use for many centuries, and when Christian names have ceased to designate the person with any degree of certainty, the ancient and rigid rule, respecting the complete accuracy of the latter in bonds and deeds, can be justified. Lord Coke, treating of the requisites of deeds, says, that “special heed must be taken to the name of baptism;” and, by stating some excepted instances, in which he considers that a grant would be good, though the name of baptism is mistaken, he clearly implies his opinion, that, as a general rule, a grant by a false Christian name would be void (Co. Litt. 3 a.). Perkins declares this doctrine more distinctly: for, after stating that doubts prevailed as to the validity of an annuity deed, in which the grantor is described by a false name of baptism (Perkins’ Profitable Book, p. 17, pl. 38), he goes on to say,—“Such things as passe by liverie, as land &c., notwithstanding the deed of feoffment be made of that by a contrary name of baptism of the feoffor, and by contrary name of baptism of the feoffee, it is a good feoffment, if liverie of seisin be made by the feoffor unto the feoffee; and it takes effect by the liverie, and not by the deed. And if a man give me his horse by word, and makes to me a writing of the same by his contrary name of baptism, and by my contrary name of baptism, it was a good gift by word, but not by the writing (pl. 42).” This distinction between the effect of an error in a baptismal name and in a surname in bonds, is found in very ancient authorities. In a case in the Year Book, 3 Hen. 6, 25, 6, it was held that an obligor whose real name was Richard Talbot, should not be charged with [450] a bond in which he was named John Talbot. The counsel for the plaintiff in that case contended at the bar, that if a bond is made by Watte at Stile by the name of Watte at Gap, and an action of debt is brought against him by the latter name, according to the bond, he cannot object that his real name is Watte at Stile. But the Court said “that there is a diversity where one is bound by another surname than he has put in the deed, and where he is bound by another proper name than he has put in the deed: for where one is bound by another surname, and the writ is brought according to the deed, there, if he pleads that he hath another surname, the plaintiff shall maintain his writ by special shewing,—such as that he bound himself by that name, or that the defendant in fact delivered the deed to him. And this is the reason, for that a man may have divers surnames, and be known by one and by the other; but with the name of baptism the law is different, for a man cannot have two names of

(c) See per Holt, C. J., in *The Queen v. The Bishop of Chester*, 1 Lord Raymond, 303, and 12 Mod. 186.

baptism." So also in a case in the Year Book, 33 Hen. 6, 19, Chief Justice Prisot says expressly, "I am of opinion that if Thomas Littleton is bound to me by the name of Robert Littleton, this obligation is void; for if I bring a writ against him by the name of Robert, the writ is bad, and alias dictus cannot be of proper names." Another judicial dictum to the same effect will be found in the Year Book, 9 Ed. 4, 43 (abstracted in Fitzherbert's Abr. tit. Grant, pl. 23). The same principle is also expressly recognised in *Panton v. Chowles* (Moore, 897), *Button v. Wrightman* (Popbam, 56), *Disply v. Sprat* (Cro. Eliz. 57), *Humble v. Glover* (Cro. Eliz. 328), and *Regina v. Bishop of Chester* (1 Lord Raym., 292; 12 Mod. 185); and it is adopted without question as the law in Fitzherbert's Abr. tit. Grant, pl. 23: 2 Roll. Abr. 21, Faits, B. 3; Com. Dig. tit. Fait, E. 3; Bacon's [451] Abr. tit. Grants, C. Chief Baron Gilbert (History of the Common Pleas, pp. 174, 178) states the law respecting the distinction between the effect of a mistake in the Christian name and that of an error in the surname in grants and obligations, entirely in accordance with the above authorities, and suggests what occurs to him as a reason for the rule, that a mistake of the former cannot be aided by pleading or averment. Assuming, therefore, this distinction to be undoubted law, and applying it to the present objection, it will be found that in every case which has been, or which can be, cited in support of this application, the mistake held to be fatal has been the mistake of the Christian name only. Thus in *Hyckman v. Shotbolt* (Dyer, 279 a.), it was John for William; in *Field v. Winlow* (Cro. Eliz. 897), it was John for James; in *Watkins v. Oliver* (Cro. Jac. 558), in *Sir Edward Ashfield's case* (Brownlow, 48), and in *Maby v. Shepherd* (Cro. Jac. 640), it was Edmund for Edward; in *Clarke v. Isteud* (Lutwyche, 894), it was Robert for John; in *Evans v. King* (Willes, 554), Henry for Henry Vaughan, but the name of Vaughan appeared upon the plea in abatement, and was admitted upon the record, to be a Christian name; and lastly, in *Gould v. Barnes* (3 Taunt. 504), upon which case this rule was obtained, it was Thomas for Joseph. It is clear, therefore, from the authorities, that the objection, if available at all, applies only to the mistake of a Christian name; it may be doubted whether the altered usages of society in this respect, which have entirely reversed the relative importance of baptismal names and surnames for the purposes of designation, have not rendered the old law upon this subject obsolete; but, at all events, there is nothing in this case to shew that Francis is not a surname, adopted since the bond was made, and the Court will not intend [452] that it is a Christian name in order to maintain an objection of this nature.

But a conclusive answer to this objection is afforded by the rule of Hilary Term, 4 Will. 4, r. 21, which declares that "in debt on specialty the plea of non est factum shall operate as a denial of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." Now if the defendant intended to rely upon the ancient doctrine that a bond containing the false baptismal name is void, he was bound under the above rule to plead specially, though such a defence might formerly be available under non est factum. In like manner, if he relied upon the variance of the name in the declaration from that in the bond, he cannot avail himself of such a defence without a special plea, because there is no question in this case respecting the identity of the person, the defendant having beyond all doubt executed the bond in point of fact; and upon non est factum, since the above rule, the only proof which the plaintiff is bound to produce at Nisi Prius is, that the party did in point of fact execute the instrument set out in the declaration.

Erle and Ball, in support of the rule. Although a man cannot properly have two Christian names of baptism, yet it is a principle of law, that if a party execute a deed by any name, he will be estopped, in an action upon the instrument, from disputing that his name is different from that which he has adopted: and the authorities shew that if a party signs a bond by a wrong name, he must be sued in that name. It is a principle of law that estoppels must be mutual, and therefore the obligee is bound by the same rule, and the name given in a deed must be taken, as between the parties to that deed, as absolutely conclusive. They relied upon *Hyckman v. Shotbolt*, *Panton v. Chowles*, *Watkins v. Oliver*, *Maby v. Shepherd*, *Evans v. King*, *Gould* [453] *v. Barnes*, and *Reeves v. Slater* (7 B. & Cr. 486). In the case of a Jew, a Pagan, or a Turk, who can have no Christian names, they would be liable to be sued by the name which they had put to a bond or deed. This defendant ought, therefore, to have been sued by the name by which he signed the bond, viz. "William

Bryant," and not "William Francis Bryant." Next, as to the point that this objection cannot be taken advantage of under the plea of non est factum. It was intended that that plea should put in issue the execution of the instrument by the person described in the declaration; but shewing the execution of a bond by William Bryant is no proof of the execution of the bond by William Francis Bryant, against whom the action is brought. The new rules were intended to apply to cases where an instrument is sought to be vitiated by some informality; but not to cases where the plaintiff's proof is deficient, in not shewing the execution of the instrument by the party sued. [Alderson, B. They say it is the same person.] The question whether Francis ought to be taken as a surname, ought to have been raised at the trial, as that was a question of fact for the jury to determine, and evidence might have been given to shew that it was a name of baptism. Besides, if it is to be presumed that the defendant took that name as a surname since the execution of the bond, that ought to have been suggested, as is done in the case of a party acquiring a change of dignity or title, or where he has changed his name by letters patent from the crown.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The plaintiff in this case, by his declaration, complained against William Francis Bryant, sued by the [454] name of William Bryant the elder, on a bond. On an issue on a plea of non est factum, tried before my Brother Maule, it appeared in evidence that the defendant did execute a bond, agreeing with that described in the declaration, by the name of William Bryant; and that at the time of the execution he was well known by that name: but it was objected, that the issue was not maintained, and that the plaintiff ought to be nonsuited. My Brother Maule directed a verdict for the plaintiff, but reserved to Mr. Erle the liberty to move to enter a nonsuit.

A rule nisi was obtained, and cause shewn, last term. We have considered the case, and are of opinion that the rule ought to be discharged.

The authorities in support of the rule, were the case of *Gould v. Barnes* (3 Taunt. 504), and others therein referred to. It appears from these to be a settled point, that if a declaration against a defendant by one Christian name, as, for instance, Joseph, state that he executed a bond by the name of Thomas, and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution, such a declaration would be bad on demurrer, or in arrest of judgment, even after issue joined on a plea of non est factum. And the reason appears to be, that in bonds and deeds, the efficacy of which depends on the instrument itself, and not on matter in pais, as feoffments, there must be a certain designatio personæ of the party, which regularly, in the case of ordinary persons, ought to be by the true first name, or name of baptism, and surname (Sheph. Touch. 233); of which the first is the most important. And there are many cases, in which the court have said, and as recently as in that in *Willes*, 554, that a man cannot have two Christian names at the same time; nor can he, properly and strictly, have two: but, on the other hand, it is certain that a person may at this time sue, or be sued, [455] not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation; though it was otherwise held in the case in *Vin. Abr. Misnomer*, C. 12, in 7 Will. 3: if a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement; and not only is this the established practice, but the doctrine is promulgated in very ancient times. In *Bracton*, 188 b., in speaking of pleas in abatement, it is said, "Item, si quis binominis fuerit, sive in nomine proprio sive in cognomine, illud nomen tenendum erit quo solet frequentius appellari, quia ideo imposita sunt, ut demonstrant voluntatem dicentis, et utimur notis in vocis ministerio." And Lord Chief Baron Comyns, in his *Digest*, *Fait*, E, 3, says, "If a man be baptized by one name and known by another, a grant by the name by which he is known shall be good." This is founded on the dicta in the *Year Book*, 46 Edw. 3, fo. 22. And if a party may sue, or be sued, by the proper name by which he is known, it must be a sufficient designation of him, if he enter into a bond by that name. It by no means follows, therefore, that the decisions in the case of *Gould v. Barnes*, and others before referred to, in which the question arose on the record, would have been the same, if there had been an averment on the face of the declaration, that the party was known by the proper name in which the bond was made at the time of making it. We find no authorities for saying that the declaration

would have been bad with such an averment, even if there had been a total variance of the first names, still less where a man having two proper names, or names of baptism, has bound himself by the name of one. And on a plea of non est factum, where the difference of name does not appear on the record, and there is evidence of the party having been known, at the time of the execution, by the name on the instrument, there is no case cited on the argument, and none that we are aware of, which decides that the instru-[456]-ment is void. In *Hyckman v. Sholtolt* (Dyer, 279), which was cited as shewing that the variance of name was fatal, on non est factum, the wrong name in the bond (John instead of William) is said to have been inscribed by mistake; and therefore, it is to be presumed, was not a name by which he was known. In the absence, therefore, of any authority to the contrary, and relying upon the law now fully established, as to misnomers in actions, we think a bond is not void which is in the name, whether such name be the first or Christian name, or family name, by which the party is commonly called or known, and, consequently, that the plaintiff in this case was entitled to recover.

We wish to add, that it appears to us, that if the objection were valid, it was not available under this plea of non est factum, since the new rules.

Rule discharged.

BUTTEMERE v. HAYES. Exch. of Pleas. 1839.—Where A., being possessed of a messuage and premises for the residue of a certain term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises:—Held, that this was an agreement relating to the sale of an interest in land, within the 29 Car. 2, c. 3, s. 4.—Held, also, that in an action brought by A. on this contract, B. was entitled to avail himself, under non assumpsit, of the objection that there was no memorandum or note in writing, &c., of such contract.

[S. C. 7 Dowl. P. C. 489; 9 L. J. Ex. 44; 3 Jur. 704. Applied, *Leaf v. Tuton*, 1842, 10 M. & W. 393.]

Assumpsit. The first count of the declaration alleged, that the plaintiff was possessed of a certain messuage and dwelling-house, held by him as tenant to one J. G., for the residue of a certain term of seven years, three years of which were then to come and unexpired; as also of certain chattels and fixtures being in the said messuage or dwelling-house; that before the making of the agreement thereafter mentioned, there were certain repairs necessary to be done in the said messuage, which the said plaintiff was then about to cause to be done; and thereupon, in consideration that the plaintiff, at the request of [457] the defendant, would on completion of the said repairs give up and relinquish possession of the said messuage and dwelling-house to him, the said defendant, and suffer him to become the tenant thereof for the said unexpired residue of the term, the said defendant promised the said plaintiff to pay him the sum of 10l towards the amount of the dilapidations, on the latter being estimated by a surveyor. The declaration then alleged, that in pursuance of the said agreement, the defendant entered into the possession of the premises, and became the tenant thereof; and that the dilapidations, were ascertained by a surveyor, but that the defendant refused to pay, &c. The defendant pleaded non assumpsit.

At the trial before Lord Abinger, C. B., at the Sittings after last Hilary Term, the plaintiff having proved a parol contract to the effect of that stated in the declaration, and a breach of such agreement, it was objected for the defendant, that the agreement declared on was a contract for the sale of the interest in lands, within the meaning of the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, and therefore, to entitle the plaintiff to recover, it was incumbent on him to shew that the agreement was by a memorandum or note in writing, signed by the party to be charged thereby, according to the terms of that section. The learned Judge directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit or a verdict for him, if the Court should be of opinion that this was a contract within the 4th section of the Statute of Frauds, and the defendant was entitled to avail himself of such a defence under the plea of non assumpsit, since the new rules.

Martin having in Easter Term last obtained a rule accordingly,

Platt and Gurney shewed cause. The case is not within the statute. The defendant contracts, in consideration of [458] the plaintiff's undertaking to repair the dilapidations and to relinquish the possession to him, to pay him 10l. towards the dilapidations. That, it is submitted, is a good contract by parol. Here every part of the consideration for the contract is executed, and the defendant has obtained the whole of the consideration in respect of which the contract was made. In the case of *Inman v. Stamp* (1 Stark. N. P. C. 12), where a contract to let furnished lodgings was held to be a contract for an interest in land, the matter merely rested in contract: but here the consideration is executed, and the Statute of Frauds does not apply. [Parke, B. The question is, whether the executory contract alleged is proved—and whether non assumpsit puts that in issue since the new rules. On that point we will hear the other side.]

Martin, contrà. The question is, whether the contract set out in the declaration is proved in due form of law. The contract declared on is an executory contract to assign and give up an interest in land, for the residue of a term of which three years remained unexpired. Such an agreement is within the 4th section of the statute, and as no memorandum or note in writing has been shewn, it has not been properly proved. The first three sections of the act relate to the creation of interests in land; the fourth has respect to agreements for an interest in land. The latter section enacts, "That no action shall be brought upon any contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, shall be in writing &c." [Parke, B. The declaration states an agreement to give up the possession of the premises, and to suffer the defendant to become tenant. Now he could not make him tenant without doing some act in writing within the meaning of the [459] statute. But supposing that to be so, and his not having done so to be a valid defence under the Statute of Frauds, can that defence be made available under the plea of non assumpsit?] In *Elliott v. Thomas* (3 M. & W. 170), the learned counsel for the plaintiff admitted that it could; and the same point appears to have been held in *Johnson v. Dodgson* (2 M. & W. 653). In *Lysaght v. Walker* (5 Bligh, N. S. 1), in the House of Lords, Lord Tenterden, C. J., threw out an opinion that a plea of the Statute of Frauds would be bad on general demurrer.

LORD ABINGER, C. B. I am of opinion that the contract stated in this declaration is one relating to an interest in land, within the meaning of the statute. Then comes the question, whether that objection can be taken advantage of under non assumpsit. On that point we will take time to consider: but at present my inclination is to adhere to the decision of this Court, that it may.

PARKE, B. I am entirely of the same opinion. Perhaps, if the declaration had stated an agreement to relinquish the possession merely, it might not have amounted to a contract for an interest in land: but it goes on to allege, that the plaintiff was to suffer the defendant to become tenant thereof for the residue of the term. Now he could not become tenant for the residue of the term, except by an assignment, and that would be a contract for an interest in land within the statute, and ought to be reduced into writing.

MAULE, B. I am of the same opinion as to this being a contract for an interest in land. On the other point I entertain much doubt.

Cur. adv. vult.

[460] PARKE, B. The question which the Court reserved for consideration was, whether, in an action on an executory contract concerning an interest in land, the plaintiff was required, on the plea of non assumpsit, to prove a memorandum in writing as required by the 4th section of the Statute of Frauds. Upon this point, depending on the construction of the New Rules, a considerable difference of opinion has prevailed in the profession, and the Court have therefore been desirous to give the question full consideration.

There is no doubt that before the new rules of pleading, such proof would have been necessary. But the 1st and 3rd of these rules, in actions of assumpsit, have limited the operation of the plea of non assumpsit. Allegations in the declaration are now admitted by that plea, which formerly it required the plaintiff to prove; and defences are now excluded by the new rule, which formerly might have been proved under it. Before the New Rules, under the plea of non assumpsit, the plaintiff was required to prove all the material averments in the declaration, and not merely the

making of the contract declared on; and the defendant was at liberty not only to disprove all the allegations of the declaration, but to shew by evidence consistent with them, that the contract, though actually broken, was void in law, and even to prove defences, such as release, or accord and satisfaction, which shewed that though a cause of action had once subsisted, it was put an end to before the commencement of the suit. The object of the New Rules was clearly to remove this inconvenience, and with that view the first and third of these in assumpsit restrict the general issue, by limiting the operation by which it formerly put in issue all the averments in the declaration in actions on special contracts, and by confining it to a denial of one of them only, namely, of the contract declared on, and by excluding all defences which might formerly have been made by disproving all the other [461] allegations of the declaration, or by proof of matter which shewed that the contract was void, or that the cause of action had ceased before the commencement of the suit. In the present case the question in effect is, whether the writing required by the 4th section of the Statute of Frauds, and which formerly was a necessary part of the plaintiff's proof on the issue of non assumpsit, is so still; and the Court are of opinion that it is. Under the former system of pleading, the plaintiff was required to prove a writing within the Statute of Frauds. This must have been in order to support some allegation of his declaration, and there is no allegation, except that of the making of the contract, which it supports. This allegation is still put in issue by the plea of non assumpsit; and there is nothing in the New Rules which alters the evidence by which the plaintiff was required to support it.

It was contended on the behalf of the plaintiff, that the want of a writing to satisfy the Statute of Frauds was a matter which was required to be specially pleaded under the 3rd rule, as shewing the contract to be void or voidable in point of law; but we think that the meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, such as usury, fraud, &c.; and not to exempt the plaintiff from proving anything which he would formerly have been required to prove. We therefore think that the writing required by the 4th section must be proved on the general issue by the plaintiff.

This Court has already intimated its opinion, that the plaintiff must prove a note in writing, required by the 17th section, on the plea of the general issue: *Johnson v. Dodgson* (2 M. & W. 657), *Elliott v. Thomas* (3 M. & W. 170); and we have no difficulty in saying that in the other cases in which the Statute of Frauds requires a writing, as, for instance, in cases of [462] demises for three years, a writing must be proved, not merely on a special traverse of the demise, but where the denial of a demise is included in the general issue.

The rule, therefore, which has been obtained in this case, to enter a verdict for the defendant on the first count, must be made absolute.

Rule absolute.(a)

HIBBLEWHITE v. M'MORINE. Exch. of Pleas. 1839.—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract.

[S. C. 8 L. J. Ex. 217; 3 Jur. 509. See further, 6 M. & W. 200; 2 Railway Cases, 51.]

Assumpsit. The first count of the declaration was upon an agreement made between the plaintiff and the defendant, on the 10th of September, 1838, for the sale by the plaintiff to the defendant of 50 shares in the Brighton Railway Company, to be transferred, delivered, and paid for, on or before the 1st day of March, 1839, or at any

(a) On the same day that this judgment was pronounced, it was quoted by counsel and read by Lord Denman, C. J., in the course of the argument in a case of *Eastwood v. Kenyon*, where the same question arose on the 17th section of the statute; and the Court of Queen's Bench held, in accordance with it, that a defence under that section also need not be specially pleaded.

intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share, together with all calls that might have been paid on the same, &c. The count averred mutual promises, that the plaintiff was ready and willing to transfer and deliver the shares to the defendant, if he would have paid for the same, and that he would have offered him a legal transfer of them, but that the defendant did not nor would accept and pay for the said shares, but altogether refused so to do, &c.

The defendant pleaded, sixthly, as to the first count of the declaration, *actionem non*, because he says, that at the time of the making of the agreement therein mentioned, and of the mutual promises therein mentioned, he the plaintiff [463] was not possessed of or entitled to the said fifty shares in the Brighton Railway Company, in the said first count mentioned to have been purchased by the defendant from the plaintiff, or any of them, nor had the plaintiff at that time entered into any contract for the purchase of such fifty shares, or any of them, nor had he at that time any reasonable expectation of becoming possessed of or entitled to any such shares within the time by the said agreement provided for the fulfilment thereof by the plaintiff, otherwise than by his the plaintiff's purchasing such shares after the time of making the said agreement. Verification.

General demurrer and joinder.

Cowling, in support of the demurrer. This plea is clearly bad ; for it is altogether immaterial to the maintenance of this action, that the plaintiff was not possessed of the shares at the time of making the agreement. The plea is framed upon the authority of the case of *Bryan v. Lewis* (Ry. & M. 386), where Lord Tenterden ruled at Nisi Prius, that if a party contract for the sale of goods to be delivered at a future day, he not then having them nor having contracted to buy them, but intending afterwards to go into the market and buy them, he cannot maintain an action for the non-performance of the contract by the other party ; such a contract amounting, on the part of the vendor, to a wager on the price of the commodity. Even supposing that case to be law, it does not follow that this is a good plea. It should have stated in terms that the contract was a wager, if that be the legal result. But it is submitted that the doctrine laid down by Lord Tenterden cannot be supported in law. It may be observed that the case of *Bryan v. Lewis* went off on a different point, so that there was no opportunity for questioning the ruling of the learned Judge. The unfortunate state to which [464] the trade of the country had at that time been reduced by rash speculation, appears to have influenced his judgment. Even if it were a wager, the contract would not be void unless it were contrary to public policy : *Evans v. Jones* (ante, p. 77). In *Wells v. Porter* (2 Scott, 141 ; 2 Bing. N. C. 722), a plea to an action for work and labour, that the work was done by the plaintiff as a broker, in the making of time-bargains in foreign funds, was held bad on demurrer. *Bryan v. Lewis* was there cited for the defendant, to shew that such a contract would be void at common law, and Bosanquet, J., appears to have expressed doubts as to the soundness of Lord Tenterden's dictum. The general usage of trade is entirely in favour of the legality of this contract. Orders are continually sent from abroad to merchants in England, to supply commodities which they do not themselves deal in ; and it would be of most dangerous consequences to the security of commerce, if, by establishing such a doctrine as is contended for here, the parties abroad could evade payment. [Maule, B. It would render void all contracts to supply the army and navy, and workhouses, and almost every public institution.] He was then stopped by the Court.

Tomlinson, contra. The decision of Lord Tenterden, in *Bryan v. Lewis*, is an express authority that this action cannot be maintained. His Lordship says in that case that the opinion expressed by him was "no new law : " and it is quite an error to treat it as a mere obiter dictum, for in the case of *Lorymer v. Smith* (1 B. & C. 1 ; 2 D. & R. 23), decided four years earlier, the same learned judge had said, that "the bargaining to deliver corn not then in the possession of the vendor, and relying upon making a future purchase in time to fulfil his undertaking, was a mode of dealing not to be encouraged." The case of *Wells v. Porter* (confirmed [465] by *Elsuworth v. Cole* (2 M. & W. 31), undoubtedly establishes that as against the broker, suing for his work and labour, his employer cannot defend himself by alleging that it was bestowed in gambling transactions in foreign funds : but it may be observed, that Tindal, C. J., there expressly avoids any decision that the contract would not be void at common law

as between the parties to it. It may be conceded, however, that the trafficking in foreign funds is legal, as had been before held by Lord Tenterden, in *Henderson v. Bise* (3 Stark. N. P. 150). That case occurred within a few days of the decision in *Lorymer v. Smith*, so that it appears that the attention of the learned judge was, at the very period, drawn to the distinction between the two cases, of traffic in the foreign funds, and of a contract for goods not then in the vendor's possession, when he expressed his opinion of the prejudicial tendency of the latter. Operations in the funds of a foreign country may be considered as below the consideration of the law, and not entitled to the protection of the courts; but contracts for the sale of goods in this country form a part of its own legitimate commerce; and the effect of large speculations and time-bargains in them may be most injurious to third parties. The legislature has considered these railway shares as the fair subject of legitimate investment; then the prices of them must be exceedingly affected by wagering bargains in them. Lord Tenterden's doctrine applies with even more force to them than to the case of goods. A fictitious demand and supply are created by unreal transactions. In considering whether a wager be legal or not, the law looks, not to the consequences that may result in a particular case, but to its general tendency: *Gilbert v. Sykes* (16 East, 150), *Eltham v. Kingsman* (1 B. & Ald. 683). [Parke, B. What is the tendency of this wager—to raise or lower [466] the prices?] To produce an oscillation in prices. [Maule, B. It might tend to steady them. Alderson, B. Your argument assumes that it must produce a bad effect, because we cannot see what effect it will produce. Parke, B. We cannot tell what is the consequence of this contract. The consequence on the vendor is to lower the prices, on the vendee to raise them. Besides, it cannot be a wager unless both parties are cognizant of the facts: that is not stated here.] The plea follows the terms stated by Lord Tenterden, as making the contract illegal.

PARKE, B. I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in *Bryan v. Lewis*: it excited a good deal of surprise in my mind at the time; and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession: and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties. The dictum of Lord Tenterden certainly was not a hasty observation thrown out by him, because it appears from the case of *Lorymer v. Smith* that he had entertained and expressed similar notions four years before. He did not indeed, in that case, say that such a contract was void, but only that it was of a kind not to be encouraged: and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the Bench, [467] until the case of *Lorymer v. Smith*, in the year 1822; and there is no case which has been since decided on that authority. Not only, then, was the doubt expressed by Bosanquet, J., in *Wells v. Porter*, well founded, but the doctrine is clearly contrary to law. This plea, therefore, is bad in substance, and it is unnecessary to consider whether it be bad in form.

ALDERSON, B. I am of the same opinion. I think the dictum of Lord Tenterden cannot be supported. There is no principle in its favour. It would put an end to half the contracts made in the course of trade. Suppose a vendor makes a contract for the delivery of goods, which may be performed by the delivery of any goods of the kind bargained for: whether he has them in his possession at the time of the contract or not, can make no material difference, if he has them ready to be delivered at the time when the contract is to be fulfilled. I disclaim deciding on the ground of public policy: the policy of one man is not the policy of another, and such a consideration only tends to introduce uncertainty into the law.

MAULE, B. I am of the same opinion. I always considered the doctrine laid down in *Bryan v. Lewis* as contrary to law, and most inconvenient in practice: and I have often heard it spoken of with great suspicion, both by lawyers and mercantile men, upon both grounds,—as against law, and against all mercantile convenience. It was with great surprise I heard so accurate a lawyer give utterance to a doctrine so evidently

erroneous; but my surprise is much diminished by the circumstances to which Mr Tomlinson has drawn our attention, and by reference to the case of *Lorymer v. Smith*, from which it appears that the opinion gradually formed itself in his mind, not so much from considerations of law as of mercantile convenience—of which he was not, perhaps, so good a judge—until at length he expressed it so confidently. I have no doubt, however, that it is erroneous, and therefore that this plea must be disallowed.

Judgment for the plaintiff.

RAWLINSON v. SHAND. Exch. of Pleas. 1839.—To an action of debt for work and labour as an attorney, and upon an account stated, the defendant pleaded, except as to 4l. 12s. 8d., parcel &c., nunquam indebitatus; “and as to the said sum of 4l. 12s. 8d., parcel &c., as aforesaid, the defendant says, that the sum of 4l. 12s. 8d. parcel of the sum in the first count mentioned, and the sum of 4l. 12s. 8d., parcel of the sum in the last count mentioned, are one and the same debt of 4l. 12s. 8d., and not other or different debts, and the same as the said sum of 4l. 12s. 8d. in the first plea mentioned;” and the plea then proceeded to answer so much:—Held, on demurrer, that the plea was bad for duplicity.

[S. C. 8 L. J. Ex. 270.]

Debt for work and labour as an attorney, and on an account stated.

The defendant pleaded, except as to the sum of 4l. 12s. 8d., parcel of the monies in the declaration mentioned, nunquam indebitatus; “and as to the said sum of 4l. 12s. 8d., parcel &c., as aforesaid, the defendant says that the sum of 4l. 12s. 8d., parcel of the sum in the first count mentioned, and the sum of 4l. 12s. 8d., parcel of the sum in the last count mentioned, are one and the same debt of 4l. 12s. 8d., and not other or different debts of 4l. 12s. 8d., and that the same is the said sum of 4l. 12s. 8d., parcel &c., as in the said first plea mentioned.” The plea then alleged that the said sum of 4l. 12s. 8d. became due in respect of work done by the plaintiff, as the attorney of the defendant in the Court for the Relief of Insolvent Debtors, and that no signed bill had been delivered.

Special demurrer to the second plea, and joinder in demurrer.

Martin in support of the demurrer. The second plea is bad. It purports, in the commencement of it, to be pleaded to one sum, yet it in truth answers two sums mentioned in different counts, for different causes of action. It was incorrect to say that they were one and the [469] same debt; one count is upon the original consideration, the other upon the account stated subsequently; and it does not appear to which count the plea is intended to apply. Another objection is, that it does not appear by the plea, which of the sums in the declaration the plea confesses and avoids.

Wightman, *contrà*. The plea is substantially correct. [Parke B. Ought it not to have been pleaded as to the sum of 4l. 12s. 8d. in the first count, and the sum of 4l. 12s. 8d. in the second count? This plea answers two sums.] It says those two constitute but one and the same debt, though mentioned in separate counts. This mode of pleading tends to conciseness, and the plaintiff may traverse the allegation in the plea, that they are the same debt.

Per Curiam. The plea proposes to answer one sum, but in truth it is an answer to two. You have denied that you were indebted except as to 4l. 12s. 8d.; then you have two chances, two defences. You may have leave to amend, and plead to the two sums. The plea is bad for duplicity.

Leave to amend on payment of costs, otherwise judgment for the plaintiff.

COOMBS v. DUTTON. Exch. of Pleas. 1839.—A lease, dated October 1825, to which the King was a party, was granted by the Commissioners of his Majesty's Woods and Forests, containing a clause that if the commissioners for the time being should at any time during the term be minded or desirous to determine the demise, and of such their mind and desire should cause “one calendar month's notice in writing under their hands” to be given to the lessee, the lease at the expiration of such notice should cease, determine, and be absolutely void:—Held,

that the lease was determined by a notice signed by two only out of the three commissioners, by virtue of the stat. 10 Geo. 4, c. 50, s. 92.

[S. C. 8 L. J. Ex. 278.]

In this action, which was tried before Lord Abinger, C. B., at the London Sittings after last Hilary term, the following [470] special case was agreed upon and stated between the parties for the opinion of the Court.

By an indenture made the 18th of October, 1825, between the then King's most excellent Majesty of the first part, the Hon. Charles Arbuthnot, William Daeres Adams, and Henry Dawkins, Esqrs., the three then Commissioners of his Majesty's Woods, Forests, and Land Revenues, of the second part, and the plaintiff of the third part; certain lands and premises were by the said Commissioners demised to the plaintiff from the 10th of October, 1824, for the term of seventeen years.

The indenture contained the following clause and proviso:—That if the said Charles Arbuthnot, W. D. Adams, and Henry Dawkins, as such Commissioners as aforesaid, or the Commissioners for the time being of his Majesty's Woods, Forests, and Land Revenues, should, at any time or times during the term thereby granted, be minded or desirous to determine the demise thereby made, as to the whole or any part or parts of the said premises, and of such their mind and desire should cause one calendar month's notice, in writing under their hands, to be given to the said Ann Coombes, her executors, administrators, or assigns, or left at or upon the same premises, or any part thereof, then and in every such case, and upon the expiration of such notice, the grant and demise thereby made, as to the whole or such part or parts of the said demised premises as should be therein specified, should cease, determine, and be absolutely void.

On the 10th of November, 1837, during the continuance of the said term of years, notice in writing, signed by two of the then Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, was given to the plaintiff, that they were minded and desirous to determine the said grant and demise to her of a portion of the premises demised and let by the said indenture.

At the time of this notice being signed and given, there [471] were three Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings.

The notice was sufficient, under the clause and proviso above set out, to determine the grant and demise to the plaintiff of the premises mentioned in it, if it had been signed by the said three commissioners.

The question for the opinion of the Court was, whether or not the notice, having been signed by two only of the commissioners, was sufficient to determine the demise. If the Court should be of opinion that it was not, then the verdict was to stand; but if otherwise, the verdict was to be entered for the defendant.

Bramwell, for the plaintiff. The notice given in this case, being signed by two only of the commissioners, is not sufficient. The statute 2 Will. 4, c. 1, s. 8, which was passed subsequently to the granting of this lease, provides that the present commissioners shall have the same powers as former commissioners had. That act worked no injury to the plaintiff. The 9th section provides, that all leases, contracts, and agreements, shall remain in force in the same manner as if that act had not passed, and the commissioners were to have the same powers as they had under former acts—the last of which was the 10th Geo. 4, c. 50. By the 10th section of the same statute 2 Will. 4, c. 1, it is enacted, that where anything is by any act theretofore passed required or permitted to be done by the Commissioners of his Majesty's Woods and Forests, and which if done by two of them would, by law, be as valid as if done by all of them, the same may be done by any two of them, and shall be as valid and effectual as if done by all of them, unless express provisions be made to the contrary. But this is not an act required or permitted to be done by any act, nor does any statute confer upon the commissioners the power of giving such a notice as this. [Parke, B. You say this is not a power given by any act of Parliament, [472] but by their own contract. But the 92nd section of the 10 Geo. 4, c. 50, which is an enabling statute, provides, that it shall be lawful for the commissioners to give any notice which shall be requisite to compel any tenant of his Majesty to deliver up possession: and that every such notice which shall be given or made in writing under the hands of the commissioners, or any two of them, shall be good, valid, and effectual, to all intents and purposes, as if the same were given by his Majesty.] That

section is preceded and followed by a variety of clauses, which confer on the commissioners powers which they otherwise had not. Here they might have stipulated by this lease that they should have power to determine it by giving a notice signed by any two of them; but it is not so. [Alderson, B. The notice is to be given according to the act of Parliament, not the lease.] The act would not give them power to determine the lease by notice, unless there were a stipulation to that effect contained in the lease, in pursuance of the act of Parliament, and then there would be the joint operation of the lease and of the statute. Here the words "commissioners for the time being," clearly embrace all the commissioners. The plaintiff may have entered into the contract upon the understanding that there should be the joint willingness of the three to turn her out of possession. The act was not intended to alter the contract. If the Court hold this notice to be good, it will be to decide that the notice would be operative whilst the lands remained the property of the Crown, but not when they ceased to be so.

Kelly, for the defendant, was stopped by the Court.

PARKE, B. This is the case of a lease granted by the Commissioners of his Majesty's Woods and Forests, and there was a clause in the lease, that notice "by the commissioners for the time being" should determine the lease. [473] A notice was given signed by two of them only. It is quite clear that notice might have been given by all the commissioners, but that was not done. The effect of the stat. 10 Geo. 4, c. 50, is to render valid this lease, which was made before the passing of that act. The 92nd sect. is an enabling one, and the question is, does it apply here? I think there can be no doubt that it does. The words of the section are, "that it shall be lawful for the commissioners for the time being, &c., to give any notice, &c., on behalf of his Majesty." Now is this a notice given on behalf of his Majesty? It clearly is so. He is a party to the lease, which is granted on behalf of his Majesty, and has the same effect as if made by himself; and the notice must be taken to have been given on his behalf. The clause then proceeds thus: "Every such notice given in writing under the hands of the said commissioners, or any two of them, on behalf of his Majesty, shall be good, valid, and effectual to all intents and purposes whatsoever, and shall have the like force as if given by his Majesty." The notice is sufficient, therefore, if given by two commissioners on behalf of his Majesty.

ALDERSON, B., concurred.

MAULE, B. I never entertained much doubt that this was such a notice as is required by the Act. The Act provides that a notice signed by two commissioners on behalf of his Majesty shall be valid and effectual to all intents and purposes. This was so signed, and is therefore effectual for this purpose.

Postea to the defendant.

End of Trinity Term

[474] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 3 VICTORIÆ.

MEMORANDA.

On Wednesday, the 25th of September, died The Right Honourable Sir John Vaughan, one of the Judges of the Court of Common Pleas.

In this term, Baron Maule resigned his seat in this Court, and was appointed a Judge of the Court of Common Pleas, in the room of Mr. Justice Vaughan.

Sir Robert Mounsey Rolfe, Knight, her Majesty's Solicitor-General, was called to the degree of the coif, and gave rings with the motto *Suaviter et fortiter*; and immediately afterwards was appointed a Baron of this Court, in the room of Mr. Justice Maule. His lordship took his seat on the 11th of November.

Thomas Wilde, Esq., one of her Majesty's Serjeants, was appointed Solicitor-General in the room of Baron Rolfe.

[475] PHILLPOTTS AND OTHERS v. EVANS Exch. of Pleas. 1839.—Where A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof;" and subsequently (the market

having fallen) gave the seller notice that he would not accept it if it were delivered, the wheat being then on its transit to Birmingham:—Held, in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to him for acceptance at Birmingham and refused; and not on the day when the notice was received by the seller.

[S. C. 9 L. J. Ex. 33. Approved, *Ripley v. McClure*, 1849, 4 Ex. 345. Explained, *Cort v. Ambergate Railway*, 1851, 17 Q. B. 127. Discussed, *Hochster v. De la Tour*, 1853, 2 E. & B. 678; *Frost v. Knight*, 1870, L. R. 5 Ex. 332 reversed, 1872, L. R. 7 Ex. 111.]

This was an action of assumpsit by the plaintiffs, corn-merchants at Gloucester, against the defendant, a miller at Birmingham, for not accepting a quantity of wheat which the plaintiffs, early in the month of January, 1839, contracted to sell to the defendant, “to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof.” The market shortly afterwards began to fall and the defendant, on the 26th January, gave notice to the plaintiffs that he would not accept the wheat if it were delivered. It was at that time on its way by canal to Birmingham, and on its arrival there the defendant was required to accept it, but he refused to do so; whereupon this action was brought. At the trial before Alderson, B., at the last Gloucester Assizes, the only question between the parties was as to the time at which the damages were to be calculated. The defendant’s counsel contended that the proper measure of damages was the difference between the contract price and the market price on the 26th January, the day when the notice of non-acceptance was given. For the plaintiffs it was insisted, on the authority of the case of *Leigh v. Paterson* (2 Moore, 588), that they were entitled to damages according to the market price on the last day when the contract could have been performed, viz. when the wheat was tendered for acceptance to the defendant. The learned Judge was of that opinion, and under his direction a verdict was found for the plaintiffs for 218l. 9s., the amount of the damages according to the latter computation, leave being reserved to the defendant to move to reduce the damages to 93l. 12s.

R. V. Richards now moved accordingly. The proper measure of the damages was the difference of prices on the 26th January, the day when the notice was given by the defendant that he would not accept the wheat. He had [476] thereby precluded himself from accepting it, and discharged the plaintiffs from their obligation to deliver it. He clearly could not afterwards have sued the plaintiffs for not delivering; yet, if they are entitled to the whole damages claimed by them, the effect is, that they must notwithstanding be bound to send the cargo all the way to Birmingham, knowing that it would not be received when it arrived there. This was an unqualified refusal to accept the goods, which entitled the plaintiffs to bring their action on that refusal. The only damage, therefore, which the plaintiffs have sustained was by their not selling (which they might have done by sample, though the wheat was in transitu) as soon as they received the notice. [Alderson, B. How do you distinguish this case from *Leigh v. Paterson*? where Dallas, C. J., says,—“The contract was mutually made between the plaintiff and the defendants, and can therefore only be dissolved by the mutual consent of both parties. . . . If the plaintiff had assented to its being put an end to, or it could even be inferred that he did so, it might have the effect of terminating it. But as that is not the fact, it remained open till the 31st of December, [the last day on which the goods could have been delivered]. . . . I therefore think that the damages should have been estimated at the difference of the prices in tallow when the contract was made, and on the 31st of December, being the last day when the defendants could have delivered it.”] It is submitted that that case requires re-consideration. If the plaintiffs could have sold the goods on receipt of the notice, the measure of damages was the difference of prices at that time, and they had not the option of going on and taking advantage of a further fall in the market.

LORD ABINGER, C. B. I think there is no ground for reducing the damages. The proper period at which to calculate them was when the defendant ought to have received the goods. The original contract was in no way modified by the notice, and the plaintiffs were not bound [477] then to sell in order to reduce the damages. The case cited seems to me precisely in point, and I concur with every word of the judgment.

PARKE, B. I think the damages have been calculated on the proper principle. If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damages would be according to the price at the time of the notice. But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versâ, the plaintiffs could not sue him before. The same rule was adopted in the case of *Startup v. Cortazzi* (2 C. M. & R. 165). The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time, and rescinds the contract. I think, therefore, that the damages have been calculated according to the proper principle, and that there should be no rule.

ALDERSON, B. I could not distinguish this case from *Leigh v. Paterson*, and I still think that decision governs it.

GURNEY, B., concurred.

Rule refused.

[478] FOWLER & WIFE v. EDWARD ROUND, Administrator of Joseph Round, Deceased. Exch. of Pleas. 1839.—Covenant on an indenture of lease, against the administrator of the assignee of the lessee, assigning breaches for non-payment of rent and non-repair. Plea, that by assignment during the continuance of the lease, the premises were assigned to the intestate and J. S., and that J. S. was still alive; which assignment was denied by the replication:—Held, that J. S. was a competent witness for the plaintiff, to prove that he never accepted or acted under the assignment.

[S. C. 9 L. J. Ex. 51.]

Covenant on an indenture of lease, dated the 24th of June, 1824, made by the female plaintiff, *dum sola*, and one Arnold, as tenants in common of premises in the county of Stafford, against the defendant as administrator of Joseph Round, the assignee of the lessee. The lease reserved a separate rent of 10l. to each lessor, and contained also several covenants with each of them for the payment of rent and for repair. The breaches assigned were for non-payment of rent and non-repair. The defendant pleaded (amongst other pleas) that by indenture of assignment, dated the 24th of December, 1834, during the continuance of the term granted by the lease, the premises were assigned by the lessee to the intestate and one Smallwood, their executors, &c.; and that Smallwood was still alive. Replication denying such assignment. At the trial before Alderson, B., at the last Stafford Assizes, the plaintiffs having given *prima facie* evidence to charge the intestate as assignee, the defendant produced the assignment to Round and Smallwood, as stated in the plea: being an assignment in trust for the benefit of the creditors of the lessee. The plaintiffs thereupon called Smallwood to prove that he had never accepted the trust, or acted under the deed. The defendant's counsel objected that he was incompetent, inasmuch as his evidence went directly to exempt him from all liability under the deed. The learned Judge overruled the objection, and received the evidence; and a verdict was found for the plaintiffs, damages 130l.

Talfourd, Serjt., now moved for a new trial, on the ground that the evidence was improperly admitted. The witness had an immediate interest in the result of the trial, since a verdict for the plaintiffs went to relieve him from [479] all responsibility as assignee. And as this clearly was not a case in which the witness was to be affected through the medium of the verdict, he was not rendered competent by the 3 & 4 Will. 4, c. 42, s. 26.

PARKE, B. I think the witness clearly was competent. He stood indifferent between the parties. The verdict cannot be used in evidence against him; and if it could, that objection is cured by the statute. The only other ground, then, on which

he can be objected to, is, that he will benefit by the result, because he will exonerate himself by fixing the defendant with the sole liability. But if he fixes the defendant with the whole damages, he may be equally liable for contributions: there is nothing to prevent his being liable over: therefore, on the authority of *Blackett v. Weir* (5 B. & Cr. 385; 8 D. & R. 142), *Hall v. Curzon* (9 B. & Cr. 646; 4 M. & Ry. 565), *Hudson v. Robinson* (4 M. & Sel. 475), and other cases, he is a competent witness.

The other Barons concurred.

Rule refused.

ROBINSON v. POWELL. Exch. of Pleas. 1839.—In order to entitle a defendant to apply for costs under the 43 Geo. 3, c. 6, s. 3, he must have been actually arrested and held to special bail.—Where a sheriff's officer, having a warrant against the defendant, went to his house and informed him of it, and agreed with him that they should meet at a certain place and time, and that the defendant should there give bail to the sheriff, which was accordingly done:—Held, that this was not an arrest, so as to satisfy the meaning of the stat. 43 Geo. 3, c. 46, s. 3.—Where, in an action for an attorney's bill, the defendant obtained an order for referring it to taxation, "the plaintiff to give the defendant credit for all sums received on his account, on payment of which costs, and of the costs of the action, all proceedings to be stayed:—Semble, that the award of the Master under this order was not a recovery of the amount within the meaning of the stat. 43 Geo. 3, c. 46, s. 3.—Where an attorney's bill is reduced more than a sixth, on a reference to taxation after action brought, the attorney is not compellable to pay the costs of taxation.

[S. C. 9 L. J. Ex. 17; 3 Jur. 1033.]

The plaintiff, an attorney, had delivered to the defendant a bill of costs amounting to 213l. 10s. 4d. Some [480] months afterwards, the bill not being paid, he commenced this action, and sued out a bailable writ against the defendant, marked for bail for 80l. The sheriff's officer went to the defendant's house and informed him that he had a warrant against him, whereupon it was agreed between them that the defendant should meet him at a place and time mentioned by the officer, and there give bail to the sheriff, which was accordingly done. The defendant afterwards obtained a judge's order for referring the bill to taxation, "the plaintiff to give the defendant credit for all sums received on his account; on payment of which costs so to be taxed, and of the costs of the action, all proceedings to be stayed." The bill was reduced on taxation from 213l. 10s. 4d. to 158l. 4s. 8d.; and after deducting payments made by the defendant on account before the commencement of the action, the ultimate balance allowed to the plaintiff was only 10l. 17s. 11d., which was paid accordingly.

C. Jones having obtained a rule to shew cause why the Master should not tax the defendant his costs under the 43 Geo. 3, c. 46, s. 3, and why he should not also allow him the costs of the former taxation, on the ground that more than a sixth had been taken off the bill,

W. H. Watson shewed cause. With regard to the latter part of this rule, the cases of *Benton v. Bullard* (4 Bing 561), and *Harbin v. Miles* (9 B. & C 755), are express authorities to shew that the client is not entitled to the costs of taxation, though more than a sixth is taxed off, unless the application to refer the bill to taxation be made before action brought.

Secondly, this case is not within the stat. 43 Geo. 3, c. 46, s. 3, for two reasons. In the first place, there has not been any actual arrest of the defendant. It was ex-[481]-pressly decided in *James v. Askew* (8 Ad. & Ell. 351; 3 N. & P. 495), that, in order to bring a case within the terms of the statute, there must be both an actual arrest and a holding to bail. But further, the statute does not apply except where there has been a recovery by verdict and judgment: *Kenne v. Doeble* (3 B. & C. 491; 5 D. & R. 383). Here the proceedings are stayed by the judge's order, on payment of the taxed amount and the costs. The Court then called on

C. Jones, in support of the rule. This case falls within the statute. In *Robinson v. Elsam* (5 B. & Ald. 661), the circumstances of which were precisely similar to the present, (except with respect to the point as to the arrest), the Court held it to be a case strictly within the act of Parliament, the sum recovered being ascertained by the Master's allocatur, and the suit being thereby terminated; and Abbott, C. J., also

said, that even if the case were not within the statute, yet the plaintiff being an attorney, they would compel him, in the exercise of their jurisdiction over the officers of the Court, to pay the costs of the action. [Alderson, B. Your rule asks for them only under the statute, and the plaintiff comes only to shew cause against that.] The rule in *Robinson v. Elsam* was in similar terms, and the order for taxation was in the same form as here. With regard to the other point, as to the arrest, there was here what was equivalent to an actual arrest; the officer having seen the defendant, and informed him he had a warrant against him, and the defendant having been thereupon held to bail. [Gurney, B. It does not appear that the officer had the warrant with him.] He abandoned that part of the rule which prayed for the costs of the taxation.

LORD ABINGER, C. B. This case is not brought before [482] the Court on the ground of improper conduct in its officer, but specifically under the statute. That being so, the case of *James v. Askew* is sufficient to dispose of it. The Court there decided that an actual arrest is necessary to bring the case within the act of parliament; and I concur in that decision. It is probable that the plaintiff might wish not to arrest the defendant at all, but to get special bail without doing so. With regard to the other point, the decisions which have been cited shew that this case does not fall within the statute which directs the attorney to pay the costs of the taxation; and I see nothing in the merits of the case to induce us to go out of the statute to give them.^(a)

PARKE, B. The cases cited by Mr. Watson are clearly sufficient to dispose of the latter part of the rule. As to the other, the case of *James v. Askew* disposes of that also. I have entertained some doubts whether such ought to be the construction of the statute, and, I believe, so intimated in a case in this Court; ^(b) but as the Court of Queen's Bench have so decided the point, I think it should be considered as settled, that the statute will not apply unless an actual arrest has taken place.

ALDERSON, B. The statute of the 43rd Geo. 3, c. 46, was made "for the purpose of preventing frivolous and vexatious arrests." The first section says "that no person shall be arrested or held to special bail," &c.; the third provides that certain consequences shall follow, where a defendant shall, without probable cause, be "arrested and held to special bail" for too large a sum. Those two sections [483] clearly shew that the legislature meant to distinguish between an arrest and a holding to bail.

GURNEY, B., concurred.

Rule discharged, with costs.

ANDERSON AND OTHERS v. CHAPMAN AND OTHERS. Exch. of Pleas. 1839.—In assumpsit against carriers by sea, the declaration charged that the defendants had so negligently conducted themselves in and about the stowage and otherwise taking care of and carrying the goods, which were described to be 100 casks of tallow, that they were damaged and spoiled. The defendants pleaded that they did take due care of the goods, and did not negligently conduct themselves in and about the stowage of the goods or otherwise; on which issue was joined. At the trial, the plaintiffs failed to prove any negligence in respect of the stowage of the tallow, but proved a damage to one cask from negligence in the loading, as to which alone they obtained damages:—Held, that the defendants were not entitled, under rule 74 of H. T., 2 Will. 4, to a verdict or costs on the above issue, in respect of the rest of the casks.

[S. C. 7 Dowl. P. C. 822; 9 L. J. Ex. 9; 3 Jur. 1154. Considered, *Paterson v. Harris*, 1862, 2 B. & S. 814.]

This was an action of assumpsit against the defendants, as carriers, for breach of a contract for the carriage on board their ship, from Buenos Ayres to Liverpool, of a

(a) The plaintiff's affidavit explained the reduction made by the Master in his bill, by the loss of certain vouchers for disbursements, which would otherwise have been produced on the taxation.

(b) *Edwards v. Jones*, 2 M. & W. 417; see also *Wilson v. Broughton*, 2 Dowl. P. C. 631.

cargo of tallow and grease, the property of the plaintiffs. The breach stated, that the defendants "so negligently behaved and conducted themselves in and about the stowage and otherwise taking care of and conveying" the goods, that by and through the improper stowage, negligence, and improper and careless conduct of the defendants, they were broken, damaged, &c. The defendants pleaded, first, non assumpsit; secondly, that they did take due and proper care of the goods, and "did not negligently behave and conduct themselves in and about the stowage or otherwise taking care of, and carrying and conveying" the goods, as in the declaration alleged: on which plea issue was joined. The cause was tried before Parke, B., at the Liverpool Spring Assizes. The plaintiffs' counsel opened a case of injury to the whole cargo by improper stowage, but the evidence altogether failed to make out any negligence in this respect. It appeared, however, that by reason of one of the casks of tallow not having been properly fixed to the hooks by which they [484] were lowered into the hold of the vessel during the loading, that cask fell upon one of the casks of grease, which was broken, and the grease injured; and in respect of this damage only, the plaintiffs had a verdict on the second issue, damages 12l. The verdict was entered up on the *postea*, as to that one cask for the plaintiff, as to the residue for the defendant: and the Master, on taxation, allowed the plaintiff so much of the costs of that issue as related to the damaged cask, and taxed the defendant his costs as to the rest, and deducted them from the plaintiffs'. In Trinity Term, Wightman obtained a rule to shew cause why the Master should not review his taxation, and allow the plaintiffs the whole costs of the second issue.

W. H. Watson now shewed cause. The question in this case depends on the meaning of the word issues in the rule of H. T., 2 Will. 4, s. 74. That rule directs that "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues on which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." Here there was in substance a distinct issue joined as to the negligence with respect to each cask of tallow, and the defendants have succeeded as to all except one. *Doe v. Errington* (4 Dowl. P. C. 602) is strongly in favour of the defendants. There the lessor of the plaintiff sought to recover, under one count and one demise, several messuages,—some freehold, some copyhold,—and succeeded as to the copyhold, but failed as to the freehold; the Court held that the defendant was entitled, under the above rule, to his costs as to the messuages with respect to which the plaintiff had failed; for that a distinct issue is raised, by the plea of not guilty, as to each messuage from which the plaintiff complains of an ouster. *Knight v. Brown* (9 Bing. 643; 2 M. & Scott, 797) and *Prudhomme v. Fraser* (2 Ad. & E. 645; 4 N. & M. 381) are authorities [485] to the same effect. This is very different from a plea of not guilty in trespass; the plaintiffs here bring a charge of negligence as to the improper stowage of 100 casks of tallow; the defendants deny that they were guilty of negligence as to any of them, and the jury find negligence as to one. Surely the plea is divisible under such circumstances. Suppose the defendants had pleaded not guilty, only as to so much of the declaration as complains of improper stowage; they would clearly have been entitled to set off their costs of that issue; and what difference can it make whether they plead two pleas, or one in substance the same? [Parke, B. According to the facts as they appeared to me at the trial, the plaintiffs went for two different causes of action; one for the one cask, and another and different one for the other ninety-nine.] The whole difficulty arises from their including what are substantially two different causes of action in one count. [Alderson, B. Why did you not ask for particulars of the negligence complained of? You would then have found that two different kinds of negligence were imputed, and might have paid money into Court as to one. Lord Abinger, C. B. According to your argument, a defendant in trover ought to have a verdict and costs as to all the goods not proved to have been converted.] It was not necessary to raise such a question before the New Rules; but as a general verdict and damages would now vest the property in all the goods in the plaintiff, the defendant ought to have the verdict entered for him as to the goods not proved, in order to ascertain the respective rights of the parties in future proceedings. [Parke, B. The question here in reality is as to the form of the *postea*.] It is therefore, in fact, a question on the record, and is open to a writ of error, if this rule be discharged. In *Phythian v. White* (1 M. & W. 216; 4 Dowl. P. C. 714), where the defendant complained of a breaking and entering of three several closes named, but proved trespasses in two only, the

defendant was held entitled to costs [486] as to the third. Suppose the plaintiff complained of two trespasses on different days, and had a general verdict on a plea of *liberum tenementum*, having proved a trespass on the first day only; that would be an estoppel, if pleaded, as to the whole time included in the declaration; the verdict ought therefore to be entered distributively. [Lord Abinger, C. B. The plea of not guilty is a distinct plea to each count or complaint, and in its nature embraces several issues.] The same principle applies wherever the plea extends to several causes of complaint.

Wightman, *contra*. This is a plea pleaded to the very gist of the action as laid in the declaration. The plaintiffs complain of negligence, as well in the stowage of the goods as otherwise in their conveyance. The plea alleges that the defendants did not negligently conduct themselves about the stowage or otherwise, and on this plea a distinct issue is joined. The question therefore on this issue is, whether the defendants were guilty of any negligence in the conveyance of the goods. On the trial, it appears that they were guilty to such an extent as to entitle the plaintiffs to 12l. damages. If the plaintiffs had really gone for the damage to the one cask only, their declaration would have been in the same form; and if the argument for the defendants be sustainable, they would equally in such case have been entitled to a verdict and costs in respect of the rest. It is only one cause of action, though the negligence may be to a greater or less extent. Suppose a declaration in covenant for non-repair, with a single general breach, but with several items of charge, to which the defendant pleaded performance generally, could it be contended that he would be entitled to costs in respect of a single item which was not proved? The jury have here found affirmatively for the plaintiffs on this issue, that they have proved negligence all that remains is a mere inquiry of damages. Suppose an action brought for several sums of money, with a general plea of payment, which fails as to one of them; the plaintiff [487] is entitled to the verdict, and the only question is one of damages: and the same with respect to a plea of set-off which fails to answer the whole: *Tuck v. Tuck* (ante, p. 109). The defendants here, in like manner, profess to answer the whole of the plaintiff's complaint, and fail to do so. In the cases cited on the other side, the question arose on the plea of not guilty, which is necessarily divisible in its nature. In *Phythian v. White*, the complaint was of breaking and entering three different closes specifically named and set out by their abutments; which the plaintiff himself therefore treated as distinct and unconnected trespasses. In whatever manner the plaintiff declares, the defendant may obtain particulars; but if he chooses to run the risk of pleading an entire defence, when he has in fact only a partial one, he must abide the consequences. [Lord Abinger, C. B. Suppose there were judgment by default, and proof entitling the plaintiff to 12l. damages only, would he be subject to any costs? The issue is not as to the amount, but upon the fact of negligence.] And the defendant may always protect himself by obtaining particulars, and paying the proper amount into Court.

LORD ABINGER, C. B. If we were at liberty to do justice in this particular case, in contravention of the general rule of law, I should be much disposed to discharge this rule; because the parties undoubtedly both went down to try the question as to the damage by improper stowage. But the plaintiffs, nevertheless, proved negligence within the terms of the declaration. Now the effect of the plea is, that the defendants committed no negligence such as is complained of in the declaration; that is the issue; but it appears by the evidence that they have: as soon as that is found, the case resolves itself merely into a question of damages, and assumes the same form as if the defendants had not pleaded [488] at all, but had let judgment go by default. The apparent difficulty arises from this, that the damage has been occasioned by a different species of negligence from that of the stowage; but then the issue is, whether there has been negligence of any kind. If we were to say that the costs ought to be separated in such a case, it would lead to discussion and difficulty in almost every case where the plaintiff did not succeed to the full amount claimed in the declaration. There is almost always great uncertainty as to the result of evidence, and a plaintiff is compelled to state his case more widely than if he were fully apprized of the extent to which it would be proved, or the evidence would be believed by the jury; and if we were so to lay down the rule, it would follow in almost every case that the plaintiff must pay costs, because his pleader had laid the complaint larger than the proof. I do not question any of the cases which have been cited. The general issue

raises a distinct issue on each count, and before the New Rules, on the plea of not guilty in trespass, the verdict might have been entered separately on the different counts, if counsel chose to do so. Then there is a class of cases, of which ejectment is one, in which it is usual to lay a vast number of different matters in the declaration; but if it appear that the plaintiff is going for a distinct message or close, it is necessary to give him the verdict for that alone, and the defendant a verdict for the residue, because the verdict is to ascertain the respective rights of the parties in future, and in order to enable the sheriff to give possession of that message or close only. On a general verdict, the lessor of the plaintiff might, at his own peril, make the sheriff give him possession of the whole premises, which would give rise to further litigation. Therefore, as the plea of not guilty is divisible in its nature, the defendant may well have costs, under the New Rules, in respect to the part proved by him. So, in *Phythian v. White*, the plea of liberum tenementum was applicable in its nature to [489] each close, and severable. With regard to the case of libel (*Prudhomme v. Fraser*), I entertain some doubt. If several publications were included in one count, and the general issue were pleaded to that, I should agree that it would be divisible; but I should doubt whether that ought to be so where one publication only is set forth. However, that case is not like the present; here the *e* is a single issue, which being found for the plaintiffs, the rest is a mere question of damages; and though damages are not found in respect of the whole cause of complaint, I think that does not subject them to costs.

PARKE, B. I am of the same opinion, that the rule must be made absolute; although certainly, at the commencement of the argument, I entertained a different opinion, from my impression that the plaintiffs were proceeding for two different causes of action. And I think the question resolves itself into this, whether they are in fact proceeding for different causes of action; if they are, the plea ought to be divisible. [His lordship stated the declaration and plea.] I agree to all the cases which have been cited, and think they are rightly decided. There is no harm in endeavouring to distribute the issue, whenever the plaintiff goes in fact for two causes of action, and fails as to one. The rule of H. T., 2 Will. 4, was not a new one in principle; its object was merely to bring back the practice to the true construction and effect of the statutes of 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3: and the effect of that rule is, that if the plaintiff fails either as to one entire cause of action, or a distinct part of one, the defendant is entitled to costs as to that. The first case on the construction of the rule was *Cox v. Thomas* (2 C. & J. 498; 1 Dowl. P. C. 572), where it was held, on not guilty pleaded to a declaration containing several counts in case, that the defendant was entitled to the costs [490] of the counts found for him. The next step was taken in *Prudhomme v. Fraser*, where, upon one count for libel, the defendant was held entitled to the costs incurred by disproving the innuendoes negatived by the jury. I am not prepared to say that decision was wrong, though I entertain some little doubt upon it. In the decision in *Doe v. Errington* I quite concur. In ejectment for different premises, there are in truth several causes of action embraced in one count; and if the plaintiff fails on one, the defendant is properly entitled to costs. I should hold the same doctrine also in trespass; particularly where the complaint is as to trespasses in different closes, which might be made the subject of separate actions. And so I should be disposed to hold in all cases where the plaintiff declares in a general form, and under it is going for distinct causes of action. The question then is, whether the plaintiffs are here recovering for the breach of one entire contract; and I think they are—viz. the contract safely to carry one entire shipment. It is very analogous to the case of a breach of covenant to repair, put by Mr. Wightman. The question for the jury on this issue was, whether there was a breach of one entire contract or not; and that having been proved, the rest was a mere question of damages.

ALDERSON, B. I am of the same opinion. The first issue, on non assumpsit, was properly found for the plaintiffs, the contract being proved. Then the substance of the second issue is, that the defendants have not been guilty of any breach of the contract whatever. That being found against them, the rest is merely a question of damages; and the case is not within the words or the intention of the rule.

GURNEY, B., concurred.

Rule absolute.

[491] SMITH v. POLE. Exch. of Pleas. 1839.—Issue was joined, in a town cause, in Michaelmas Term, and notice of trial given for the second sittings in that term. The cause was in the paper of those sittings, but went over to the sittings after term. The plaintiff then withdrew the record. In Hilary Term, the defendant moved for and obtained costs of the day:—Held, that the defendant might move for judgment as in case of a nonsuit in Trinity Term.

[S. C. 7 Dowl. P. C. 792; 9 L. J. Ex. 17; 3 Jur. 1054.]

This was a rule for judgment as in case of a nonsuit. Issue was joined in last Michaelmas Term, and notice of trial was given for the second sittings in that term. The cause was in the paper accordingly, but went over to the sittings after term, when the plaintiff withdrew the record. In Hilary Term, the defendant obtained a rule for payment of the costs of the day, which was made absolute, and the costs were paid accordingly. In Easter Term, the defendant moved for judgment as in case of a nonsuit for the same default; but the rule was discharged in Trinity Term, on the ground of the defendant's having made the previous application for costs of the day (see Reg. Gen. H., 2 Will. 4, r. 69). In the same term, the defendant again moved for and obtained the present rule for judgment as in case of a nonsuit.

Cole shewed cause. The defendant, having elected to proceed for the costs of the day, cannot afterwards move for judgment as in case of a nonsuit. It will be said there has been a new default; but that is not so; the mere lapse of time after the rule for costs of the day was disposed of, does not constitute a new default. There is no fresh notice of trial given, and no date, therefore, from which to count, so as to make a new default. The defendant's only course is to take the case down by proviso. [Parke, B. I have always understood, that if the plaintiff has gone down once to trial, and the cause is made a remanet, the defendant must take it down by proviso.] That is an additional ground for discharging this rule. In *Moseley v. Clark* (2 Dowl. P. C. 66), where, after a default in not trying at the Assizes, the defendant moved for costs of the day, and the plaintiff again made default by not trying at the next [492] Assizes, this Court intimated an opinion that the defendant was not entitled to move for judgment as in case of a nonsuit.

R. V. Richards, contra. This was not the case of a remanet; the cause merely went over by adjournment from one sittings to another, and the plaintiff was clearly guilty of a default in not trying at the latter sittings. If it were not so, a defendant could never have judgment as in case of a nonsuit, where the cause has gone over from one sittings to another in the same term. [Alderson, B. It certainly is rather an adjournment than a remanet. Parke, B. No fresh notice of trial is required in such a case.] Then the plaintiff has been guilty of a second default since the rule for costs of the day was disposed of, in suffering another term to elapse before he took the cause down again to trial. *Dyke v. Edwards* (2 Dowl. P. C. 53) is an express authority to that effect.

LORD ABINGER, C. B. That case is certainly an authority that a defendant may move for judgment as in the case of a nonsuit on a second default. It is argued that here there has been no second default, because there was no fresh notice of trial: but the plaintiff was bound to take the cause down for trial according to the course and practice of the Court, but he has not done so.

PARKE, B. The effect of the rule of H. T., 2 Will. 4, r. 69, is to prevent the plaintiff from being subject both to costs of the day and to judgment as in case of a nonsuit, for the same default, as he was before, according to the practice of this Court; but the plaintiff must go to trial at the next practicable time; if he does not, the defendant will be entitled to judgment as in case of a nonsuit. That is the effect of the judgment of Bayley, B., in *Duke v. Ed-wards*. [493] The rule for costs of the day purges from the consequences of that default, but the plaintiff must still try with all convenient speed.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged on a preceptory undertaking.

MAY v. HUSBAND. Exch. of Pleas. 1839.—Where a plaintiff gives notice of trial a term earlier than the practice of the Court requires, if he omit to try pursuant to such notice, the plaintiff may move for judgment as in case of a nonsuit in the next term, although the plaintiff have since given a new notice of trial for that term.

[S. C. 7 Dowl. P. C. 867 ; 9 L. J. Ex. 34.]

In this case issue was joined in Trinity Term, and notice of trial given for the sittings after that term. The plaintiff on that occasion withdrew the record, but subsequently gave a fresh notice of trial, in time for the first sittings in this term. The defendant having obtained a rule nisi for judgment as in case of a nonsuit,

Erle shewed cause, and contended that under these circumstances the defendant was not entitled to move for judgment as in case of a nonsuit, the plaintiff having previously given a new notice of trial ; and cited *Ranger v. Bligh* (5 Dowl. P. C. 235). [Gurney, B. In that case the plaintiff gave a continuing notice before the first had expired, and the cause had not been entered. Parke, B. Surely the notice to try fixes the time of trial.] The plaintiff was not bound to try in the same term in which issue was joined.

Butt, contra, referred to *Howell v. Powlett* (8 Bing. 272 ; 1 M. & Scott, 355), as an express authority in favour of the motion.

PARKE, B. This was a clear default. When the plaintiff gives notice of trial, he is bound to proceed according to that notice. Here he did not do so, but withdrew the [494] record. That was a default which entitled the defendant to move for judgment as in case of a nonsuit in the following term ; and that default was not purged by the new notice of trial. This case is distinguishable from *Ranger v. Bligh*. There, before the first notice had expired, the plaintiff extended it by a fresh notice : here he withdrew the record, and gave a fresh notice subsequently.

ALDERSON, B. The words of the act of parliament are decisive of this point. The plaintiff must proceed pursuant to the course and practice of the Court. The course and practice of the Court is, that he must go to trial within a limited time, unless he offers to go to trial before : if he does, then he must go to trial according to that notice.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged, on a peremptory undertaking to go to trial pursuant to the second notice.

CHANNELL AND ANOTHER, Executors of Henry Taylor, Deceased v. JOHN DITCHBURN.

Exch. of Pleas. 1839.—Payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the Statute of Limitations, as against the other maker.

[S. C. 9 L. J. Ex. 1 ; 3 Jur. 1107. Explained, *Fordham v. Wallis*, 1853, 10 Hare, 228.]

Assumpsit. The declaration stated, that the defendant and one Thomas Ditchburn, in the lifetime of the said Henry Taylor, to wit, on the 10th of February 1824, made their promissory note in writing, dated &c., and thereby jointly and severally promised to pay to the said Henry Taylor or order the sum of 500l., value received, with lawful interest thereon from the date thereof, at 36 months after the date thereof. The second count was upon an account stated between the defendant and the testator in his lifetime, and the third upon an account stated between the plaintiffs as executors and the defendant.

[495] Pleas, 1st, *actio non accrevit infra sex annos* ; 2ndly, to the 2nd & 3rd counts, *non assumpsit* ; upon both of which the replication took issue.

At the trial before Tindal, C. J., at the last Chelmsford Assizes, it appeared that Taylor, the payee of the note, died in January, 1827, about a month before it became due. The plaintiff's attorney proved that he received payment of 25l. for a year's interest on the note, from Thomas Ditchburn, on the 4th of March, 1833 ; the like sum on the 15th of February, 1834, and again in the year 1835. Platt, for the

defendant John Ditchburn, contended that he was entitled to the verdict, since, as against him, the debt had been once barred by the Statute of Limitations, and could not be revived by payment of interest by his co-maker. The learned judge was of a contrary opinion, and under his direction the jury found a verdict for the plaintiffs, damages 610l.

Platt now moved for a new trial, on the ground of misdirection. This promissory note became payable on the 13th of February, 1827, between which time and the 4th of March, 1833, the day when the first payment of interest was made, more than six years had elapsed. The Statute of Limitations had therefore run, and could not afterwards be revived, as against the present defendant, by the payment of interest by his co-maker of the note. In *Atkins v. Tredgold* (2 B. & C. 23; 3 D. & R. 200), where A. & B. made a joint and several promissory note, and A. died, and ten years after his death B. paid interest upon the note; it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executor liable upon the note. There Bayley, J., says—"Here the statute appears to have attached before the payment was made by Robert Tredgold, and therefore John Tredgold, [496] the co-promisor, (whose executors are now sought to be charged), being at that time protected, could not be subjected to any new obligation by the act of Robert." So here, the payment was made after the liability of the defendant was at an end. In *Slater v. Lawson* (1 B. & Adol. 396), it was also held that after the death of one maker of a joint and several promissory note signed by two, or payment of interest upon it by the executor of the deceased party, would not take the case out of the statute as against the survivor. There Lord Tenterden, C. J., after referring to the case of *Atkins v. Tredgold* as not being essentially different, says, "The same principle appears to us applicable to both cases; and we think that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute as against the survivor." Here the defendant is charged upon his several liability, which, as soon as the statute had run, ceased to exist. The case of *Burleigh v. Stott* (8 B. & C. 36; 2 Man. & R. 93) is distinguishable, because there the payment of interest was made within the six years; here it was not made until afterwards.

PARKE, B. We will take time to look into the authorities, but at present it seems to me that this case is not distinguishable in principle from *Burleigh v. Stott*.

Cur. adv. vult.

The opinion of the Court was afterwards delivered by

PARKE, B. The question in this case was, whether payment of interest by one of two makers of a promissory note, made after the lapse of six years from the time when the note became due, took the case out of the Statute of [497] Limitations with regard to the other co-maker. Mr. Platt relied upon the cases of *Atkins v. Tredgold* and *Slater v. Lawson*, as making a distinction, and throwing a doubt upon the old case of *Whitcomb v. Whiting* (Dougl. 652), which decided that one of two joint makers of a promissory note might, by acknowledgment or part payment, take the case out of the statute as against the other. After those two cases, undoubtedly some degree of doubt might fairly exist as to the propriety of the decision in the case of *Whitcomb v. Whiting*; and it does seem a strange thing to say, that where a person has entered into a joint and several promissory note with another person, he thereby makes that other his agent, with authority, by acknowledgment or payment of interest, to enter into a new contract for him. But since the decisions in *Atkins v. Tredgold* and *Slater v. Lawson*, the Court of King's Bench have twice decided that payment by one of two joint makers of a promissory note is sufficient to take the case out of the statute as against the other. The first of these cases was that of *Burleigh v. Stott*, where the defendant was sued as the joint and several maker of a promissory note, and there the Court held, that payment of interest by the other joint maker was enough to take the case out of the statute as against the defendant; and that it was to be considered as a promise by both, so as to make both liable. And since the decision in that case, the Court of King's Bench have come to the same conclusion, in the case of *Manderston v. Robertson* (4 Man. & Ryl. 440), which was argued on the 22nd of May, 1829. I have discovered my paper book in that case, which, it appears, was argued by Mr. Platt himself; and the Court decided there, that an account stated by one of the makers of a joint note, and part payment of the account, took the case out of the statute as to the other; thus confirming the authority of *Burleigh v. Stott*. Then Mr. Platt relies upon the

dis-[498]-tinction in this case, that the payment was made after the statute had run, and which was pointed out by Mr. Justice Bayley as one of the grounds on which he distinguished the case of *Atkins v. Tredgold* from *Whitcomb v. Whiting*; that there the statute had attached, and that its operation could not be affected by any act of future payment. But I find that in *Manderston v. Robertson* the note was dated the 9th of July, 1817, and an account was furnished by one of the joint makers on the 1st of June, 1825, to the payee taking credit to himself for payments of interest after the six years had elapsed, but not before; and it was held that this was sufficient to take the case out of the statute as against the other maker. There the payment was after the six years had elapsed, and yet it was held sufficient. The result is, that we must consider the case of *Whitcomb v. Whiting* as good law, and there will therefore be no rule.

Rule refused.(a)

KENNAWAY AND OTHERS v. TRELEAVAN. Exch. of Pleas. 1839.—A guarantee was given in the following terms:—"I hereby guarantee to you the sum of 250l. in case Mr. P. should make default in the capacity of agent and traveller to you:"—Held, that the consideration sufficiently appeared on the face of the instrument.

[S. C. 9 L. J. Ex. 20; 3 Jur. 1034.]

Assumpsit on a guarantee, of which the following is a copy:—

"Messrs. Kennaway & Co.

"Truro, July 12th, 1838.

"Gentlemen,—I hereby guarantee to you, Messrs. Kennaway & Co., the sum of 250l., in case Mr. Paddon, of &c., should default in his capacity of agent and traveller to you.

"WILLIAM S. TRELEAVAN."

At the trial before Erskine, J., at the last Assizes for Cornwall, a verdict was found for the plaintiffs, with liberty for the defendant to move to enter a nonsuit, in [499] case the Court should be of opinion that the above guarantee did not disclose a sufficient consideration on the face of it.

Bere now moved accordingly. The question is, whether the consideration sufficiently appears on the face of this guarantee; for the rule is, that the consideration for which it is made must be clearly stated on the face of the instrument itself: *Cole v. Dyer* (1 C. & J. 461; 6 Tyr. 304). In that case Lord Lyndhurst says: "It appears to me, that if in such written agreement to be answerable for the debt of another person, two considerations may with equal propriety be inferred as the inducement for that engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently, can give no right of action." The same principle is established by *Thomas v. Williams* (10 B. & Cr. 664). In *Raikes v. Todd* (1 Per. & D. 438), the guarantee was—"I hereby undertake to secure to you the payment of any sums of money you have already advanced, or may hereafter advance, to Messrs. H. D. & Co., on their account with you:" and it was held that the consideration for the guarantee did not sufficiently appear, so as to satisfy the Statute of Frauds. That case is directly in point; for here this guarantee is equally applicable to money which the plaintiffs might have advanced, or might thereafter advance. In *Hares v. Armstrong* (1 Bing. N. C. 761; 1 Scott, 661), Tindal, C. J., says: "There must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise." Now the words of this guarantee are equally consistent with its being an undertaking for prior as well as subsequent advances; and if so, [500] the Court cannot say which was the consideration. There is nothing to shew that the parties contemplated Paddon's future employment in the service; and there is no binding contract on the plaintiffs to continue him in their service.

(a) See *Chippendale v. Thurston*, Moo. & M. 411; 4 C. & P. 98; *Pease v. Hirst*, 10 B. & Cr. 122; 5 Man. & R. 88; *Wyatt v. Hodson*, 8 Bing. 309, 1 M. & Scott, 442; *Rew v. Pettit*, 1 Ad. & Ell. 196.

PARKE, B. It appears to me that this rule ought not to be granted. I accede to the doctrine laid down by Lord Denman, in the case of *Raikes v. Todd*, which has been referred to, that, in all these cases, the proper course is to look at the instrument, and see whether the consideration stated in it be the same with that alleged in the declaration, and no other. Now, let us apply that principle to the present case. Here the declaration states, that in consideration that the plaintiffs would take Paddon into their employment in the capacity of agent and traveller, the defendant would pay the plaintiffs the sum of 250l., in the event of Paddon's making default in that capacity. We are to see, then, whether the consideration for the promise expressed in the guarantee is the future employment of this person in the capacity of agent and traveller, which is the consideration alleged in the declaration:—whether, looking at this instrument as reasonable men, we can infer that such was the motive operating on the mind of the defendant when he signed this paper. It says: “I guarantee to you the sum of 260l., in case Mr. Paddon, of B., should default in his capacity of agent and traveller to you.” It is perfectly clear from the words, that the parties were contemplating a future default to be committed by Paddon, in the capacity of agent and traveller; and consequently, it must have been their intention that he should be employed in that capacity at some future period. It is said, however, that this guarantee may extend to defaults committed by this party in not paying over money received by him before the instrument was given. Such is not necessarily its meaning; [501] perhaps the parties only contemplated such sums as he should receive in future by virtue of his agency: but even supposing the effect of this instrument were to oblige the defendant to make good the sums which Paddon had already received in the capacity of clerk, but neglected to account for, I do not see why the defendant ought not to be liable for those sums also: and the consideration moving to him in that case would equally be the future employment of Paddon as clerk. According to the rule, therefore, laid down by Lord Denman, this application ought not to be granted. There is a case in the books, of *Newbury v. Armstrong* (6 Bing. 201; 3 M. & P. 509; Moo. & M. 339), which strongly resembles the present. There the guarantee was in these terms: “I agree to be security to you for T. C for whatever, while in your employ, you may trust him with, and in case of default, to make the same good;” and the contract was held to be good, on the ground that the future employment of the party was a sufficient consideration. It is said, and truly, that in the present case there was no binding contract on the plaintiffs, and that, notwithstanding the guarantee, they were not bound to employ Paddon. But a great number of the cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guarantee falls under that class; when a person says—“In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,”—the party indemnified is not therefore bound to employ the person designated by the guarantee; but if he do employ him, then the guarantee attaches and becomes binding on the party who gave it. It is therefore no objection in the present case to say that the plaintiffs were not obliged to take Paddon into their service; they might do so or not, as [502] they pleased; but having once done so, the guarantee attaches, and the defendant becomes responsible for the default.

The rest of the Court concurred.

Rule refused.

COLEMAN v. LAMBERT. Exch. of Pleas. 1839.—The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, and payments by him of the freight on former occasions of the same kind, are evidence to shew that in the particular case he contracted, on the receipt of the goods, to pay the freight.

[S. C. 9 L. J. Ex. 43.]

Assumpsit for freight, with counts for carriage of goods, and wharfage. Plea, non assumpsit. At the trial before Arabin, Serjt., at the Sheriff's Court in London, it appeared that the plaintiff was a wharfinger, and that he claimed to recover from the defendant, a meat-salesman, the sum of 10l. for the freight of carcases brought

by a steam-vessel from Berwick to London, and delivered from the plaintiff's wharf to the defendant; and also the further sum of 10s. 4d., for the wharfage and cartage of them from the wharf to the defendant's premises. The clerk of the plaintiff was called, and stated that on the day after the delivery of the carcases, he called on the defendant with the account, and that the defendant offered to pay it if the plaintiff would deduct 1l., on account of an alleged previous overcharge; but he admitted on cross-examination, that the defendant, at the time, said that he was directed by the consignor to claim that deduction, and that he had no authority to pay anything unless that deduction were allowed. It was proved that on former occasions carcases had been sent for the defendant in the same manner to the plaintiff's wharf, and that the defendant had been in the habit of paying the plaintiff the amount of the freight. No bill of lading was ever transmitted. It was contended for the defendant, that he was not liable to the plaintiff for either of these demands; that the plaintiff, being neither the owner nor the master of the vessel, was not the proper person to sue [503] for the freight; and that there was no evidence of any express contract with him. The learned serjeant left it to the jury to say whether the defendant, by the receipt of the goods from the plaintiff, and his proposal to pay the amount claimed, minus 1l., had taken upon himself the liability to pay the plaintiff for the freight; and the jury found a verdict for the plaintiff for the whole amount claimed.

In this term, Gurney obtained a rule nisi for a new trial, on the ground of misdirection; against which

James now shewed cause. There was evidence for the jury, on which they were justified in finding the verdict for the plaintiff. It is true that, in general, freight is only recoverable by the owner or master of the ship, unless there be a bill of lading. But here the course of trade between the parties had been to send the goods without a bill of lading, and the defendant had been in the habit of accepting them, and paying the freight to the plaintiff, as agent for the owner. The evidence of such prior dealings and payments was sufficient to charge the defendant in the particular case. It is the receipt of goods by the consignee, in pursuance of the usual bill of lading, by which it is expressed that he is to pay freight, which makes him the debtor for the freight; *Abbott on Shipping*, 285. So also, without a bill of lading, the jury may infer, from the prior dealings between the parties, an implied contract to pay the freight; *id.* 286; *Wilson v. Kymer* (1 M. & Sel. 157). In that case it was held that the receipt of goods by the indorsees of a bill of lading, not under the bill of lading itself, but under an order of the consignees for that purpose, was not of itself a sufficient ground to raise an implied assumpsit on their part to pay the freight; but that as it appeared from previous dealings that the defendant had been in the [504] habit of receiving goods in the same manner, and paying the freight for them, that was sufficient to raise such an implied promise. Lord Ellenborough says—"The question is, taking what has been the dealing between these parties and the general usage of trade, whether the defendants, who received these goods, must not be taken to have received them under the same terms as they had adopted in other cases; viz. under the same liability to pay the freight as the original consignees were liable to." And Bayley, J., says—"The defendants must be understood as having agreed to pay the freight as on former occasions, when the captain was used to send round to them for it; and they cannot be prejudiced by this, because they have got the goods." The direction of the learned Serjeant in the present case was justified on the same grounds. *Domett v. Beckford* (5 B. & Adol. 521) may be cited on the other side, but that case only decides that the owner may revert back to the original liability of the consignor for the freight, which is not disputed; but it does not shew that the consignee, who obtains the benefit of the cargo, may not be liable on an implied contract, arising out of previous dealings and payments of the same kind. The carrier here would have had a lien for the goods, without any express contract or bill of lading; *Wolf v. Summers* (2 Campb. 631). The existence of a bill of lading makes no difference in principle; it is only evidence of the contract. The doctrine that an implied assumpsit for freight may arise against a consignee, is recognised also by Gibbs, C. J., in *Pinder v. Wilks* (5 Taunt. 612).

But, at all events the plaintiff is entitled to retain his verdict for the amount of the cartage from his wharf to the defendant's premises, for which he sues as the owner of the wharf.

Gurney, contra. The defendant is not liable for either [505] portion of the

plaintiff's claim. With respect to the freight, it is clear the plaintiff is not the party to sue for it, being neither the owner nor the master of the vessel; being only agent for the owners, he cannot sue for it in his own name. [Parke, B. Not unless he can make out by the evidence a contract with him. The case comes, therefore, to the question, whether there was evidence of an express contract by the defendant to pay the freight to the plaintiff himself.] But the only question left to the jury was, whether, by the receipt of the goods in this particular case, the defendant had taken upon himself the liability. That was clearly a misdirection. [Parke, B. The defendant certainly did not mean to take upon himself any liability in this particular case.] He was then stopped by the Court.

PARKE, B. I think there must be a new trial. I do not mean to say that there was not evidence for the jury, from the previous dealings, of a contract by the defendant to pay the plaintiff the freight: although the evidence was not very distinct. The consignee is *prima facie* the owner of the goods; but if he be not, he is not liable simpliciter as consignee, except on a new contract to pay the freight. That is evidenced in ordinary cases by the bill of lading. I accede also to the decision in *Wilson v. Kymer*, that the same evidence may be deduced from the previous dealings between the parties. If the goods have always been delivered on payment of freight by the defendant, that is reasonable evidence that in the particular case he agreed to pay the plaintiff. But the case was not submitted to the jury in that point of view; and therefore the rule must be absolute for a new trial.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[506] DOE D. WILDGOOSE v. PEARCE. Exch. of Pleas. 1839.—In ejectment by a party claiming an undivided interest in an estate under a will (the question in the cause being the competency of the testator), a person claiming another undivided interest in the same estate under the same will, is a competent witness for the lessor of the plaintiff.

[S. C. 9 L. J. Ex. 31.]

At the trial of this ejectment before Coleridge, J., at the last Bristol assizes, it appeared that the plaintiff claimed the premises in dispute under the will of the father of the lessor of the plaintiff, who died in 1795; by which the testator devised the premises in question (after the death of his wife), to his children, as tenants in common in fee; of whom the lessor of the plaintiff, the widow of one ——— Wildgoose, was one. The question in dispute in the cause was as to the competency of the testator. The will had never been proved. On the part of the lessor of the plaintiff, another of the testator's children was called as a witness: and he stated, upon his examination on the *voir dire*, that he had conveyed away his interest under the will to the husband of the lessor of the plaintiff. His evidence was thereupon received. Subsequently, Wildgoose's eldest son also was called as a witness for the plaintiff; whereupon the defendant's counsel objected that he was incompetent, inasmuch as the interest conveyed by the former witness to his father would be presumed to have descended to him, until the contrary were shewn. This witness, however, stated on the *voir dire*, that he had never heard of the conveyance to his father. The learned Judge received his evidence also; and a verdict having been found for the plaintiff,

Bompas, Serjt., in the early part of this term, moved for a new trial, on the ground that the evidence of one or the other of these witnesses was improperly received. As soon as it appeared, from the examination of the former witness, that his interest had been removed by the conveyance to Wildgoose, the other witness, in whom the interest must be taken to have vested, became incompetent to support the will. [Parke, B. What interest have the [507] other tenants in common in the result of this suit? In order to render them incompetent, they must be directly affected by the verdict. How are they so if they claim other interests?] Their evidence goes to set up the will for all purposes. This verdict would be receivable in equity to establish the will. In *Hatfield v. Thorp* (5 B. & Ald. 589), the husband of a devisee in remainder after the determination of a life estate, was held not to be a good attesting witness to the will; although the wife had died during the existence of the life estate. [Parke, B. There the question was a different one—what prevents a party from being a credible witness

within the Statute of Frauds. Maule, B. This will might be a good one as to the share which the lessor of the plaintiff seeks to recover, and yet void as to the rest. Parke, B. I do not find that you elicited any direct evidence of interest from the witness Wildgoose on the voir dire.] The defendant was entitled to use the evidence given by the former witness, as to the conveyance, in order to discredit the other. The Judge, who has to decide on the admissibility of the witnesses, is not to exclude from his mind that which has been previously sworn in the cause, and is relevant to the question whether the proposed witness be admissible or not. Whether such evidence could be made use of to the jury is a different question. [Parke, B. At present I do not see what possible interest either of these parties has in the result of the verdict.

The learned counsel suggesting, however, that there were authorities to shew that parties taking an estate under a will were incompetent witnesses to prove the will for any purpose, the Court allowed the case to stand over, in order that he might look into the cases, and renew his [508] motion on another day; but he did not appear to do so, and

PARKE, B., on a subsequent day, said:—This was an application made by my Brother Bompas, for a rule to shew cause why there should not be a new trial, on the ground of the improper reception of an incompetent witness.

It appeared that this was an action of ejectment for an undivided interest in an estate devised by will, the question being as to the competency of the testator. One of the witnesses called was entitled to another undivided interest in the same estate, and under the same will. He said, however, on the voir dire, that he had transferred his interest to another person, the husband of the lessor of the plaintiff, and therefore he was admitted to be a competent witness, supposing him otherwise to have been interested. Afterwards the heir-at-law of the husband of the lessor of the plaintiff was called, and he also was objected to as being interested. He stated on the voir dire, that he knew nothing at all of the conveyance of the interest by the former witness to his father. My Brother Coleridge thereupon admitted him, because on his own statement it did not appear that he was interested. If the case turned on the question, whether the Judge ought to take notice of what was proved on the voir dire by one witness, in order to decide upon the competency of another, we should be disposed to grant a rule, for we should think it was a point fit to be considered, whether the Judge is to be confined merely to what each person says on the voir dire, or whether he may not look also at the other evidence given in the cause for that purpose. It was, however, suggested by the Court to my Brother Bompas, that it was no objection to a witness that he took another interest under the same will, because he had not therefore any interest in the result of the cause. This was strongly pressed upon him, and he was desired [509] to look into the authorities, in order to see if he could find any cases in which it was expressly laid down that a witness claiming a different interest in the same estate was not competent. The learned counsel has not appeared before us to support his argument for a rule on that ground, and we have had an opportunity of looking into the cases on the subject; and although there are some intimations of dicta that this would be an objection to a witness, yet, in modern times, it has been understood that in order to render a witness incompetent, he must be interested in the result of the verdict; while the evidence here is clearly that he was not so. We think, therefore, that both the witnesses were competent, and that the rule must be refused.

Rule refused.

ASHLEY v. KILLICK. Exch. of Pleas. 1839.—Where an insolvent debtor was remanded for six months at the suit of G., and, during his imprisonment, A., the attorney of G., agreed with him that he should be discharged on giving A. a bill of exchange for a part of G.'s debt, and an I. O. U. for A.'s bill of costs in the action, which he gave, and was liberated accordingly:—Held, that the insolvent could not be sued either on the bill of exchange or on the I. O. U.

[S. C. 9 L. J. Ex. 34.]

Assumpsit on a bill of exchange for 25l., dated 27th of July, 1836, drawn by the plaintiff on and accepted by the defendant, payable three months after date; with counts for money lent, and on an account stated.

The defendant pleaded, first, to the whole declaration, his discharge under the Insolvent Debtors' Act on the 27th of May, 1836; secondly, as to the first count, actionem non, because the defendant says, that heretofore, and before the accepting of the bill of exchange in the first count mentioned, the defendant was indebted to certain persons, to wit, R. E. Goodridge and J. Mortimer, in the sum of 69l. 18s. 10d., and also to divers other persons, creditors of him the defendant; and being so indebted, heretofore &c., to wit, on the 27th day of May, 1836, by an order of the Court for the relief of Insolvent Debtors, the defendant, then being an insolvent debtor, in actual custody at the suit of the said Goodridge and Mortimer, [510] for the recovery of the said debt of 69l. 18s. 10d., was ordered to be discharged from custody, and entitled to the benefit of the said act, as to the said debts of the said Goodridge and Mortimer, and the said several other creditors of him the defendant, as soon as he should have been in custody at the suit of one or more of them for the space of six months from the 9th day of April, 1836, which period had elapsed before the commencement of this suit; at the end of which period, to wit, on the 24th day of September, in the year aforesaid, he the defendant was duly discharged according to the said act; of all which premises the plaintiff afterwards, to wit, on &c., had notice. And the defendant further saith, that after he was so ordered to be discharged under the said act, and whilst he was in custody at the suit of the said Goodridge and Mortimer as aforesaid, to wit, on the the day and year in the first count mentioned, he the defendant, at the solicitation and request of the plaintiff, (the plaintiff then being the attorney of the said Goodridge and Mortimer) accepted the said bill of exchange in the first count mentioned (the same then being the said acceptance thereof in the first count mentioned) for and on account and to secure payment of, or of part of, the said debt or sum of 69l. 18s. 10d., from which he the defendant had been so ordered to be discharged as aforesaid, and was so subsequently discharged as aforesaid; and the defendant says that there never was any consideration or value for the acceptance of the said bill of exchange by the defendant, or for payment by him of the amount thereof, or any part thereof, to the plaintiff, except as aforesaid. Verification.

The plaintiff replied to the first plea, denying the discharge of the defendant; and to the second plea (admitting the order), *de injuriâ absque residuo causæ*; on which issues were joined.

At the trial before Lord Abinger, C. B., at the London Sittings after Trinity term, it appeared that the defendant [511] having been remanded by the Insolvent Debtors' Court, at the suit of Goodridge and Mortimer, for six months from the 9th of April, 1836, the plaintiff, who was their attorney, came to him in prison on the 27th of July following, and proposed on their part to discharge him from custody, on his giving a bill at three months for 25l., and an I. O. U. for the amount of the plaintiff's costs in the action. The defendant agreed to these terms, and accordingly gave the plaintiff the bill in question, and an I. O. U. for 3l. 5s., to be paid within ten days, and was shortly afterwards discharged. It was contended for the defendant, that under the 61st section of the Insolvent Debtor's Act, 7 Geo. 4, c. 57, the defendant was not liable, this being a new contract or security for payment of a debt with respect to which he had become entitled to the benefit of the act; and *Evans v. Williams* (1 C. & M. 30) was cited. For the plaintiff it was answered, that the remission of the remaining portion of the imprisonment constituted a new consideration sufficient to make the defendant liable. The Lord Chief Baron reserved the point, and a verdict was taken for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

In the early part of this term, Erle accordingly obtained a rule nisi for a nonsuit, or a new trial; against which

Humfrey shewed cause. *Evans v. Williams* is not an authority decisive of this case. There the defendant and his surety having signed a promissory note, and the defendant having been discharged under the Insolvent Act, the payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note. It was there argued that the forbearance to the surety constituted a new consideration for the latter note; but the answer given by the Court was, that inasmuch as the surety remained liable upon the original note, this was in reality a new contract to secure the old debt, and therefore fell within the 61st section of the act. [512] But here the note was not given after the defendant's discharge. The object of the statute is the rateable distribution of the insolvent's property among his

creditors; that object is better attained by his being enabled to earn money at liberty, than by his being kept within the walls of a prison. [Parke, B. The act does not speak of new contracts or securities given after the discharge of the party, but after he has become entitled to the benefit of the act.] At all events, the 3l. 5s. for costs stands on a different footing. That is a claim for which the defendant could not have been discharged under the act. [Parke, B. That is a debt which was due to the plaintiffs in the action; the attorney's costs are not a debt due from the opposite party to himself. It is a debt which would have been barred by the discharge.]

Erle, contra, was stopped by the Court.

LORD ABINGER. It struck me at the time of the trial, and I still think, that there was a new consideration in this case. But then the act of Parliament overrides that, and says that no new security given by an insolvent after he has been declared entitled to the benefit of the act, for the old debt, shall be enforced against him. The rule must therefore be absolute.

PARKE, B. I am of the same opinion. *Evans v. Williams* is on all fours with the present case, as to the bill of exchange given for the previous debt; and as to the costs, they constituted a debt due to the plaintiff's clients, which was barred by the discharge; therefore the security given to the attorney for his costs is in truth a security given for an old debt.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute to enter a nonsuit.

[513] MASON v. KIDDLE. Exch. of Pleas. 1839.—In order to make a cognovit valid, its execution must be attested by an attorney attending on behalf of the defendant, other than the attorney acting for the plaintiff.

[S. C. 9 L. J. Ex. 37.]

Busby had obtained a rule to shew cause why the cognovit given by the defendant in this cause, and the judgment and execution thereon, should not be set aside. It appeared from the affidavits, that the plaintiff lived at Derby, and the defendant at Shaftesbury; that the agents of the plaintiff's attorney in London sent down the writ of summons to an attorney at Shaftesbury to be served on the defendant, by whom it was served accordingly. The defendant went to that attorney, requesting him to endeavour to obtain time for him for the payment of the debt, and to propose to the plaintiff's attorney to take a sum of 10l. in satisfaction; and on two subsequent occasions he again applied to him to obtain terms, and said that he would pay him for his trouble; and the attorney had accordingly charged the defendant in his books for these applications. The plaintiff having agreed to take a cognovit, his agents sent it down to the same attorney at Shaftesbury for execution by the defendant. The attorney sent for the defendant to his office for that purpose, and informed him that he must name some attorney to attend on his behalf; whereupon the defendant said, "Then I name you;" and the cognovit was accordingly executed by the defendant in the presence of, and attested by, the attorney before-mentioned, no other attorney being present on behalf of the defendant.

Godson shewed cause. This was a sufficient execution of the cognovit to satisfy the statute. The attorney had become, by the previous employment of him by the defendant on several occasions, as much his attorney as the agent of the plaintiff's attorney. The objection made in this case would indeed equally apply, if he had been the attorney always employed by the defendant. [Lord Abinger, C. B. The defendant did not go to him as his own attorney, but as the agent for the other side.] But he adopted him as his attorney, by employing him to make terms for him, and engaging to pay him for his services.

Busby, contra, was stopped by the Court.

LORD ABINGER, C. B. I think it is pretty clear that the attorney at Shaftesbury, in making out his bill, charged the attorneys in London for all he did in the matter. We must not open the door for a laxity of construction of an act of a very beneficial nature. This attorney, who received the cognovit, and acted in the matter as the agent of the plaintiff, ought to have told the defendant that he should have some other attorney present on his part.

ALDERSON, B. I am of the same opinion. The original rule was that the

cognovit must be executed in the presence of an attorney. Under that rule, it was held sufficient if it were executed in the presence of the plaintiff's attorney. This was found to lead to inconvenience and fraud, and it was therefore added to the rule that the attorney should be expressly named by the defendant, and attending on his behalf. That clearly means an attorney other than the plaintiff's. The act of Parliament has now embodied those rules, and made them the law of the land. The effect therefore is, that there must be an attorney, other than the plaintiff's, expressly named by the defendant and attending on his behalf, otherwise the cognovit is void. If we held otherwise, we should open a door to fraud, so wide that we never should close it again. I have no doubt that this attorney charged both sides: he was not therefore that impartial person contemplated by the act of Parliament.

ROLFE, B., concurred.

Rule absolute; no action to be brought.

[515] CHAMBERLAIN v. HAZLEWOOD. Exch. of Pleas. 1839.—An action for seducing the daughter and servant of the plaintiff may be brought either in trespass for the direct injury per quod servitium amisit, or in case for the consequential damage.

[S. C. 7 Dowl. P. C. 816; 9 L. J. Ex. 87; 3 Jur. 1079.]

Action upon the case for the seduction of one Mary Ann Chamberlain, the sister and servant of the plaintiff, per quod servitium amisit. General demurrer and joinder in demurrer. The points marked for argument on the part of the defendant were as follows:—That an action for debauching a man's servant, per quod servitium amisit, is an action of trespass, and not an action of trespass on the case; that the present action is misconceived; for that it is an action of trespass on the case, and that the declaration cannot be treated as framed in trespass, nor would the plea of "not guilty" put in issue the relation of master and servant.

Manning, in support of the demurrer. The foundation of the action for seduction is the trespass committed upon the plaintiff's servant in effecting the injury upon her, and thereby depriving the plaintiff of the benefit of her services; and therefore trespass, and not case, is the proper remedy. In *Ditcham v. Bond* (2 Mau. & Selw. 436), it was held that a count for beating the plaintiff's servant, per quod servitium amisit, might be joined with counts in trespass. That decision was founded upon the authority of *Woodward v. Walton* (2 New Rep. 476); and Lord Ellenborough said, "In the opinion of those who formed the Register, and in Townshend's and Cornwall's Tables, this action has been treated as an action of trespass; and the Court of Common Pleas, in *Woodward v. Walton*, have also treated it as such." In the last-mentioned case it was held that an action for debauching the plaintiff's daughter, per quod servitium amisit, is an action of trespass, and that a count for that injury might be joined with a count for breaking and entering the house. There the dictum of Buller, J., in *Bennett v. Allcott* (2 T. R. 167), that [516] "an action merely for debauching a man's daughter, by which he loses her services, is an action on the case," was cited and overruled; and Chambre, J., said that it was founded upon a mistake of Lord Holt's meaning.^(a) To shew that this was the old law, it will be necessary to refer to some of the earlier authorities. In Fitzherbert's *Natura Brevium*, 88 D., it is said, "And if a man taketh his villain and putteth him into the stocks, and others come and break the stocks, he shall have a writ of trespass:"—and in 90 H.,—"And a man shall have an action of trespass for taking his son and heir, or his daughter and heir, and marrying her." And the form of the writ is given in both cases. He referred also to Fitzherbert's *Abr.*, Gard. 32 [Lord Abinger, C. B. There is no doubt that trespass may be maintained; but the question is, whether it is not one of those cases in which either case or trespass may be maintained. Parke, B. The practice has been to bring either the one or the other, according as either form of action has been thought most convenient to the plaintiff.] That practice was founded upon the mistaken notion entertained by Buller, J., of the opinion of Lord Holt, which was overruled in *Woodward v. Walton*, confirmed by *Ditcham v. Bond*; but since those later decisions it

(a) In his judgment in *Russel v. Corne*, 2 Lord Raym. 1302.

is submitted that the action ought to be trespass. It was only in cases where there was no form of a count in trespass in the Register that a special action on the case was maintainable. Here it has been shewn that there was a form applicable to this case in trespass.

Cowling, *contra*. In all the books, it is laid down that although trespass will lie, yet that case will also. The cases which have been cited are merely authorities to shew that trespass will lie, which is not disputed : but no case has been cited to shew that case will not lie. [He was then stopped by the Court.]

[517] LORD ABINGER, C. B. The question is not whether trespass will lie, but whether case will not lie also ; and I have known from pretty long experience that either will lie. In actions of crim. con. it has always been the practice to bring trespass or case indiscriminately, on the ground that the party aggrieved might waive all damages resulting from the trespass ; and if that be so in cases of crim. con., it applies *a fortiori* to a case of seduction. Perhaps it was more usual formerly to bring trespass, because a notion at one time rather prevailed that a married woman was from her situation in law incapable of giving her consent.

PARKE, B. I am of the same opinion. There may have been no direct decision on this subject, but it has been the constant practice with pleaders to declare either in one form of action or the other. The cases which have been cited, of *Woodward v. Walton* and *Ditcham v. Boul*, are only authorities to shew that trespass may be maintained, although the observations of Chambre, J., and Dampier, J., are certainly at variance with what has been for years the established practice. We should do much mischief if we were to shake a practice which has so long prevailed. The plaintiff has the option to bring trespass for the direct injury to his servant *per quod servitium amisit*, or case for the consequential damage.

Judgment for the plaintiff.

[518] ELGIE v. WEBSTER. Exch. of Pleas. 1839.—By an agreement in writing, W. agreed with E. to advance him a sum of money for the purpose of manufacturing and perfecting certain inventions ; and it was agreed that if the inventions should become of public or private use, W. should be entitled to one-third of the profits of the inventions. The agreement contained an express promise on the part of E. to repay the sum of money advanced by W. :—Held, in an action brought by W. to recover the money thus advanced, that this agreement did not constitute a partnership between the parties with respect to that sum.

[S. C. 9 L. J. Ex. 86 ; 3 Jur. 1107.]

This was an action of debt to recover a sum of 59l., money lent, and on an account stated ; to which the defendant pleaded *nunquam indebitatus*. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Trinity Term, the plaintiff rested his case on the following agreement :—“Memorandum of an agreement made the 7th day of November, 1835, between W. Webster and G. J. Elgie. Whereas the said W. Webster had it some time back in contemplation to manufacture, mature, and perfect, two certain ideas or inventions for the registering of distances of carriages travelling, and for ascertaining and registering the number of persons going into and out of omnibuses, which it was conceived would not only benefit the public, but would be a great benefit to the proprietors of omnibuses, as a check on their conductors in the receipt of the monies paid to them ; and whereas the said W. W. not having the means to enable him to carry into execution his said intentions to make and manufacture the said inventions, applied to the said G. J. Elgie to advance and lend him the monies necessary for those purposes, and it was proposed and agreed by the said W. W., that if he accomplished the said two inventions, and they should become of public or private use, the said G. J. Elgie should have and be entitled to one third part or share of the same, and of all benefit and advantage and emoluments to arise or be made therefrom both for public and private use. And whereas accordingly the said G. J. Elgie has advanced and lent the said W. W. the sum of 59l., up to this day, as I the said W. W. do admit and hereby promise to pay : it is therefore agreed, &c., that the said G. J. E. was and is to have and be entitled to one third part or share of the said two inventions, and of all profits and advantages to arise and be

made therefrom, independent of the payment of the said sum of 59l. so advanced and [519] lent as aforesaid. And the said G. J. Elgie agrees that in case the said inventions, or either of them, shall be called for and come into public use, he will advance all the sums of money required for the manufacture of the same, upon being allowed the re-payment of such advances out of the monies to arise and be received for the same, together with interest, before any division of the profits shall take place. And it is further agreed, that in case the said inventions shall be sold, or either of them, or any premium shall be obtained for them, such premium and purchase-money shall be equally divided between the said W. W. and the said G. J. E." Signed by the plaintiff and defendant. It was objected on the part of the defendant, that the effect of the above agreement was to constitute a partnership between the contracting parties, and consequently to prevent their suing each other in respect of the matters contained in the agreement. The jury by the direction of the learned Judge, found a verdict for the plaintiff, the defendant having leave to move to enter a nonsuit.

Godson now moved accordingly, and contended that this agreement constituted a partnership between the parties, as to the sum of 59l., for which the action was brought.

Sed per Curiam. This is an agreement to pay the sum of 59l. at all events, although, in consideration of that advance, the plaintiff agrees to give the defendant a share of profits if any should arise. There might be a question whether a partnership was not created by this agreement, so as to the subsequent profits, and the sums of money agreed to be afterwards advanced by the plaintiff for the purpose of carrying out the inventions. But the express promise to pay the specific sum at all events, takes away the objection of that forming a part of any partnership fund.

Rule refused.

[520] *EDWARDS v. ROBERTSON*. Exch. of Pleas. 1839.—Where a defendant is in custody of the Warden of the Fleet at the suit of one plaintiff, and a Judge's order is obtained at the instance of another plaintiff, for his arrest pursuant to 1 & 2 Vict. c. 110, s. 3, the Court has no power to compel the Warden to accept a capias, in order that it may operate as a detainer against the defendant.

[S. C. 7 Dowl. P. C. 857; 9 L. J. Ex. 3; 3 Jur. 1106.]

The defendant being in custody of the Warden of the Fleet at the suit of A. B., and being about to obtain his discharge, the plaintiff Edwards procured a Judge's order for his arrest under the stat. 1 & 2 Vict. c. 110, s. 3, founded on affidavits stating that he had expressed his intention to leave the kingdom. A capias was issued accordingly, the plaintiff intending to lodge it with the Warden of the Fleet, in order that it might operate as a detainer against the defendant, but the Warden refused to receive it.

Kelly now moved for a mandamus or order to the Warden to compel him to do so, and urged that although no form of a writ of detainer had been given by the Act abolishing imprisonment for debt, yet the Court, by virtue of its general jurisdiction over its officers, might command the Warden to detain in his custody a party against whom any bailable writ had been issued, or a writ of capias might perhaps be issued, directed to the Warden himself instead of the Sheriff.

PARKE, B. According to the form given in the schedule to the new act, the capias is to be directed to the sheriff, or to the constable of Dover Castle, or to the mayor and bailiffs of Berwick-upon-Tweed [or as the case may be]. These last words mean that the writ is always to be directed either to the sheriff, or to some person acting in the capacity of sheriff or for him. Besides, by the 4th section, it is enacted that "the defendant, when so arrested, shall remain in custody until he shall have given a bail-bond to the sheriff:" now no person can be held responsible for the execution of a writ but the officer to whom it is directed, so that we ought not to grant this application against the Warden, the writ not being directed [521] to him. On the other hand, if the writ were not to be directed to the sheriff, how could he be called on to take a bail-bond under the 4th section? This case was not contemplated by the legislature when they passed the present statute, and the only course for the plaintiff to pursue is to place the capias in the hands of the sheriff's officer, and get the

Warden of the Fleet to give him notice when the defendant is likely to be discharged out of custody, and retake him at the prison door.

The other Barons concurred.

Rule refused.

PATTERSON v. BUSBY. Exch. of Pleas 1839.—A writ of summons is irregular, if the memorandum “that it is to be served within four calendar months” &c., be not subscribed to it.—The affidavit in support of a motion to set aside service of an irregular writ, need not shew that the defendant has not been served with any other regular process.

[S. C. 7 Dowl. P. C. 868 ; 9 L. J. Ex. 16.]

Humphrey shewed cause against a rule nisi obtained by Gunning, to set aside the service of the writ of summons issued in this cause for irregularity, the copy served not having subscribed to it the memorandum mentioned in the Uniformity of Process Act—“This writ is to be served within four calendar months” &c. He contended, that this was no necessary part of the writ, being only required by the statute to be added to it; and also objected, that the affidavit in support of the motion did not state that the defendant had not been served with any writ in the correct form.

PARKE, B. The memorandum is part of the schedule to the Act; being part of the act of the legislature, it is clearly irregular to omit it. It is an omission of the same kind as that of the indorsement of the attorney’s name and residence. And the Master informs us it is not the practice for the affidavit, in the first instance, to negative the fact that the party has been served with other regular process. The rule must therefore be absolute.

Rule absolute.

[522] RICHARD KITCHEN v. BROOKS. Exch. of Pleas. 1839.—Where the plaintiff’s Christian name was rightly stated in the writ of summons, but wrongly in the declaration, and the time for pleading having expired without the defendant’s taking the declaration out of the office, the plaintiff signed judgment for want of a plea:—Held, that the defendant could not set the judgment aside on the ground of the above irregularity; that it was in reality an objection to the declaration, and ought to have been taken, at all events, within the time for pleading.

[S. C. 9 L. J. Ex. 5.]

In this case a writ of summons was sued out on the 20th of September, for Richard Kitchen against Joseph Brooks. On the 24th of October, an appearance was entered for the defendant sec. stat., and on the 25th notice of declaration was given, in which, and in the declaration itself, the plaintiff was incorrectly described as Joseph Kitchen. The time for pleading expired on the 2nd of November, and on the 4th the plaintiff signed judgment as for want of a plea. The defendant did not take the declaration out of the office until after the time for pleading was out, when he discovered the mistake, and returned it to the plaintiff’s attorney. Whateley having obtained a rule to set aside the judgment for irregularity, on the ground of the variance between the writ and the declaration,

Crompton shewed cause. Either this was matter of plea in abatement; Com. Dig. Abatement (G.), 8; or it is an objection to the declaration for an irregularity; and in either case, the application is too late. The defendant ought to have applied, according to the 3 & 4 Will. 4, c. 42, s. 11, to have the mistake rectified at the plaintiff’s expense, within the time for pleading.(a)

Whateley, contra, urged that the application to set aside the judgment was made in time, the error in the declaration not having been discovered until after judgment was signed.

PARKE, B. The application is too late. The objection in reality is to the

(a) See *Hinton v. Stevens*, 1 H. & W. 621. Quere, however, whether the statute applies to misnomer of the plaintiff: see *Lindsay v. Wells*, 4 Scott, 471.

declaration ; because we know nothing [523] of the writ on the face of the pleadings. Before the act of 3 & 4 Will. 4, c. 42, s. 11, the defendant might have pleaded the misnomer in abatement ; and since the act, he should take the objection within the same time, viz. four days : or, at all events, within the time for pleading, viz. eight days. The rule must therefore be discharged, and, as there is no affidavit of merits, with costs.

ALDERSON, B., concurred.

Rule discharged with costs.

JONES v. JONES. Exch. of Pleas. 1839.—A declaration on a judgment in a county court, stating the court to have been held before the sheriff and suitors, is bad on special demurrer.—Semble, that the declaration ought to set out the names of the suitors.

[S. C. 7 Dowl. P. C. 841 ; 9 L. J. Ex. 41 ; 3 Jur. 1078.]

Debt. The declaration stated, that the plaintiff, at the county Court of the Hon. Thomas Pryce Lloyd, sheriff of the county of Carnarvon, held at Pwllheli, in and for said county, and within the jurisdiction of the said Court, on a certain day, to wit, &c., before the said Thomas P. Lloyd, sheriff, and the suitors of the said Court, came according to the custom of the said Court, by W. L. Roberts, his attorney duly appointed, and then and there, in the said Court, according to the custom of the said Court, levied his plaint against the defendant in a plea of debt of 39s. 11d., for a certain cause of action arising to the plaintiff within the jurisdiction of the said Court ; and such proceedings were therefore had, that afterwards, to wit, on &c., at the county Court of Sir R. B. W. Bulkeley, Bart., then being sheriff of the said county, duly holden at Carnarvon, in and for the county aforesaid, and within the jurisdiction of the said Court, before the said last-mentioned sheriff, and certain free suitors of the said Court, the plaintiff, by the consideration and judgment of the said Court, recovered against the defendant 11. 12s. 6d. for his [524] said debt, and also 6l. 8s. 2d., which in and by the said Court, before the said last-mentioned sheriff and suitors, were then adjudged to the plaintiff, with his assent, for his damages which he had sustained as well by reason of the detention of the said debt, as for his costs and charges by him in and about his suit in that behalf expended, whereof the defendant was convicted, as by the memorandum and proceedings thereof remaining in the said county Court more fully appears, which said judgment still remains in full force, unreversed, and unsatisfied, &c.

Special demurrer, assigning for causes, that the county Court in the declaration first mentioned is alleged to have been held before the said T. P. Lloyd, sheriff, and the suitors of the said Court, and the county Court in the declaration last mentioned is alleged to have been holden before the said Sir R. B. Bulkeley, Bart., then being sheriff of the said county of Carnarvon, and certain free suitors of the said county Court : whereas by law the county Court in every county must be held before the suitors of such county only, and not before the suitors and sheriff or any other person or persons ; and also that in and by the declaration it is stated and shewn, that the sheriff in the declaration first mentioned was a Judge of the county Court in the declaration first mentioned, and that the sheriff in the declaration last mentioned was a Judge of the county Court in the declaration last mentioned, which is incongruous, at variance with law, and impossible, &c., &c. And also, that the names of the suitors in the declaration mentioned and referred to are not stated therein, &c.

Joinder in demurrer.

James, in support of the demurrer. The declaration is bad on both the grounds suggested. In the first place, the sheriff has no judicial authority in the county Court ; the suitors are the sole judges, and the sheriff sits only in his ministerial capacity, in order to pronounce the judg-[525]-ment of the suitors : Dalton, 407 ; Com. Dig., County Court (C.), 2. It therefore appears on the face of this declaration, that judgment has been given by a person who was not a Judge of the Court. It may be urged, that the words " before the sheriff and " may be rejected as surplusage ; but that cannot be done, for the greatest precision is required in setting forth the style and proceedings of an inferior court, in favour of whose jurisdiction nothing can be

presumed: *Sollers v. Lawrence* (Willes, 413), *Read v. Pope* (1 C. M. & R. 302; 4 Tyrw. 403).

Secondly, *Lewis v. Weeks* (Carth. 85; Comb. 149) is an express authority that in setting forth proceedings of this kind, the names of the suitors must be stated.

Jervis, contra. The suitors are no doubt, properly speaking, the Judges of the county Court; but it is equally clear that the sheriff is a constituent part of the Court, and not a mere ministerial officer; *Tunno v. Morris* (2 C. M. & R. 298). The judgment is pronounced by him: even if he were to pronounce it without the direction or assent of the suitors, no writ of false judgment would lie, but the party must resort to an action on the case. By the 27 Hen. 8, c. 13, the sheriffs of certain counties in Wales are required to hold "their Courts" (meaning the county Courts) at particular places. So also, Dalton says (p. 406), that "the county Court is the Sheriff's Court; and the entry of all the pleas and proceedings there are incident to the office of the sheriff, and cannot be granted or severed from the same; and the sheriff is to appoint clerks under him in this Court, such as he will answer at his peril." Again, it is said, that although to describe the county Court as held before the sheriff's deputy would be bad, yet if it were alleged to be held before the sheriff, when in fact the deputy presided, that would be sufficient: Com. [526] Dig., County (C.), 2. But, at all events, the mention of the sheriff is immaterial, and that part of the allegation may be rejected.

Secondly, it is not now essential that the names of the suitors should be mentioned. In *Draper v. Garratt* (2 B. & Cr. 2; 3 D. & R. 226), which was an action against a sheriff for taking insufficient pledges in replevin, a variance between the names of the suitors as set out in the declaration and as stated in the record of the county Court, was held to be immaterial. [Parke, B. That was altogether a collateral proceeding; this is an action directly on the judgment.] The case of *Lewis v. Weeks* was decided at a time when the rules of pleading in these respects were much more strict than in later times. It was then necessary, even when setting out the proceedings of the superior Courts, to name the Judges: Com. Dig., Pleader (2 W.), 12; whereas now it is sufficient to shew the jurisdiction of the Court in general terms: *Tilley v. Foxall* (Willes, 683). He cited also *Perreau v. Bevan* (5 B. & Cr. 284; 8 D. & R. 72).

James, in reply. *Tilley v. Foxall* was the case of a judgment of a court of record; and that distinction was admitted in *Read v. Pope*. [He was then stopped by the Court.]

LORD ABINGER, C. B. I think our judgment must be for the defendant. The words "before such and such persons," I think, necessarily imply that the cause was heard before the persons who were the lawfully constituted judges of the Court: the words "before the sheriff and suitors," therefore, imply that the sheriff is a Judge of the county Court, which certainly is not the case. If the suitors were to differ in opinion, and the sheriff were to give a casting [527] vote, and thereby decide the question, the judgment would be bad. Suppose a judgment recovered before the Court of Common Pleas were pleaded as a judgment recovered "before the justices of our Lady the Queen of the Bench, and the Lord High Chancellor," it would be error, and the latter part of the allegation could not be rejected as surplusage.

PARKE, B. The old precedents all describe the Court as the county Court of the Sheriff, held before the suitors, and set out the names of the suitors.

GURNEY, B., and MAULE, B., concurred.

The plaintiff had leave to amend on payment of costs; otherwise Judgment for the defendant.

BARBER AND ANOTHER v. TAYLOR. Exch. of Pleas. 1839.—A., by letter, requested B. to purchase for him 150 bales of cotton: the letter contained the following terms:—"Upon executing the above and forwarding a bill of lading, I will accept your draft at sixty days' sight after the receipt of the bill of lading:"—Held, that B. was bound to deliver the bill of lading as soon after its arrival as he conveniently could, without reference to the arrival or unloading of the cargo.

[S. C. 9 L. J. Ex. 21.]

This was an action of assumpsit for a breach of contract, tried before Coleridge, J., at the Liverpool Spring Assizes, 1838, when a verdict was found for the plaintiff for

3000l., (the damages in the declaration), subject to the opinion of this Court on the following case; and it was agreed that the pleadings should form part of the case.

The first count of the declaration stated, that on the 1st December, 1836, in consideration that the plaintiffs would purchase, on account of the defendant, 150 bales of cotton, equal to a sample they transmitted, at a certain limited price, and would ship the same not later than the last day of February then next, and would forward the bill of lading thereof to the defendant, he the defendant [528] promised that he would receive the bill of lading and cotton, and pay for the same by accepting the plaintiff's draft for the amount, payable at sixty days' sight from the receipt of the bill of lading. That the plaintiffs did purchase a quantity of cotton equal to the sample, and shipped it not later than the last day of February, and the same afterwards arrived at Liverpool. That although the plaintiffs forwarded the bill of lading, and afterwards, and within a reasonable time after the arrival of the cotton at Liverpool, were ready and willing, and offered to deliver the same to the defendant, on the defendant's paying for the cotton, and accepting the plaintiff's draft as aforesaid; and the plaintiffs were willing and ready to present the draft for the amount, and requested the defendant to receive the bill of lading and the cotton, and pay for the same; yet the defendant refused to receive the bill of lading or cotton, or to pay for it.

The second and last counts were for money paid, and commission.

To the first count the defendant pleaded, denying that the plaintiffs forwarded the bill of lading, and that within a reasonable time after the arrival of the cotton at Liverpool they were ready and willing, and offered to deliver the bill of lading to the defendant, on the defendant's paying for the cotton as aforesaid. To the residue of the declaration the defendant pleaded non assumpsit: on which pleas issues were joined.

The plaintiffs, at the times after mentioned, were merchants and commission agents, carrying on business at Liverpool and New Orleans, under the firm of Messrs. Barber, Brothers, & Co., the plaintiff Samuel Barber being resident at Liverpool.

On the 1st December, 1836, the defendant gave the plaintiff, Samuel Barber, in Liverpool, a written order, addressed to the plaintiffs' firm, in the terms following:—

[529] "Messrs. Barber, Brothers.

"Liverpool, Dec. 1st, 1836.

"Gentlemen,—Please purchase for my account 150 bales of cotton, equal to the sample accompanying this letter, at 7½d., say 7¼d. per lb., delivered in Liverpool. This is understood to include freight, and all your charges. Upon executing the above, and forwarding a bill of lading, I will accept your draft at sixty days' sight after the receipt of the bill of lading, for the amount of the same.—I am, Gentlemen, yours, &c.

"JOHN TAYLOR.

"Not to be delivered on board later than the last day of February next."

To which the following addition was afterwards made:—

"In reference to the order which I addressed to Messrs. Barber Brothers, on the 1st inst, it is not to include dock and town charges in Liverpool, or custom duty, or insurance.

"JOHN TAYLOR."

The plaintiff, after the receipt of this order, purchased 152 bales of cotton at New Orleans, according to the samples, at prices within the limits of the order, and shipped them, with a bill of lading, by the "Romulus" for Liverpool, and delivered them on board the said vessel before the last day of February, 1837.

It was not contended at the trial that the purchase was not according to the order and no point was made as to the access of the two bales.

The plaintiff wrote from New Orleans certain letters to the defendant, apprising him that he had purchased the cotton.

On the 21st of April, 1837, the "Romulus" arrived at Liverpool with the cotton and the bill of lading mentioned in the above letters, and on the next day was reported

at the Custom-house. On the 28th the "Romulus" [530] was entered on the Custom-house books for a landing-waiter. On the 3rd May a landing-waiter was obtained, and the "Romulus" began to unload her cargo. The cotton was not completely discharged from the vessel until the 8th May.

On Monday, the 24th of April, the plaintiff, Samuel Barber, with his father, called on the defendant with a copy of invoice, and a draft on the defendant for 1571l. 14s. 10d., and stated, as the fact was, that Messrs. Thomas Wilson & Co. had the bill of lading in their hands, and they would not deliver it up unless the defendant got a banker's guarantee of his acceptance, or paid in cash before delivery, or pledged the cotton with a broker, in order to secure the due payment of the acceptance. The defendant declined accepting on those terms. The copy invoice and the draft were left with the defendant by the plaintiffs. The invoice and copy were headed thus:—

"Invoice of 152 bales of cotton, shipped by Barber Brothers, & Co., per A. 1, American ship 'Romulus,' Webster, for Liverpool, consigned to order for account and risk of John Taylor, Esq., Liverpool."

Then followed the particulars of the cotton.

On the next day the defendant's brother by his orders went to the office of the plaintiff at Liverpool; he called twice and saw a clerk of the plaintiff's on each occasion, but on neither the plaintiff was in. On the second call, on asking for the bill of lading, the clerk stated that he had not it. The defendant's brother offered to accept the draft if the bill of lading were given up, and on the clerk not being able to produce the bill of lading, he delivered to the clerk the copy invoice (it was said that the words "and the draft" ought to have been inserted here), and declared the contract was at an end.

On the 3rd May, the day on which the unloading of the "Romulus" began, the plaintiff Samuel Barber, accompanied [531] by a clerk of the said Thomas Wilson and Co., called on the defendant, and tendered to him the bill of lading indorsed by the plaintiffs, and at the same time also tendered to him the said draft for his acceptance; but the defendant refused to receive the bill of lading or to accept the draft, stating, that having made ineffectual applications for the bill of lading, he had returned the invoice, and thereby entirely repudiated the transaction. The plaintiffs afterwards gave notice to the defendant that if he persisted in his refusal they should sell the cotton, and hold him liable for any loss, and afterwards sold the cotton, according to such notice, at a considerable loss.

The damages, if the plaintiffs are entitled to recover, to be settled out of Court.

The price of cotton was generally falling from the arrival of the "Romulus" until the 8th of June, when it was sold.

The questions for the opinion of the Court were—

1st, Whether on the whole the plaintiffs are entitled to retain the verdict on the issue on the first count?

2nd, If the Court are of opinion that the defendant is entitled to a verdict on that issue, then whether the plaintiffs are entitled to judgment non obstante verdicto.

If the Court shall be of opinion that the plaintiffs are entitled to judgment, it is agreed that the amount of damages shall be referred, and that the judgment or verdict and judgment [as the case may be] shall be reduced to such amount as shall be found and certified by the referees.

If the Court shall be of opinion that the plaintiffs are not entitled to retain the verdict, or that the judgment ought to be arrested, they are to determine accordingly.

The plaintiffs' points marked for argument were:—The plaintiffs will contend that the tender of the bill of lading on the day when the vessel began to unload was an offer [532] to deliver it within a reasonable time after the arrival of the cotton, and that such bill was forwarded according to the meaning of the contract, and therefore that the plaintiffs are entitled to retain the verdict; and, secondly, that if the bill of lading was not forwarded and tendered within a reasonable time, this is not a ground of defence to this action, but only a ground of cross action for damages, and therefore that the plaintiffs would be entitled to judgment non obstante verdicto.

The defendant's points were:—

The defendant contends that he has a right to the verdict, on the ground that the time which elapsed after the arrival of the bill of lading at Liverpool, before it was offered to the defendant, was unreasonable under the circumstances.

Also that the judgment should be arrested, because there is no averment of

the plaintiffs' forwarding, or being willing to forward, the bill of lading to the defendant.(a)

Cresswell, for the plaintiffs. It will be contended on the other side, that the plaintiffs ought to have delivered the bill of lading as soon as the vessel arrived; but the tender of it on the 3rd of May, the day on which the vessel began to unload, was within a reasonable time after the arrival of the cotton, for there was nothing in the contract to require the delivery of a bill of lading on the arrival of the vessel, or before she could be reasonably unloaded and the cotton delivered; and there is no suggestion of any unreasonable delay in the unloading of the vessel. There is nothing to shew that the plaintiffs were bound to send the bill of lading by the first possible conveyance, or on the arrival of the vessel: there is no undertaking to deliver it before the cotton. [Lord Abinger, C. B. [533] If there were any reasonable ground suggested for the plaintiffs' keeping the bill of lading until the ship began to unload, the case might be different; but here they refused to deliver it up, on the ground that the defendant refused to give them a banker's guarantee, which they had no right to do.] It is admitted that the offer on terms was no offer at all; but that was on the 24th of April; the first legal tender was on the 3rd of May, when the cotton was unloading. [Parke, B. If nothing had been said in the contract about the bill of lading, the 3rd of May might have been a reasonable time for its delivery; but the delivery of the bill of lading is introduced as a term into the contract, and it might be material to the purchaser to have it delivered as soon as possible after the arrival of the vessel, in order that he might go into the market to sell.] There is nothing in the contract which requires that it should be delivered at any particular time. Then does the law require that it should be so delivered?—and by what criterion? Suppose this bill of lading had come by another ship three weeks before the "Romulus," how long would the plaintiffs be allowed to keep it? Suppose they kept it a fortnight, and tendered it before the goods arrived, would not that be sufficient? The party cannot be bound to deliver the cargo before the ship arrives, then how can he be bound to deliver the symbol? [Lord Abinger, C. B. I think the bill of lading ought to be delivered a reasonable time after it arrives, without reference to the arrival of the cargo.] It has never yet been held that the bill of lading must be delivered a day or two after its arrival. [Parke, B. The difficulty arises from your having made the bill of lading deliverable within a reasonable time.] It is submitted that this was a reasonable time.

Sir F. Pollock, contra, was stopped by the Court.

LORD ABINGER, C. B. I think this case will not bear [534] an argument. The defendant is entitled to a bill of lading by the terms of the contract, and he is entitled to have it as soon after its arrival as the party who has it can conveniently deliver it to him. Here the plaintiffs made an illegal demand, which the defendant did not comply with. The jury could not doubt that the reasonable time was expired: the plaintiffs' own conduct shews that they could have delivered it, and ought to have done so, in the twenty-four hours after its arrival; and if they did not choose to do so, they must take the consequences.

PARKE, B. I do not think there can be any question about the meaning of this contract: the meaning is, that the goods are to be delivered on board on a certain date, and a bill of lading is to be sent and delivered forthwith. It is very important that the defendant should have possession of his bill of lading, it being the symbol of the property in the goods. If it be true that the meaning of the contract is, that the bill of lading is to be sent as soon as it can, in this case it is clear there was an unreasonable delay, from the 24th of April to the 28th, during which time the plaintiffs were keeping it merely to compel the defendant to pay in a different way than that for which he contracted.

GURNEY, B. It is perfectly clear that the plaintiffs were blameable, as they had had time to deliver the bill of lading sooner; but they seem to have acted as they did with a view to the state of the market. When it did not suit their purpose any longer to impose the conditions upon which the bill of lading should be delivered, they withdrew those conditions; but the defendant had then repudiated the contract.

ROLFE, B., concurred.

Judgment for the defendant.

(a) Nothing was said as to this latter point in the argument.

[535] *HUTCHISON AND ANOTHER v. BOWKER AND ANOTHER*. Exch. of Pleas. 1839.—Assumpsit for the non-delivery of barley. It was proved at the trial that the defendants wrote to the plaintiffs offering them a certain quantity of "good" barley, upon certain terms: to which the plaintiffs answered, after quoting the defendant's letter, as follows:—"Of which offer we accept, expecting you will give us fine barley and full weight." The defendants, in reply, stated that their letter contained no such expression as fine barley, and declined to ship the same. Evidence was given at the trial that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley:—Held, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that, they having found what that meaning was, it was for the Court to determine the meaning of the contract; and the Court held that there was not a sufficient acceptance.

[S. C. 9 L. J. Ex. 24.]

Assumpsit for the non-delivery of barley. Plea, non assumpsit.

At the trial before Lord Abinger, C. B., at the London sittings after last Trinity Term, it appeared that the action was brought by the plaintiffs, who were corn-merchants and factors at Kirkaldy, in Fifeshire, to recover from the defendants, who were corn-merchants at Lynn, damages for the non-performance of a contract to supply 400 quarters of barley. To prove the contract, the following letters were given in evidence:—

"Messrs. Rt. Hutchison & Co., Kirkaldy.

"Lynn, 21st Nov., 1838.

"Gentlemen,—In reply to your favour of 17th inst., we beg to offer you a cargo of about 400 qrs. of good barley, weighing 52 lbs. per bl., at 34s. per qr. on board; receiving your acceptance in course of post, and for payment by banker's draft on London at two months, to be remitted in full upon receipt of invoice and bill of lading. We hold but few grey peas, although we have no doubt could procure you, say about 50 qrs. at 40s. per qr., having your instructions accordingly. Waiting the favour of your reply,—We remain, your most obedient Servants,

"A. & J. BOWKER."

To this letter the plaintiffs returned the following answer:—

[536] "Messrs. A. & J. Bowker, Lynn.

"Kirkaldy, 24th Nov., 1838.

"Gentlemen,—We have your favour of 21st current, offering 400 qrs. good barley, 52 lbs. per bl., at 34s. per qr. f. o. b., payment in full by banker's bill at two months, on receipt of bill of lading and invoice; of such offer we accept, expecting you will give us fine barley and full weight. We yesterday accepted 5 to 600 qrs. from Yarmouth, 53 lbs. at 33s. 6d. You may ship 50 qrs. dry peas, either dun or maple, 64 lbs. at 40s. per qr. f. o. b.—Engage a vessel for a port in the Frith of Forth (not Leith), calling here for orders, and if we fix a port we will advise; inform us of her name, and that of the captain, before sailing, that we may insure.—We remain, Gentlemen, your most obedient Servants,

"ROBT. HUTCHISON & Co."

The following correspondence afterwards passed between the parties:—

"Messrs. Robt. Hutchison & Co., Kirkaldy.

"Lynn, 27th Nov., 1838.

"Gentlemen,—We are favoured with yours of 24th, in answer to ours of 21st inst., in which you say you expect we shall give you "fine barley." Upon reference to our offer, you will find no such expression; as such, we must decline shipping the same, and remain,—Gentlemen, your most obedient Servants,

"A. & J. BOWKER."

"Messrs. A. & J. Bowker, Lynn.

"Kirkaldy, 30th Nov., 1838.

"Gentlemen,—We are favoured with yours of the 27th current. [537] In accepting of your offer of 400 qrs. barley, on the 24th current, we detailed word for word

of your offer made on 21st current, and then added, 'of which offer we accept;' then we merely remark, that we expect you will send us fine barley and full weight. We have sold the cargo to go to Leven, about nine miles east of this; and we request you will immediately charter a vessel for that port, at the lowest possible freight, and advise before sailing, that we may insure.—We remain, your most obedient Servants,
 "ROBT. HUTCHISON & Co."

"Messrs. Robt. Hutchison & Co., Kirkaldy.

"Lynn, 5th Dec., 1838.

"Gentlemen,—In reply to your favour of 30th ultimo, we refer you to the words used in yours of the 24th, in answer to ours of the 21st, 'of which offer we accept, expecting you will give us fine barley and full weight;' and now we ask you, is this in accordance with our offer?—We are, Gentlemen, your most obedient Servants,

"A. & J. BOWKER."

Evidence was given at the trial to shew that the phrases "good" barley and "fine" barley were terms well known in the trade, and that fine barley was the heavier. The jury at first found a verdict for the plaintiffs generally, stating their opinion to be, that "the difference was in weight, and that barley would be fine and good at 52 lbs. per bushel." The learned Judge asked them to reconsider their verdict, and answer this question, whether there was a distinction in the corn trade between "good" and "fine"? and they then found that there was a difference between [538] good and fine, but that the parties did not understand each other; and they returned a verdict for the plaintiffs, damages 30l. Cresswell having on a former day obtained a rule to shew cause why this verdict should not be set aside, and a nonsuit entered,

Sir F. Pollock (W. H. Watson with him) now shewed cause. The verdict of the jury is conclusive. They have found that the words "fine" and "good" were phrases well known in the corn trade; and therefore the letter of the 24th of November was a distinct acceptance of the defendants' offer. The words have either a general or a technical meaning. It was found that the word "fine" had a technical meaning, and the obscurity is removed by the verdict. The jury thought that on this contract there could be no misunderstanding amongst merchants. It was a question to be left to the jury, what was the meaning of the word "fine" in the contract. [Parke, B. You may ask the jury the meaning of the word "fine" in a mercantile sense, but you cannot go further. The Court is to say what is the meaning of the contract, and whether there has been an acceptance of it.] In the case of *Dunkin & Another v. Wilford*, which was tried before Lord Ellenborough at the Guildhall sittings in the year 1814, and which is not reported, a question arose similar to the present. That was assumpsit for the non-delivery of wheat. The first letter put in to prove the contract was from the defendants to the plaintiffs, dated November 25, 1813, in which he said, "I will now ship you about 500 quarters good new sound red wheat, 59 lbs. at 66s. per quarter." To which, on the 27th November, they answered as follows:—"Your favour, offering us a cargo of wheat at 66s., is at hand. Your price exceeds what we are buying at home, which of course prevents our accepting it; but as we are [539] inclined to do business with you, we hereby offer you 56s. per quarter for 500 quarters of your best wheat, to weigh not less than 60 lbs. per bushel." To which, the defendant replied, on the 30th of November, "I will accept your offer of 56s. per quarter for about 500 tons good new sound red wheat, 50 quarters under or over, as a vessel can be had, 60 lbs. per bushel, overweight paid for, underweight made up, and not to weigh less than 59 lbs. per bushel." The language of those letters very much resembles the present; but there does not appear to have been any evidence that there was a difference in meaning between "best" and "good." Marryatt, for the defendant, objected that there was no complete contract; but, according to the note of Mr. Taddy on his brief, Lord Ellenborough left it thus to the jury:—"The defendant is himself the best judge; he has put his own construction upon the contract. As to the question whether the letter of the 30th of November is an acceptance of the offer made on the 27th, you must take into consideration all the correspondence from beginning to end. The first letter was on the 25th of November, concerning 'good new sound red wheat:' that was a mere offer. The term best wheat does not seem to introduce a new quality. The question is, whether the letter of the 30th is not an acceptance of the offer of the 27th; there is in the letter of the 30th the new introduction of 'overweight to be paid for, underweight to be made up, &c.;' but it

is for you to say whether it was a new proposal." [Lord Abinger, C. B. If there is evidence as to the meaning of a particular word in a contract, and the jury have found its particular meaning, is the Court to be deprived of the power of putting a construction on the contract?] Though the jury found that the word "fine" had a particular meaning in the trade, they have also found that it was not applied in that particular sense. It is admitted that when the words of a [540] contract are clear and unambiguous, it is for the Court to put a construction upon it; but where the words are either unintelligible, or have both a popular and a technical meaning, it is for the jury to say whether the words were used in their technical or ordinary sense. But, secondly, if it is for the Court to put a construction on this contract, there is no ambiguity here. The plaintiffs mean to say that the article will be fine of the sort described; the words are—"expecting you will give us fine barley and full weight;" which means, we expect you will send us good barley, which shall be fine and of full weight. In reading this contract, it cannot be said that a distinction was intended between good and fine. The letter does not mean to say fine barley, in a mercantile sense, as contradistinguished from good barley.

Cresswell and Greenwood, contra, were stopped by the Court.

LORD ABINGER, C. B. It appears to me that the question as to the interpretation of this contract is a question entirely for the Court, and not for the jury. That they should ever be the judges on such a matter was founded on this, that there might be technical words used in a contract, which the jury might understand, and the Court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the Court, that the jury are to have the interpretation of the contract, and not the Court. In this case, if there had been no evidence at all of the distinction between good and fine, I should have done precisely as Lord Ellenborough did in the case cited. I should have said, "There is a distinction between the words good and fine, which you, gentlemen of the jury, may understand; and if you think so and so, then there is a contract between the parties." But though [541] the jury have found that the parties did not mean so, they have found that the terms were quite distinct,—that good barley meant one thing, and fine another. That being once found, is it to be said good is fine, and fine good, according to their pleasure? It would be very inconvenient if such a question were allowed to be left to the jury. In this case, if they had said they were satisfied that there was no difference in the words, I should then have directed them to find for the plaintiffs; but they told me they were of opinion that there was a difference in the words, but they did not think the contract should be interpreted with reference to that distinction, as the parties did not understand each other. I think that they had no right to assume that.

Then, as to the interpretation of the contract, I do not mean to say what the real meaning was, but I am quite satisfied that had the action been the other way, and these defendants had been plaintiffs and the plaintiffs defendants, the plaintiffs would not have been slow to urge that they never meant to be bound but for fine barley, and they might have said, "This good barley must be fine, and take notice, we understand you to mean, by good barley, what we understand to be fine barley." The meaning, therefore, being left ambiguous, I am of opinion that this rule ought to be made absolute.

PARKE, B. I am of the same opinion. It was for the plaintiffs to make out in this action that there was a contract between them and the defendants, both agreeing in the same subject-matter of contract; they were to make out that they assented to the proposal of the defendants, and that they were bound by it as well as the defendants. A letter is produced, which on the face of it is somewhat ambiguous, but further ambiguity is introduced into the case by the parol evidence, which is admitted for the purpose [542] of shewing there are two descriptions of barley in the same market,—one fine, and one good. The law I take to be this,—that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word "fine," in the corn market; and the jury having found what it was, the question, whether there was a complete acceptance by the written documents, is a question for

the Judge. The finding of the jury leaves this letter ambiguous in its terms. The burthen of proof that the contract was complete lay upon the plaintiffs; it seems to me that they have not discharged that burthen, and therefore ought to be nonsuited.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute for entering a nonsuit.

ACKROYD v. READ. Exch. of Pleas. 1839.—Where a plaintiff refuses to accept a sum tendered at the commencement of a suit, but afterwards takes the sum out of Court when paid in under a plea, he is *prima facie* liable to pay the costs incurred from the time the money was tendered; but this is open to explanation: and where, in an action of assumpsit by landlord against tenant to recover unliquidated damages for the non-repair of the premises, it was shewn that at the time the money was tendered the plaintiff was not aware of the amount of damage sustained, nor was acquainted with it until after plea pleaded, when, finding the difference between the sum tendered and the amount at which the injury was valued so trifling as not to be worth proceeding for, he took the money out of Court; it was held that these circumstances were sufficient to rebut the inference that the sum tendered was refused for the purpose of making costs.

[S. C. 7 Dowl. P. C. 810; 3 Jur. 797.]

This was an action of assumpsit by landlord against tenant, for the non-repair of certain premises occupied by the latter. The defendant, on the 23rd of February, after the declaration had been delivered, took out a summons, calling upon the plaintiff to shew cause why, upon pay-[543]-ment of the sum of 10l. into Court, with costs, all further proceedings should not be stayed. This the plaintiff's attorney refused to accede to, and indorsed the summons accordingly. The parties in consequence did not go before a Judge; but the defendant paid the money into Court under the usual plea. On the 17th of April, the plaintiff took the money out of Court, and served an appointment for taxation. The Master, on taxation, having allowed the plaintiff his full costs, Hoggins obtained a rule to shew cause why the Master should not review his taxation, and disallow the costs incurred since the refusal by the plaintiff's attorney to take the amount tendered, and allow the same in the defendant's favour.

Cresswell shewed cause upon the affidavit of the plaintiff's attorney, which stated that he was only the London agent, and not the attorney in the cause; that the property in respect of which the action was brought, was situated in Yorkshire, and that his reason for refusing to take the sum tendered on the 23rd of February was, that he was not at that time aware of the amount of damage sustained by the plaintiff; but that, having obtained a surveyor's report after the plea had been pleaded, and finding the damage amounted to 25l. only, he thought it more advisable to take the sum tendered. He contended that, under the circumstances, the plaintiff's attorney was justified in refusing to accept the sum tendered, as this was an action for unliquidated damages, and the amount of damage had not then been ascertained.

Hoggins, in support of the rule. This case falls within the principle of the decision in *James v. Raggett* (2 B. & Ald. 776; 1 Chit. R. 441). There an action was brought for two separate sums of money, one of which the defendant offered to pay, with all costs [544] to that time. The plaintiff's attorney refused to stay the proceedings on those terms, and the defendant paid that sum into Court; and the plaintiff's attorney, finding that he could not support the action for the other part of his demand, took the money out of Court, and discontinued the action. The Court allowed the defendant his costs from the date of his offer to pay the sum paid into Court, and directed that the same should be set off against the plaintiff's costs previously incurred. Here the attorney who refused the tender ought to have communicated to the defendant at the time his reason for so doing, and asked for time to consider and inquire as to the amount of damage sustained. Besides, it is the duty of a plaintiff to ascertain the amount of damage before he commences the action.

LORD ABINGER, C. B. I am of opinion that this rule ought to be discharged. The attorney has accounted for his refusal to take the defendant's offer, by shewing that he did not know the amount of damage at that time, and refused to take it on that ground.

PARKE, B. The foundation of the rule laid down in *James v. Raggett* is this,—that

wherever a plaintiff refuses a sum of money, tendered through the medium of a summons, in satisfaction of the debt for which the action is brought, and afterwards takes out of Court the same sum, when paid in under a plea, that *prima facie* shews that it was refused vexatiously, and for the purpose of making costs; and then it is reasonable that the plaintiff should pay the costs incurred since the time of his refusal. But that is open to explanation: and in the present case, which is an action brought to recover not a debt, but unliquidated damages, the plaintiff has shewn, as a reason for his refusal, that at that time the precise amount of injury done had not been ascertained, and was not so until after the defendant had [545] pleaded, and that he then found the difference between the two sums so inconsiderable as not to be worth proceeding for. The *prima facie* case is therefore answered.

Rule discharged.

IN RE LORD CARDROSS. Exch. of Pleas. 1839.—An application by a client for the delivery of his attorney's bill of costs, containing taxable items, must be made to a court in which some of the business was done.—Where an attorney, for the purpose of securing payment of a balance due to him from a client, effected a policy of insurance on the life of the client, and charged the premiums to him, and on the client's death received the amount of the policy: the Court refused to interfere summarily to compel the attorney to account with the administrator of the client, and deliver up the policy.

[S. C. 7 Dowl. P. C. 861; 9 L. J. Ex. 36.]

This was a rule calling on Messrs. Hodgson and Burton, the attorneys of the late Lord Cardross, to shew cause why they should not deliver to his administrators their bill of costs in all matters in which they had been concerned for him, and why they should not give credit for all sums of money received on his account, and on payment of the balance found to be due deliver up a certain policy of insurance effected on the life of Lord Cardross. It appeared from the affidavits, that Messrs. Hodgson and Burton had acted as solicitors for Lord Cardross during the year 1831 and the three following years. He had given them on account certain bills, drawn upon a third party, some of which only were paid; and there remained due to them, at the time of the death of Lord Cardross, a balance of between 200*l.* and 300*l.* Messrs. H. and B., as security for their claim, and with the consent of Lord Cardross, effected a policy of insurance on his life, the premiums on which were paid by them, but charged to Lord Cardross. On the death of Lord Cardross, in 1836, Messrs. H. and B. received the amount of the policy. None of the business was done in this Court, but there were claims for business done in the Palace Court, in suits removed to the Queen's Bench.

Erle shewed cause. The affidavit on which this rule was obtained is bad, not being intitled in any cause. A party has no right to come to the Court without intitling his affidavit in some cause. 2ndly, if there be any taxable items in this bill, the application should be made to the [546] Court in which the business was done. None of the business having been done in this Court, it has no jurisdiction to order the delivery of a bill.

Kelly, in support of the rule. It is no answer to say that the business was done in another Court. These persons are attorneys of this Court, which has therefore jurisdiction over them as its own officers, and will compel them to do that which they ought to do. They have received the money on this policy of insurance, and are compellable to account for the balance after satisfying their claim. [Parke, B. No doubt they are, in an action for money had and received: but this application must be made to some Court in which some of the business was done.] If the Court has power to interfere summarily, it ought to do so, and spare the personal representatives of Lord Cardross the expense and trouble of an action. *In re Aitkin* (4 B. & Ald. 47) is an authority to shew that the Court may interfere. There Abbott, C. J., says, "The question in this case is, whether this Court will compel an attorney to do that which in justice he ought to do? Now the rule by which the Court are to be governed, in exercising this summary jurisdiction over its officers, seems to me to be this: where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to

execute faithfully the trust reposed in him; but when the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction: and the case where the Court compelled the attorney to deliver over deeds placed in his hands for the purpose of making a conveyance, proceeds upon this ground; for inasmuch as a conveyance requires knowledge [547] of law, the trust is reposed by the client in the party in respect of his being an attorney." In this case no part of the business was done in the Court of Queen's Bench, still that Court compelled the delivery of a bill of costs.

PARKE, B. This rule must be discharged. With respect to calling on an attorney to deliver his bill for the purpose of taxation, the Courts have jurisdiction for that purpose only when an action has been brought on the bill, or, under the stat. 2 Geo. 2, c. 23, s. 23, when the greater part of the business was done in the Court to which the application is made. The Courts have, by construction, limited the qualification imposed by the statute, and now hold, that if any part of the business were done in the Court to which the client applies, it will suffice. But it is imperatively requisite that some portion of it be done there, and the affidavit upon which such application is founded must be entitled in the Court. Now, here there is no business done in this Court. The next question is, have we the power to grant this application, by virtue of the general jurisdiction of the Courts over their officers? The rule is that laid down *In re Aitkin*, that where an attorney is employed in preparing deeds or conveyances, or any other business properly belonging to the profession of the law, the obligation to discharge which faithfully arises out of the duty imposed on him in that character, and he receives money in that capacity, he must account with his principal for it. The only foundation of a claim in the present case is, that there is a policy of insurance remaining in the hands of these attorneys. But when called on to account, they deny that Lord Cardross or his administrators have any interest in it, as it was originally given to them for their own protection and benefit, although they afterwards attempted to charge Lord Cardross with the premium. But, suppose it even did belong to Lord Cardross, are the parties to be called on to give an account, [548] merely because he gives a security? Such a position would go far beyond the case of *In re Aitkin*. On the contrary, there is a case of *Ex parte Schwalbanker* (1 Dowl. P. C. 182), where Patteson, J., refused to call upon an attorney to account with a party for whom he had discounted bills, and refused to give an account of the balance.

The rest of the Court concurred.

Rule discharged with costs.

WARD v. THOMAS BYRNE AND HANNAH BYRNE. Exch. of Pleas. 1839.—The defendant gave a bond to the plaintiff, (a coal merchant in London), by which, after reciting that the plaintiff, at the request of the defendant, had received and taken the defendant into his service in the capacity of town-traveller and collecting-clerk, it was conditioned (*inter alia*) that the defendant should not, within two years after leaving the plaintiff's service, solicit or sell to any customers of the plaintiff; that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the employment of the plaintiff; and that he should not leave his employment without giving a month's notice:—Held, (Lord Abinger, C. B. dissentiente), that this condition prevented the defendant from setting up in business as a coal merchant on his own account, or being employed in that business by another person for the time limited.—Held, also, on motion in arrest of judgment, that the bond was void, on the ground that this was a restraint of trade unlimited in point of space.

[S. C. 9 L. J. Ex. 14; 3 Jur. 1175. Followed, *Nevanas v. Walker*, [1914], 1 Ch. 413. Distinguished, *Underwood v. Barker*, [1899] 1 Ch. 300. Referred to, *Allsopp v. Wheatcroft*, 1872, L. R. 15 Eq. 64; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 363; *Hill v. Hill*, 1887, 55 L. T. 771; *Davies v. Davies*, 1887, 36 Ch. D. 367; *Badische Anilin und Soda Fabrik v. Schott, Segner and Company*, [1892] 3 Ch. 447; *Maxim-Nordenfeldt Company v. Nordenfeldt*, [1893] 1 Ch. 630; [1894] A. C. 535.]

Debt on bond. The defendants pleaded, setting out the bond and condition on oyer. The condition recited, "that the plaintiff, at the request of the defendants, had

received and taken the defendant, Thomas Byrne, into his service, and did intend to keep and employ him, the said Thomas Byrne, in the capacity of a town-traveller and collecting clerk, or otherwise, as the said William Ward should think fit;" and it contained the following, amongst other stipulations:—"And also, if the said Thomas Byrne shall not, at any time within two years after leaving the service of the said W. Ward, his executors or administrators, either by himself separately, or in conjunction with or through the medium of any person or persons whomsoever, solicit or sell to any customer or customers of him the said W. Ward, with whom the said W. Ward hath at any time done business, for the sale of any goods, wares, or merchandize, or otherwise, or influence or apply to, or in any way interfere with, or allow his name to be used in order to influence, [549] or to cause application to be made to, any customer or customers aforesaid, or endeavour to influence, either by himself separately, or in conjunction with or through the medium of any person or persons whomsoever, or in any way interfere with, any customer or customers aforesaid for any purpose whatever; and also if the said Thomas Byrne shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he the said Thomas Byrne shall have left the employment of the said W. Ward; and also if the said Thomas Byrne shall not leave the employment of the said W. Ward, his executors or administrators, without giving him or them one month's notice of his intention so to do," &c. &c. The plea then averred performance generally of the above conditions.

The replication assigned breaches of all the conditions in the bond; but as all the issues, except the last, were found for the defendants, it is not material to state them.

As to the last part of the condition, the plaintiff assigned the following breach:—That the said Thomas Byrne, within the space of nine months after he left the employment of the said plaintiff as aforesaid, to wit, on &c., and on divers other days and times afterwards, and before the commencement of this suit, did follow and was employed in the said business of a coal merchant, directly and indirectly, contrary to the said condition, &c.

The rejoinder traversed the allegations in the replication, whereupon issue was joined.

At the trial, before Lord Abinger, C. B., at the London Sittings after last Hilary Term, it was proved that after Byrne had left the employment of the plaintiff, in August, 1838, he went into the service of the Protector Coal Company, in the situation of clerk. The Lord Chief Baron, being of opinion that the condition did not apply to the defendant's being employed in the situation of a clerk, but only to his being employed in the business of a coal [550] merchant on his own account, nonsuited the plaintiff, but gave him liberty to move to set that nonsuit aside, and enter a verdict with nominal damages. Miller, in Easter Term last, obtained a rule accordingly.

Kelly and Addison shewed cause in Trinity Term. The learned Judge was right in the opinion he expressed at the trial; for the condition does not mean that Thomas Byrne shall not be employed as a clerk, but only that he shall not carry on the business of a coal merchant on his own account, so as to interfere with the business of the plaintiff. In the former part of the condition, where the situation of clerk is mentioned, the word "clerk" is used; and if it had been intended that the party should not accept the situation of clerk or town-traveller to any other person, it would have been very easy to have used those words again. The condition cannot be taken to import that which would deprive the party of the means of getting his livelihood, and would at the same time be totally unnecessary for the protection of the plaintiff. The Court must put such a construction on the instrument, if possible, as will render it legal, *ut res magis valeat quam pereat*; but if the construction contended for on the other side be put upon it, the condition will be illegal, as being in restraint of trade: *Hitchcock v. Coker* (6 Ad. & Ell. 438, 1446; Nev. & P. 796, 804). There Tindal, C. J., in delivering the judgment of the Court on a writ of error in the Exchequer Chamber, says: "We agree in the general principle adopted by the Court below, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party, with whom the contract is made, can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." That is precisely applicable to the present case. Besides, the words, "If the said T. Byrne shall not [551] follow or be employed in the said

business of a coal merchant, either directly or indirectly," have an obvious meaning, as applied to a man carrying on trade, either in his own name, or under the name of another person; but they could not be properly applicable to his doing so as a clerk.

Erle and Miller, *contra*. For the purpose of construing this condition, the Court are to look to the intention and circumstances of the parties. The meaning of the clause is this:—The plaintiff says, "As you, the defendant, have acquired a knowledge of my trade, you shall not be employed in the business of a coal merchant, so as to make that knowledge available to any other person but me, for the space of nine months after leaving my employment." In that there is nothing either unreasonable or oppressive. If it had been meant to restrain the defendant only from being employed as a coal merchant, nothing could have been easier for the parties than to have adopted those words.

LORD ABINGER, C. B. I have not been able to change the opinion which I formed at *Nisi Prius*. The question is, how we are to construe the words, "Follow or be employed in the said business of a coal merchant?" Now in order to support this rule, and to find the verdict on that issue for the plaintiff, his counsel construe these words as if they were—"Follow the said business of a coal merchant, or be employed by any person who follows the business of a coal merchant;" that is to say, they introduce other words in order to force the construction against the natural import of the clause, and for the purpose of limiting and restraining the defendant's means of gaining his livelihood. It appears to me that the language of the condition ought to be construed strictly, and that we ought not to introduce any words in order to carry it further. It is said, on the other hand, that the words "follow" and "be employed" must be construed in a different sense, be-[552]-cause they follow each other. To see whether that be a sound observation, we may refer to the language of the instrument in other parts of it. It begins by stating, "Whereas the above-named William Ward, at the request of the above bounden Thomas Byrne and Hannah Byrne, hath received and taken the above bounden Thomas Byrne into his service:"—Is received different from taken, or are the words used synonymously?—"And doth intend to keep and employ him, the said Thomas Byrne, in the capacity of a town-traveller and collecting clerk or otherwise, as he the said William Ward shall think fit." Is the word "employ" there used in a different sense from "keep?" It appears to me that they are synonymous. And again, "So long as he the said Thomas Byrne shall continue and be employed in the service of the said William Ward;"—are the words "continue" and "be employed in" used necessarily? I have taken these three instances, and there are some others that occur of the same sort; and if they are in a sense unnecessary, and purely synonymous, why are we to suppose the framer of this instrument used the word "employed" in the latter part of the instrument in a more comprehensive sense than he did in the former? [His Lordship here read the clause in question.] It is contended that the word "employ" must be construed in a different sense to the word "follow," because they are found in the same sentence; but that is an argument I cannot accede to.

PARKE, B. When this case was first before the Court, I was strongly inclined to think that the view taken by my Lord Chief Baron was right, but on hearing the argument my mind has come to a different conclusion. A great deal of difficulty as to the construction certainly arises on the use of the words "follow" and "be employed;" but looking at the concluding words of the condition, and taking it all together, I have no doubt the intention of the parties was that the defendant should not follow on his own account [553] the business of a coal merchant, or be employed by another as such; and that, I think, is the true construction of this bond. No doubt there are tautological expressions used, but at the same time, if a different meaning can be given to them without doing violence to the sense, and if the contract would seem to import that such was the intention of the parties, we must give them a different meaning. Now this condition in the first place recites, that William Ward, at the request of Thomas Byrne as principal, and Hannah Byrne as his surety, had taken the said Thomas Byrne into his employ in the capacity of traveller and collecting clerk; and the condition is, that, as long as he shall continue and be employed in the service of the said William Ward, he shall honestly discharge his duties: and then comes the provision in question. Now the plaintiff might reasonably be desirous not only of guarding against the defendant's setting up on his own account, but it is also

reasonable to suppose that he would be anxious to prevent the possibility of any customer being carried away by their good will to the clerk or traveller, who of necessity comes most in contact with the customers; and therefore the plaintiff might wish to prevent his going into the service of any other coal merchant, because the customers might follow him; the condition therefore provides that the defendant "shall not solicit or sell to any customer of the plaintiff," and also that "he shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he the said Thomas Byrne shall have left the employment of the said William Ward: and also the said Thomas Byrne shall not leave the employment of the said William Ward, his executors and administrators, without giving them one month's notice." Where we find the word "employed" closely connected with the word "employment," we must understand it to be in the same sense; therefore he is not to be employed in the business of a coal merchant after he has left the employ-[554]-ment of the plaintiff. I own it appears to me that the word may well be understood in the same sense in both clauses, especially if we look to the object the plaintiff had in view, namely, preventing his trade from being interfered with in any way; and it seems to me that the true construction of this part of the instrument is to prevent Byrne from either following the business of a coal merchant on his own account, or being employed in the business of a coal merchant by another. That being so, I am of opinion that the verdict must be entered for the plaintiff, with one shilling damages.

GURNEY, B. I have no doubt what the intention of these parties was, but I have entertained some doubt whether their intention is sufficiently expressed; but on the whole, I think the words "shall not follow or be employed in the business of a coal merchant," prohibited the defendant from being the clerk of another who is in the trade and business of a coal merchant. The object was to prevent the defendant from interfering with the plaintiff's business,—the customers knowing him,—either by soliciting, selling, setting up on his own account, or being employed by another, for that is, and may fairly be construed to be, within the mischief it was intended to prevent. I therefore think that the construction sought to be put upon this condition by the plaintiff is the right one, and that consequently the verdict must be entered for the plaintiff with one shilling damages.

MAULE, B. The defendant's construction would lead to this consequence, that Byrne might be employed, supposing he were not employed on his own account, as the manager and conductor of a similar establishment, which clearly would be within the mischief which the parties must have intended to prohibit; for it would enable him materially [555] to interfere with the business of his old master. I think, therefore, there ought to be a verdict for the plaintiff.

Rule absolute.

The verdict having accordingly been entered for the plaintiff, Kelly moved for and obtained a rule to shew cause why the judgment should not be arrested, on the ground that the agreement declared on was void in law, as being in restraint of trade. Against this rule

Erle and Miller now shewed cause. The general proposition of law is, that an absolute and unqualified contract in restraint of trade is void. But if the restraint be limited and reasonable in respect of the mutual interests of the parties, it may be supported. And since the decision of the Court of Exchequer Chamber in *Hitchcock v. Coker* (6 Ad. & E. 438, 446), it is clear that the Courts will not consider the adequacy of the consideration for such a contract. If there be a valid consideration in point of law, and the restraint be limited either in space or in time, they will support the contract. This is indeed a much narrower restraint than in some of the cases. In *Hitchcock v. Coker* the agreement was, that the defendant should not at any time thereafter carry on the business of a druggist in the town of Taunton, or within three miles thereof; it was therefore altogether unlimited as to time, and limited only in space. In *Wickens v. Evans* (3 Y. & J. 318), the parties mutually agreed, during their respective lives, to abstain from interfering with each other in large districts of England, and the contract was supported. In *Bunn v. Guy* (1 East, 190), the restriction of an attorney's practice in London, and 150 miles round it, was held valid. In *Homer v. Ashford* (3 Bing. 322; 11 Moore, 91), the defendant agreed not [556] to work for, or be employed (as a saddler's ironmonger) by, any other person than the plaintiff, for the term of fourteen years. There the restraint of trade was limited as

to time only ; yet it was supported. *Davis v. Mason* (5 T. R. 118) is a similar case. In *Hunlock v. Blacklowe* (2 Saund. 156), there was no specification of any limit, either of time or space, but only a restriction as to a particular class of customers. In *Chesman v. Nainby* (1 Bro. P. C. 234 ; S. C. in K. B., 2 Lord Raym. 1456 ; 2 Str. 739), the restraint was extended even beyond the life of the party for whose benefit it was imposed, being applied to any house that she, her executors, or administrators, should remove to in order to carry on the trade. There the restriction was (as is stated by Tindal, C. J., in *Hitchcock v. Coker* (6 Ad. & E. 456)) obviously indefinite in point of time ; yet it was held valid. These authorities all tend to shew that it is not necessary that there should be any particular species of limitation upon the absolute restraint, in order to support the contract. In *The Gunmakers' Company v. Fell* (Willes, 388), the rule of law is thus stated :—"The general rule is, that all restraints of trade (which the law so much favours), if nothing more appear, are bad. . . . But to this general rule there are some exceptions : as, first, that the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained ; a contract or agreement, upon such consideration, restraining a particular person, may be good and valid in law, notwithstanding the general rule." *Bryson v. Whitehead* (1 Sim. & Stu. 74) appears to be directly in point for the plaintiff. There the Court decreed specific performance of an agreement for the sale of a secret in the dyeing trade, although one of the stipulations was that the plaintiff should not himself engage in the business of a dyer for twenty years. [557] [Parke, B. It appears from the report that a limit of space was introduced into the agreement, and that the decree so modified was with the consent of both parties.] In *Gale v. Reed* (8 East, 80), the party covenanted not to carry on the business of a rope-maker during his life, except on government contracts, and that he should during his life exclusively employ the plaintiffs, and no other person, to make all the cordage ordered of him. [Lord Abinger, C. B. There the prohibition clearly was not absolute, because the party was allowed to have a certain class of customers.] The public generally would be deprived of the benefit of his exertions in the way of trade. On these authorities, it is submitted that the contract in this case was valid, being limited in point of time, though not of space. It is impossible for the Court to enter into calculations as to the reasonableness of such a restriction, in the case of an extensive coal merchant trading throughout the kingdom ; it is obvious that, if it cannot be enforced, the defendant may most materially interfere with his master's connexions in distant parts of the kingdom. [Parke, B. You have not referred to the Year Book, 2 Hen. 5, pl. 26. There a bond not to carry on the trade of a dyer for half a year was held void.] (b)

Addison, contra. The principle of law applicable to this question is clearly laid down in *Mitchel v. Reynolds* (1 P. Wms. 181), and in *Hitchcock v. Coker*, viz. that where the restraint of a [558] party from carrying on a trade is larger and wider than the protection of the party with whom it is made can possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be void. Here there is a general and unqualified prohibition of the defendant's employment, either as principal or servant, throughout the kingdom, for the term of nine months. Could that be necessary for the protection of the plaintiffs' trading in the borough of Southwark ? There is no case which has gone the length of the present. In *Wickens v. Evans*, there was merely a division of the district before common to all the parties, for the mutual benefit and protection of each other. In *Bunn v. Guy* the restraint was within a range in which the clients of an attorney might well be supposed to live. In *Homer v. Ashford*, the covenant was, not to work for other persons while the party was in the service of the plaintiffs—a perfectly reasonable restriction. So in *Hunlocke v. Blacklowe*, the restriction was merely from

(b) "Det fuit port sur un obligation p. un John Dier, ou le def. alleage per Lod. per certain indenture quil niest avant, et sur condition q. si le def. ne usent my son art de Dier's craft dems le ville ou le pl.' etc., p. certain temps, s. p. demy an, q. l'obligation perdra sa force ; et dit q. ne usist my son art de Dier's craft en le temps limit, quil matr il voile averrer, et ddom' judgmens si action, &c. Hull :—A ma intent vous purres aver demure sur luy, q. l'obligation est voide, eo q. le condition encount' common ley ; et per Dieu si le pl' fuit icy, il irra al prison, tanq. il ust fait fine au roy."

an interference with the customers of the plaintiff. As to the case of *Bryson v. Whitehead*, the agreement actually enforced was not that which was originally sought to be enforced; and it was not decided that the original agreement was valid. In *Gale v. Reed*, so far from there being any absolute restraint on the covenantor, he was to be allowed a commission on all the goods which the plaintiffs should manufacture on his recommendation for solvent customers. But there are several authorities directly in point to shew that a restraint unlimited in point of space is void. The first is the Year Book, 2 Hen. 5, already referred to, and which is cited in the case of *The Tailors of Ipswich* (11 Rep. 53). And in *Claygate v. Batchelor* (Owen, 143), an obligation which restrained the total use of the party's trade for four years, was held void, as being "against the liberty of a freeman, and against the Statute [559] of Magna Charta;" and Anderson, J., said, that he might as well bind himself that he would not go to church. He referred also to *Hutton v. Parker* (7 Dowl. P. C. 739). This was clearly a restraint more extensive than was necessary for the protection of the plaintiffs; and if so, it is illegal and void.

LORD ABINGER, C. B. Upon a review of all the cases cited, it appears that there are two lights in which the Courts have considered this subject. One is, that the restraint of trade is against general policy, and that therefore such a contract is void. But certainly there have been some exceptions which present the subject in another light, and which shew that there may be a limited restraint of trade, where the party who is subject to the restraint is only doing justice, and no more than justice, to another person from whom he had received a benefit; and it is in that view that the question of consideration arises: that where the party makes a contract with another, having received a good consideration in law, and the contract does not bind him to go beyond what is necessary to do justice to the other party, a limited restraint on that ground may be supported in law. But if there is nothing in the contract to shew any consideration whatever, all such contracts are bad. If a man agreed to be bound to another without any consideration, it would be nudum pactum, and a void contract. So if the stipulation were, that he would never enter into any trade at all, it would be bad. But if he receive a consideration, the object of which is to compensate him for the injury he may do to another if he enters the trade without restriction, and to secure that other from any disadvantage of his quitting his service, then the restraint may be good, provided it is limited by the proper object of the contract. If, therefore, in the present case, the plaintiff had been contented to take from [560] the defendant an obligation which would not extend further than the injury to himself would extend by the violation of it, that might be reasonable. The parties stand thus:—The defendant served the plaintiff in his capacity of a coal merchant—probably to keep his accounts; and if the plaintiff had limited the restraint to his accepting any office as clerk to a coal merchant within a certain distance, so as not to prejudice the plaintiff, that might have been reasonable; but the construction which the Court have put, and I make no doubt properly put, upon the contract, is, that he is not to become a coal merchant, or serve one in any capacity whatever, for the space of nine months. This restriction extends to all parts of England, and to every species of engagement by which this person, during that time, could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The object was, to prevent the plaintiff's suffering from any influence the defendant might have acquired with his customers, and therefore if the restraint had been confined to the limits through which his customers extended, I do not know that the time would have made any difference: the party might, within that distance, have been tied up for his life. But the obligation which the defendant undertakes by his bond is, that he shall neither be nor serve a coal merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require, that it is an unreasonable restriction; it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade, and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff, or what the justice of the case demands. I think, therefore, that this contract [561] cannot be enforced, and that the judgment ought to be arrested.

PARKE, B. I am also of opinion that the judgment ought to be arrested. This is

an action upon a bond, by the recital of which it appears that the defendant was taken into the service of the plaintiff as a traveller and clerk; and the condition of the bond, amongst other things, is, that the defendant shall not follow or be employed in the business of a coal merchant for nine months. It restricts him from being employed in any manner—either as principal or agent, master or servant, in the trade of a coal merchant. The question is, whether that restraint is not void as being against the general policy of the law. I think it is so both on principle and on authority. The principle on which these cases stand is laid down in the case of *Mitchel v. Reynolds*: viz. that the public have an interest in every person's carrying on his trade freely, and therefore a general restraint of trade is void on a principle of public policy, whether entered into by bond or simple contract. But there are some exceptions to this rule; and one is, that the contract may be valid where there is a partial restriction only of trade, and where it is only co-extensive with the interests of the person with whom the contract is made. I cannot express the rule on this subject more clearly than has been done by Tindal, C. J., in *Hilcock v. Coker*, where he says: "We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Now a restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of en-[562]-forcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made; and all the cases cited appear to turn on the question as to the limit of space within which the restriction should extend. Now where a limit as to space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade,—he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But when a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return: and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a total restriction on trade, limited only as to time. The case cited from the Year Book, to which I before referred, and in which Mr. Justice Hull expressed himself so strongly, was a case where the restriction was that the party should not carry on the business of a dyer for half a year; and he held that to be clearly and absolutely void. There is, in short, no authority for the position that any absolute restriction, limited only as to time, can be imposed, except the dictum of Willes, C. J., in the case of the *Gunmakers' Company v. Fell*; but his attention was not called to any particular case of a restriction in time only, and he probably used the general language referred to, with reference to those instances where the restriction was partial both as to time and place, which occurs in most of the cases. It seems to me, therefore, that there is no authority in favour of the position, that there can be a general restriction, limited only as to time, and that this case falls within the rule laid down by Tindal, C. J., viz. that this is a general prohibition from [563] carrying on trade, which is more extensive than the interests of the party with whom the contract is made can possibly require. On that ground, I think the judgment ought to be arrested.

GURNEY, B. I am of the same opinion. Generally speaking, restraints of trade are unlawful; but there may be a partial restraint, provided there be a good consideration for it. Notwithstanding there is a consideration here, the restraint is general and unlawful. What is there in the trade of a coal merchant in London, whose interests could be injured by any person setting up as a coal merchant, or assisting another person in that trade, at Exeter or York? Yet the defendant cannot do either the one or the other within the terms of this contract.

ROLFE, B. I am of the same opinion. The general policy of the law is against these restrictions, and it is only in deference to the convenience of the trading part of the community that certain exceptions to the general rule have been allowed. Those exceptions have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does

not extend remains exactly as it did before the restriction took place. But in this case the whole of the public is restrained during the period in question, and the only argument is, that this is to endure only for a short time; that is to say, that what the law does not allow, is to be tolerated because it is of short duration. I see no principle in favour of such a conclusion. I do not think that is the law; and I consequently concur with my learned Brothers, in saying that this contract is void.

Rule absolute.

[564] *DOE D. WAWN v. HORN AND OTHERS.* Exch. of Pleas. 1839.—Where houses had been pulled down by a Railway Company, and a railway constructed on the site of them:—Held, that this was such an occupation as amounted to an actual ouster of a tenant in common of the premises.

[S. C. 9 L. J. Ex. 129.]

A nonsuit having been entered in the former action between these parties, pursuant to the judgment of this Court (ante, vol. 3, p. 339), the lessor of the plaintiff brought a fresh ejectment, having first determined, by a notice to quit, the tenancy of Messrs. Horn & Co. in the premises. The cause was tried before Maule, B., at the last Durham Assizes, when it was again objected for the defendants, that the occupation of the premises by the Durham and Sunderland Railway Company did not amount to an actual ouster. The learned Judge reserved the point for the decision of the Court, and the verdict passed for the plaintiff.

Alexander now moved, pursuant to leave reserved, to enter a nonsuit. On the former discussion of this case, the Court held the first objection, that there was an outstanding demise, to be a complete answer to the action, and it did not become necessary to determine the question as to the ouster. [Parke, B. It was in fact considered and decided, although it was not necessary to do so.] There is no disseisin of the lessor of the plaintiff, nor any prevention of the same sort of occupation which he had before the construction of the railway. [Lord Abinger, C. B. The matter will not bear an argument: how can the land be in any sense in the occupation of the lessor of the plaintiff? Parke, B. You may consider the point as settled: the Court went out of their way to settle it, in order to put an end to the question.]

Per Curiam. Rule refused.

[565] *MARKS v. BENJAMIN.* Exch. of Pleas. 1839.—In an action of debt to recover the penalty of 100l. given by the statute 25 Geo. 2, c. 36, s. 2, for keeping an unlicensed house for public dancing, &c., it appeared that music, dancing, &c., had occasionally taken place at the defendant's house (a public-house); that no money was taken by him for admission, but the rooms were let to persons who sold tickets, and received money for admission at the door: but there was no direct evidence that the defendant knew of this practice.—Held, that, upon these facts, there was evidence to go to the jury of a keeping of the house by the defendant for the purposes mentioned in the statute; and that the Judge was wrong in directing a nonsuit.

[S. C. 9 L. J. M. C. 20; 2 Moo. & R. 225; 3 Jur. 1194. Followed, *Syers v. Conquest*, 1873, 28 L. T. 402. Distinguished, *Milnes v. Bale*, 1875, L. R. 10 C. P. 591. Referred to, *Garrett v. Messenger*, 1867, L. R. 2 C. P. 584.]

Debt, to recover from the defendant a penalty of 100l., under the statute 25 Geo. 2, c. 36, s. 2, for keeping a house for public dancing, music, and other public entertainments, without a licence from the quarter sessions. Plea, not guilty. At the trial before Lord Abinger, C. B., at the London Sittings after Trinity Term, it appeared that the defendant was a publican, and that music, dancing, and masquerades had occasionally been held at his house, where, from its vicinity to the great synagogue, Jewish marriages were frequently celebrated. No money was taken at the door, or elsewhere, by the defendant for admission, but the rooms were let to a dancing-master, and to other persons, the plaintiff amongst others, who sold tickets, and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice. Upon this evidence, Lord Abinger was of opinion that

the defendant did not come within the meaning of the statute, and nonsuited the plaintiff. In the early part of this term, Humfrey obtained a rule nisi to set aside the nonsuit, and for a new trial, on the ground of misdirection; against which

Jervis shewed cause. In order to make the defendant liable to this penalty, it must appear that the room was kept by him for public dancing, music, and entertainment. In all the reported cases, it appeared, either that the defendant, the master of the house, himself kept the house for such purposes, or at all events, that it was so used with his knowledge and for his profit, and regularly kept open for public admission at stated intervals. In *Clarke v. Searle* (1 Esp. 25), the present point did not directly arise; the [566] question raised there was, whether the statute applied except to houses where dancers, &c., were kept for the purpose of exhibiting as performers; and Lord Kenyon held that it extended also to houses kept for the purpose of dancing, to which persons were admitted for money. In *Archer v. Willingrice* (4 Esp. 186), it appeared that the defendant was a publican, and that his house was opened every Monday evening for the reception of persons, male and female, who met there to dance; and that a sum of 1s. 6d. was paid for admission, not, however, to the defendant, but to the dancing master. Lord Ellenborough said that the taking of money was sufficient evidence that the defendant was the owner of the house, and that it was sufficient to shew that there had been dancing publicly carried on in his house without its being licensed, to subject him to the penalty. There the house was regularly used, on stated days, for the purpose of public dancing. But in *Bellis v. Burghall* (2 Esp. 722), a room kept by a dancing master for the weekly instruction of his scholars and of subscribers, and to which persons were not indiscriminately admitted, was held not to be within the statute. That case nearly resembles the present. In *Bellis v. Beal* (ibid. 592), it was held that it was not necessary that the room should be kept or used solely for the purposes prohibited by the statute, if it was regularly open for such purposes. *Green v. Botheroyd* (3 C. & P. 471) is to the same effect. *Shutt v. Lewis* (5 Esp. 128) was a case very similar to the present. There the room had been taken from the defendant, the owner of the public-house, by one Velasco, a Jew, for eight days, the period of the Jewish passover, for the entertainment of people of the Jewish persuasion during that period: it appeared that money was taken at the door for admission, which was paid for [567] the fiddler. Lord Ellenborough directed a verdict for the defendant, on the ground that this appeared to be a merely temporary appropriation of the room to that mode of entertainment, and that it was proved not to be used for any such purpose at other times; and that this could not be a keeping of a house for public dancing and music; the room was not appropriated to any such purposes, but at all other times used as part of the public-house. There can be no essential difference between an opening of the house for such a purpose on one occasion for eight days, or at uncertain intervals for particular occasions: in neither case is it kept for the purpose, as when it is appropriated to it at regular and stated intervals.

Humfrey, contra. All that it is necessary to shew, in order to entitle the plaintiff to a new trial, is, that it was a question of fact for the jury, whether the defendant kept the house for any of the purposes mentioned in the statute. [Lord Abinger, C. B. I thought there was no evidence that it was kept for public dancing—that an incidental use of it for the benefit of another person, on particular occasions, was not sufficient; any more than in the case of ladies of high quality, who sometimes allow concerts to be held at their houses for the benefit of particular singers; but the house is not dedicated to that purpose.] But if every singer who chose held a concert there, and a great number of persons were admitted, it would be a question for the jury whether the case was not within the statute. That, however, is not like the case of a keeper of a tavern, who obtains a profit on all such occasions by the sale of his liquors. In *Clarke v. Searle*, it does not appear that more than a single instance of the use of the house for dancing was proved. *Archer v. Willingrice* is precisely like the present case, with the exception that there the dancing was on every Monday; the objection that it should be shewn to be for the defendant's profit was [568] distinctly overruled; and the regularity of the intervals can make no difference. [Lord Abinger, C. B. Did it appear there whether the defendant knew that the dancing master received the money?] If that be material, it is a question for the jury, and there was in the present case ample evidence to go to the jury that he did. He is the keeper of the house; in his house, at various irregular intervals, parties hold balls and

masquerades, at which any person decently dressed is admitted on payment of a given sum. Can it be possible that he does not know that fact? But even assuming that the defendant did not know that money was taken, he may yet be liable. It is not matter of law, but is entirely a question for the jury, whether he kept the house for the purposes forbidden by the statute. In *Bellis v. Burghall* the action was not brought against the keeper of the house, but against the dancing master; he clearly did not keep the house. *Shutt v. Lewis* was a case of a user on a single special occasion. Here it ought to have been left to the jury to say whether the defendant knew the manner in which the house was used.

LORD ABINGER, C. B. My learned Brothers think there was evidence to go to the jury that the house was kept for the purpose alleged, and that I ought to have left it to them. Not one of the cases cited appears to give the least assistance in construing the statute. The meaning of the act is perfectly plain; the house, &c., must be kept for and dedicated to the purpose thereby prohibited, among others; and the mere incidental use of it in that manner would not make the party liable.

PARKE, B. It is enough for the present to say that we think the case ought to have been left to the jury. There is no doubt or difference of opinion on the law. In the first place, the house or room must be kept with the defendant's knowledge; secondly, it must be kept for the [569] purpose prohibited by the statute; there must be something like an habitual keeping of it, which, however, need not be at stated intervals; thirdly, it must be public, to which all persons have a right to go, whether gratuitously or on payment of money, no matter whether paid to the defendant or not, if he knows of the payment. All these are questions to be left to the jury. There would be a difficulty in making the owner of a private house liable, because that is kept for the purpose of occupation, whereas a public-house is kept for entertainment; and a much less number of instances may be sufficient to render the owner liable for keeping it for the purposes mentioned in the statute.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

HILLS AND ANOTHER v. THE LONDON ASSURANCE CORPORATION. Exch. of Pleas.

1839.—An insurance was effected on wheat shipped in bulk, and valued at 1600l., warranted free from average except general, or the ship were stranded. On the voyage the ship met with tempestuous weather, and made considerable water; and in pumping it out, wheat to the value of about 75l. was pumped out with the water and lost:—Held, that the plaintiffs could not recover as for a total loss of the part so lost.

[S. C. 9 L. J. Ex. 25.]

Debt on an account stated. Plea, (by statute), non assumpsit. By order of Lord Abinger, C. B., the following case was stated for the opinion of this Court:—

The plaintiffs are merchants in London, and shipped at Königsberg, on or about the 12th of August, 1837, a cargo of wheat, their property, in and on board the ship "Frederica Louisa," Voeltz, master, to be carried to London.

On the 14th of August, 1837, the plaintiffs effected an insurance thereon for 1500l. with the London Assurance Corporation, by a policy under their seal bearing that date, and which insurance was declared to be on ninety-two lasts of wheat, valued at 1600l., on board the above-mentioned ship, on a voyage from Königsberg to London, including [570] the risk of craft. By the memorandum at the foot of the policy, the said insurance was declared to be "free from all average on corn, flour, fish, salt, saltpetre, fruit, and seeds, except general, or the ship should be stranded; free from average on sugar, rum, hides, skins, hemp, flax, rice, and tobacco, under 5l. per cent.; and on all other goods, the freight, and ship, under 3l. per cent., except general, or the ship be stranded." The ship, perfectly seaworthy, sailed on the 14th of August, 1837, from Königsberg, on her voyage to London, with the wheat on board. After leaving that port, the vessel experienced a heavy gale and storm and tempestuous weather, and lost some of her sails, and received damage in her masts, yards, rigging, and bulwarks; a squall during the gale threw the vessel on her side, and her cargo shifted. From the heaviness of the sea, the vessel also laboured and was strained, and during the gale made considerable water; and after the cargo shifted,

and during the gale, the salt-water got amongst the wheat. The crew were obliged to pump the vessel from time to time to keep her free. In the night of the 28th of August, 1837, the weather moderated, and it was then found (as the fact was) that, in pumping the vessel, wheat was brought up mixed with water, and which continued to increase hourly, and at last the pumps were choked. Wheat so injured, amounting in value to the sum of 75l., was so pumped up with the water from the pumps, and thereby wholly lost in the sea. The vessel afterwards put into Swinemunde in distress, and the cargo was landed there, to enable the parties to repair the vessel. A part of the cargo was found to be so injured as to be unfit for food, and there sold. The vessel, after undergoing a partial repair, her hull being found to be perfectly tight, ultimately arrived at the port of London, with the residue of the cargo, which was delivered to the plaintiffs.

The question for the opinion of the Court was, whether or not the plaintiffs were entitled to recover the value of [571] the wheat so pumped out and lost; if so, the judgment was to be for the plaintiffs by confession, for the said sum of 75l., being the value thereof as aforesaid; if not, then a judgment of *nolle prosequi* was to be entered for the defendants.

W. H. Watson, for the plaintiff. This is a total loss of part of the cargo, and not an average loss on the whole: and it clearly is a loss by perils of the seas. *Davy v. Milford* (15 East, 599) is an authority in favour of the plaintiff's right to recover as for a total loss. That was a policy of assurance for 200l., on flax valued at 400l., and warranted free of particular average. The vessel was wrecked on the voyage, and the assured did not abandon, but laboured to save the cargo, and did in fact save one-sixteenth of it, but much damaged: and it was held, that they were entitled to recover as for a total loss of the other fifteen sixteenths. In *Lewis v. Rucker* (2 Burr. 1170), Lord Mansfield lays down the following rule:—"If part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be 100 hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of these ten hogsheads, without any regard to the price for which the other ninety may be sold." The same principle applies to any number of quarters of wheat shipped in bulk; each is capable of a several and distinct valuation. [Lord Abinger, C. B. Sugar and other goods of the same kind are ordinarily packed in distinct packages, and insured per package. If the cargo lies in mass, like wheat, you may value the whole at so much per quarter, but not each quarter.] That argument would equally have applied in *Davy v. Milford*, because there a part of each package was saved. In *Cologan v. London Assurance Company* (5 M. & Selw. 447), one of the questions was, whether, part of the [572] cargo (which was wheat in bulk) having become so damaged by sea-water that it was thrown overboard by order of the public authorities at Bermuda for the sake of the public health, this amounted to a total loss of that part of the cargo? It did not become necessary to determine this point, because the Court held that there was a total destruction of the adventure; but Abbott, J., said—"It is not necessary to offer any opinion on the second point; if it were, I should strongly incline to the conclusion, that this was a total loss of part." And Holroyd, J.—"On the other point, the inclination of my opinion is, that after part of the whole cargo was thrown overboard, there was a total loss by perils of the seas of that part." *Hedburg v. Pearson* (7 Taunt. 154; 2 Marsh. 432), which appears to be an authority against the plaintiffs, is distinguishable. There, upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, although less than 3 per cent. on the whole cargo, it was held that this could not be a total loss. But there the substantial insurance was on the hogsheads of sugar; and each hogshead came safe; here it is generally on wheat. But the case is also subject to observation. It appears to have been little discussed; and the Court considered the question as having been decided by the jury, who had refused to find for the plaintiffs, subject to a reservation of the point; whereas it certainly was matter of law and not of fact, unless some usage were proved, which was not the case. Suppose a loss by capture; and the vessel was afterwards recaptured, but that while she was in the enemy's hands, part of the cargo was taken out; would not that be a total loss of that part? Here there was an absolute and entire destruction of part of the cargo by a peril of the sea—it no longer exists. [Alderson, B. Is not there an [573] average loss on the whole bulk?] If the parties had known, while pumping, that a loss of so much of the corn would be a necessary

consequence, then it would certainly have been a case of general average; being a sacrifice of part to save the rest.

R. V. Richards, contra. The clause against particular average is said to have been first introduced into policies about the year 1749; (a) and considering the vast number of vessels since then employed in carrying corn and other goods in bulk to this country, and how frequently the pumping out of part of the cargo—as in the case of salt, or saltpetre—must have been unavoidable, it is a strong argument against this action that there is not a single instance to be found of such a claim as the present. The intention of the warranty against particular average was expressly to relieve underwriters against small claims in such cases. This is clearly not a case of general average; because the loss was not occasioned by the act of the master and crew for the safety of the vessel; nor was there any stranding. Here about one-twentieth part of the cargo has been pumped out. If this be a total loss of that part, then, however minute the portion lost, the same conclusion must follow. In the cases cited on the other side, the consideration, whether there was a total loss or not, turned partly upon the question of abandonment. In *Cologan v. London Assurance Company*, it was held to be a total loss at the time of abandonment, unredeemed by subsequent events. In *Davy v. Milford*, the goods were in separate packages; here the wheat was in bulk. This subject was fully considered in *Roux v. Salvador* (3 Bing. N. C. 265; 4 Scott, 1), where the doctrine of abandonment, which had formerly been carried to an absurd length, was limited and defined. There, [574] however, the jury found that the hides which were thrown overboard could not have been carried, quâ hides, to the port of discharge. It is clear upon a multitude of authorities, that if this corn had remained on board, however injured, the insurers would not have been liable as for a total loss. *Anderson v. Royal Exchange Assurance Company* (7 East, 38) is in point for the defendants. There the vessel, which sailed with corn insured by a policy with a memorandum to be free from all but general average, was stranded, and continued under water at high tide for nearly a month, during which time the crew, at low water, were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried. It was held that the assured, not having given notice of abandonment during the period when the vessel was under water, were not entitled afterwards to abandon, and claim as for a total loss, the goods subsisting in specie. The case of *Davy v. Milford* was cited and distinguished in *Hedburg v. Pearson*, where the Court clearly held the loss not to be total, some part of the sugar in each hogshead having been saved. [Lord Abinger, C. B. In *Davy v. Milford* there was a stranding.] But further, this is not a loss by perils of the seas within the terms of the policy. The loss was by the effect of pumping, which is an ordinary incident of the voyage. Suppose there were a loss by jettison, (there being no clause in the policy providing for the case of jettison), would it be considered as arising from perils of the sea? Or suppose the captain were obliged to sell some of the cargo in order to raise money, when driven into harbour by perils of the seas—the insurers would not be liable for the part so sold. But at all events, this being a shipment in bulk, unless the Court can consider every grain of corn as separately insured, this cannot be held a total loss of a part.

[575] W. H. Watson, in reply. This is clearly a loss by perils of the seas: *Lawrence v. Aberdeen* (5 B. & Ald. 107). [Lord Abinger, C. B. I think we must so consider it in this case.] That there is no former instance in the books of such a claim, may have arisen as well from its never having been disputed, as from its never having been made. *Davy v. Milford* is not distinguishable from the present case. In *Anderson v. Royal Exchange Assurance Company*, the whole of the corn remained in specie; here the part in respect of which the claim is made was wholly lost. The cargo is divisible in its nature. [Alderson, B. How?—into particles certainly; if you can say the insurance is on each particle, then you may say there has been a total loss of so many particles. Maule, B., referred to the report of *Hedburg v. Pearson* in Marshall's Reports, where it appeared that Gibbs, C. J., said, "Even taking it to be a case for the opinion of the Court, he did not think the Court would decide otherwise."] But it may be also argued that this is in the nature of general average: the pumping was necessary for the safety of the ship, and it was therefore the destruction of a part for the safety of the whole. [Lord Abinger, C. B. It was not necessary to

(a) So stated by Dunning, in his argument in *Wilson v. Smith*, 3 Burr. 1551.

part with any of the grain, but only to get rid of the water. We will consider the point; but it seems to me, that a jury would be more fit to decide the question than we are.]

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was an action on a policy of insurance, and the question was, whether a loss amounting to a very inconsiderable portion of a cargo of wheat, which had been shipped in bulk, was to be considered as a partial [576] or as a total loss. If it were a total loss, it would not fall within the memorandum of warranty against particular average in the policy. The case stated that the wheat was shipped in bulk, that it was insured to the amount of 1500l., and that the loss which had taken place, amounting to about 75l., resulted from the wheat being pumped out of the vessel along with the sea water, which during tempestuous weather had got in.

We are clearly of opinion that this is no more than an average loss, and therefore that the defendants are not liable to make it good. The case of *Davy v. Milford* was cited for the plaintiffs as an authority in point. But that was the case of a loss on a policy of insurance upon sugar, where each hogshead was separately valued and insured; and therefore a loss of one was properly held to be a total loss of that hogshead. But, on the other hand, in the case of *Hedburg v. Pearson*, where a part of each hogshead was saved, the jury having stated their opinion that the loss was an average one, and found accordingly, the Court held that they were right in so doing. The law had been settled in many cases before, that where the insurance is upon each package separately, it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no average loss; and there cannot in such a case be any total loss of a portion only of the cargo. The judgment in the present case must therefore be for the defendants.

Judgment for the defendants.

[577] VAUGHAN v. GLENN AND ANOTHER. Exch. of Pleas. 1839.—The plaintiff declared, in the first count, on a charter-party, whereby the defendant agreed to sail to Honduras, and there take on board a full cargo of mahogany, &c., and therewith proceed to London or Liverpool, and deliver the same on being paid freight, &c.; and alleged as a breach that part of the cargo delivered by the plaintiff at Honduras, and received by the master and crew, was not carried or delivered according to the agreement. The second count stated, that, in consideration that the plaintiff had caused certain goods, to wit, &c., to be taken to and loaded on board of the defendant's vessel, in the bay of Honduras, to be conveyed to England, for reasonable freight, &c., the defendant promised the plaintiff that due and proper care should be taken of the goods until they were loaded, &c.; and assigned as a breach, that due and proper care was not taken of the goods until they were loaded; but on the contrary, by the negligence of the defendants, the goods, after they were delivered to the defendants, and whilst in their custody to be loaded, were wholly lost:—Held, that these counts disclosed distinct subject-matters of complaint, and that the plaintiff was entitled to retain them both.

[S. C. 9 L. J. Ex. 118.]

Assumpsit. The first count of the declaration was framed on a charter-party, dated the 15th of May, 1838, made between the plaintiff and defendants, owners of a ship called the "Kent," then lying at Liverpool; whereby it was agreed that the ship should, on or before the 31st of May then instant, sail and proceed to Belize, in the bay of Honduras, and there or at the usual places of loading in the bay, take on board a full cargo of mahogany, &c., which the plaintiff thereby engaged to ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, &c., and being so loaded, should therewith proceed to London or Liverpool, and deliver the same on being paid freight at 4l. per ton, &c. The count, after an allegation of mutual promises, averred that the ship sailed according to the agreement,

and on the 1st of October arrived at a usual place of loading in the bay of Honduras, viz. Ulloa; and that the plaintiff there shipped a full cargo, not exceeding &c., to wit, 500 tons of mahogany, in this, to wit, that he did then and there, in the usual and accustomed way there, and so as that the same might be thereupon received and taken on board the said ship for the said voyage to England, deliver the said mahogany to the master and crew of the said ship, who received the same from the plaintiff for the purpose of being, and so as that the same might be, taken on board of and carried and conveyed in the said ship on the said voyage to England. Breach, that although part of the cargo was taken on board, and carried and conveyed on the said voyage to England, and although the ship pro-[578]ceeded therewith to Liverpool, according to orders theretofore received in that behalf, and there delivered the said part of her cargo; and although the plaintiff performed all the conditions of the said agreement on his part, and paid all the residue of the freight, yet the whole of the cargo so delivered and received as aforesaid was not taken on board and carried and conveyed and delivered in and from the said ship; but on the contrary thereof, part of the cargo so delivered and received as aforesaid, to wit, 100 tons of mahogany, &c., was not, nor were, nor was any part of the same parcel of such cargo, taken on board, or carried, conveyed, and delivered, according to the true intent and meaning of the said agreement; but therein the defendants wholly failed and made default, and thereby the said part of the said cargo became and was wholly lost to the plaintiff.

The second count stated, that, in consideration that the plaintiff, at the request of the defendant, had caused certain goods, to wit, 100 tons of mahogany, of great value, &c., to be taken to and loaded on board of a certain vessel called the "Kent," then lying in the bay of Honduras, for the purpose of being carried and conveyed to England, for reasonable freight and reward to the defendants, the defendants promised the plaintiff that due and proper care should be taken of the same goods, until the same should be loaded on board the said ship. Averment, that the plaintiff did deliver the said goods to the defendants for the purposes aforesaid. Breach, that due and proper care was not taken of the said goods, until the same were loaded on board the said ship; but on the contrary thereof, so little care was taken of the same, that by and through the negligence, carelessness, and improper conduct of the defendants in the premises, the said goods, after they were delivered to the defendants as aforesaid, and whilst in their custody to be loaded on board the said [579] vessel as aforesaid, and before the commencement of this suit, to wit, on &c., became and were wholly lost.

The particulars of demand were as follows:—"The plaintiff claims 158l., the price and value of eight logs of mahogany delivered to the crew of the 'Kent,' at Ulloa, in the Bay of Honduras, in October, 1838, and for the recovery of which he will resort to each count of the declaration."

Crompton having obtained a rule to shew cause why one of the above counts should not be struck out of the declaration,

J. Henderson shewed cause. These counts disclose distinct causes of action. The first is on the express contract in the charter-party, to receive the goods at Honduras and convey them to England; the other on the contract implied by law to use due diligence in taking them from the shore to the ship. The case is precisely similar in kind to that of freight on a charter-party, and freight *pro rata itineris*, which is one of the exceptions mentioned in the rules of Hil. Term, 4 Will. 4. The judge could not in this case amend from one count to the other.

Crompton, contra. These counts only allege two different bailments on which the same goods are stated to have been delivered to the defendants. As to part at least of the purposes for which the goods were received, the same complaint is introduced into both counts. One part of the breach in the first count is, that the goods were not taken on board the ship, so that under it the plaintiff could prove a breach of that part of the bailment.

LORD ABINGER, C. B. I think these counts ought to stand. Under the first, the plaintiff must prove a breach [580] of the charter-party, otherwise he makes out no case. Then if it turns out, on the construction of the charter-party, or by usage, that it does not extend to cover the liability between the shore and the ship, the plaintiff seeks by the second count to recover for the breach of the contract implied by law to take care of the goods from the shore to the ship.

PARKE, B. These are really different contracts: in the first count the plaintiff

goes on the charter-party, in the second on a contract to which the charter-party may not be applicable.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

THE CHANCELLOR, MASTERS, AND SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE *v.* CHARLES BALDWIN. Exch. of Pleas. 1839.—Debt on bond against a surety. The condition recited, that the Chancellor, Masters, and Scholars of the University of Cambridge had appointed B., C., & J. their agents for the sale of books printed at their press in the University, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned, that if the said B., C., & J. and the survivors and survivor of them, and such other person and persons as should or might at any time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said Chancellor, &c., or their successors, for the sale of books as aforesaid, did and should duly account to the said Chancellor, &c., and their successors, for all books delivered or sent to them or any or either of them for sale as aforesaid, and should pay all monies which should become payable to the said Chancellor, &c., in respect of such sale, then the obligation to be void, &c.:—Held, that by the retirement of J. from the partnership of B., C., & J., the defendant, as their surety, was discharged from all further liability on this bond.

Debt on bond, dated the 20th of April, 1821. The declaration set out the bond and condition, which, after reciting that the said Chancellor, Masters, and Scholars had appointed one Robert Baldwin, one Richard Cradock, and one William Joy, their agents for the sale of books printed at their press at the said University of Cambridge, and that, previous to the said appointment, it was agreed [581] that the said Robert Baldwin, Charles Cradock, and William Joy, together with one sufficient surety, should enter into a bond to the said Chancellor, Masters, and Scholars in the sum of 1500*l.*, conditioned as thereafter was expressed, and that the defendant had offered to enter into such bond with the said Robert Baldwin, Charles Cradock, and William Joy, and the said Chancellor, Masters, and Scholars had approved of him as a sufficient surety; it was conditioned, that if the said Robert Baldwin, Charles Cradock, and William Joy, and the survivors and survivor of them, and such other person and persons as should or might at any other time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said Chancellor, Masters, and Scholars, or their successors, for the sale of books as aforesaid, did and should truly account to the said Chancellor, Masters, and Scholars, and their successors, for all books delivered or sent to them or any or either of them for sale as aforesaid, and did and should well and truly pay to the said Chancellor, Masters, and Scholars, and their successors, all monies which should or might become payable to them for or in respect of such sale of books as aforesaid, then the said therein above written obligation should be void, but otherwise should remain in full force: Provided, and it was thereby declared, that if the said defendant should at any time become unwilling to continue surety as aforesaid, and should signify such unwillingness by notice in writing delivered to the Vice-Chancellor of the said University for the time being, or at his residence in the said University, then and in such case the said Chancellor, Masters, and Scholars, and their successors, should not be entitled to recover from the defendant, his heirs, executors, or administrators, any penalty or sum of money whatsoever for or in respect of any books delivered or sent to the said Robert Baldwin, Charles Cradock, and William [582] Joy, or any or either of them, or any other person or persons acting in partnership with them or any or either of them as agent or agents as aforesaid, after one week from the delivery of such notice as aforesaid, or for or in respect of the sale or produce of any such books, or any account, matter, or thing relating thereto: as by the said writing obligatory, and the condition thereunder written, will more fully appear. And the said Chancellor, Masters, and Scholars say, that after the making of the said writing obligatory, to wit, on the 1st January, 1832, and on divers other days between that day and the 1st of January, 1838, divers, to wit, 200,000 books theretofore printed at the press of the Chancellor, Masters, and Scholars of the said University, in the said University, of great value, to wit, of the value of 20,000*l.*, were delivered and sent by the

Chancellor, Masters, and Scholars of the said University for the time being to the said Robert Baldwin and Charles Cradock for the sale thereof, the said Robert Baldwin and Charles Cradock, during all the time last aforesaid, being and acting as agents of the Chancellor, Masters, and Scholars of the said University for the time being, for the sale of books printed at their press in the said University as aforesaid, and carrying on trade in partnership and together, and the said William Joy having before the last-mentioned time or any part thereof, to wit, on the 22nd of November, 1827, retired from partnership with the said Robert Baldwin and Charles Cradock, and ceased from thenceforth to be or act as agent of the Chancellor, Masters, and Scholars of the said University for the sale of books as aforesaid. And the Chancellor, Masters, and Scholars of the said University further say, that at the commencement of this suit, to wit, on the said 1st of January, 1838, divers monies, amounting in the whole to a large sum, to wit, the sum of 1000l., became and were due and payable to the Chancellor, Masters, and Scholars of the said University [583] for the time being, from the said Robert Baldwin and Charles Cradock, for and in respect of the sale of the said books so delivered and sent as aforesaid. Yet the Chancellor, Masters, and Scholars of the said University aver, that the said Robert Baldwin and Charles Cradock have not, nor has either of them, well and truly paid to the said Chancellor, Masters, and Scholars of the said University, in the said writing obligatory mentioned, or their successors, the said monies which so became payable to them as aforesaid, or any or either of them or any part thereof, but have neglected so to do. By reason whereof, &c.

Special demurrer, and joinder in demurrer.

The point stated for argument on the part of the defendants was, that, by the retirement of William Joy from the partnership of Baldwin, Cradock, & Joy, the defendant, as their surety, was discharged from all further liability on the bond.

The case was argued in Easter Term last by

Wightman in support of the demurrer. The question is, whether on the retirement of one partner from the firm, the surety is or is not discharged? It is submitted that he is discharged. The continuance of two of the three persons, Baldwin, Cradock, & Joy, in partnership, after the retirement of one, is not a term in the condition. The states of things contemplated, under which the defendant was to be liable, are, when a partner dies, or a new one is introduced, or all carry on trade together. Retirement is substantially different from all these; the retiring partner might perhaps take with him all the assets of the firm: so Mr. Joy might be the only substantial partner, or the defendant might have other good reasons for restricting his responsibility. The parties to account are "R. Baldwin, C. Cradock, and W. Joy, and the survivors and survivor of them, and such other person and persons, &c." The books [584] are to be sent "to them or either of them," that is, being in partnership as previously mentioned. The cases of *Weston v. Barton* (4 Taunt. 678), and *Simson v. Cooke* (1 Bing. 452), are in point. In the one case the words "or any or either of them," and in the other the words "or either of them," were similarly introduced, and yet they were held to be restricted by the recitals, to any of them in partnership. [Parke, B. The recital mentions the three, but the condition may go further.]

Cowling, contra. It is not disputed that the condition may be qualified by the recital, but, as observed by Lord Ellenborough, C. J., in *Parker v. Wise* (6 Mau. & Selw. 239, 247), "all this imports that it is to be gathered from the recital that the intention of the parties requires that the condition should be qualified." Here the contrary appears, for the defendant expressly continues his liability after the death of one partner, and also the introduction of a new one, which negatives any intention of restricting his liability to the continuance of the three in partnership, as was considered to follow from the absence of such provisions in the cases cited. In *Simson v. Cooke*, Lord Gifford (1 Bing. 461) relied on the circumstance that the surety might have entertained a high opinion of the integrity and discretion of one of the partners; but here that reason cannot apply, for any one may die, and any number of strangers be introduced, and yet the defendant will remain liable. The true construction is, not to consider that the defendant makes an enumeration of all the different cases in which he is to be liable, but whether his liability does not extend through a class of circumstances of which he has afforded instances. The general intent is to be considered. He is to be liable for all books delivered "to them or any or either of them;" the previous [585] language does not shew that this is to be restricted, and the language

subsequently of the proviso shews that it is to have an extensive meaning, because liberty is reserved to the defendant to exonerate himself from all responsibility arising from any change or otherwise, by giving a week's notice. The restriction suggested by the defendant cannot be correct; for if Messrs. Baldwin, Cradock, & Joy were to take a new partner, and Joy were to retire, the defendant would continue liable by the express language of the condition, which negatives the defendant's construction. [Alderson, B. The defendant would say that in the supposed case the condition must be read as having the word "survivors," or the like, carried through the whole sentence.] That would be going further than any case hitherto in favour of sureties. If every instance in which a surety is to be liable is to be specified, it will scarcely be possible to draw these bonds with sufficient circumstantiality and correctness. [Parke, B. The words of the bond, as to partners, are "and such other person, &c.," that is, the responsibility is confined to the cases of partners together with the firm of Baldwin, Cradock, & Joy, or some of them.]

Wightman replied.

Cur. adv. vult.

The judgment of the Court was delivered in Trinity Term by

LORD ABINGER, C. B. This was an action upon a bond against a surety. The condition of the bond stated, that the firm of Baldwin, Cradock and Joy had been appointed agents to the University for the sale of books, and it was conditioned "that if the said R. Baldwin, C. Cradock, & W. Joy, and the survivors and survivor of them, and such other person and persons as should or might at any time [586] or times thereafter, in partnership with them, or any or either of them, act as agent or agents of the said Chancellor, Masters, and Scholars, or their successors, for the sale of books as aforesaid, did and should duly account," the bond should be void. It then states that Mr. Joy had quitted the partnership, and left the other two, namely, Messrs. Baldwin & Cradock, carrying it on, and that the University employed them as their agents, and that it was for their default that this action was brought against the surety, the defendant in this case.

The first impression the Court had was, that the surety was liable. On the argument, however, Mr. Wightman took a distinction between the case of any two of them carrying on partnership together in the lifetime of the other members of the firm, and contended that the words of the condition did not embrace that case; and the Court have come to that conclusion. On the argument, I did not distinctly see the answer to that objection, but I must own I was very desirous to find it; but on looking narrowly through the condition, I am afraid we must decide in favour of Mr. Wightman's objection. The words of the condition are, "that if the said Robert Baldwin, Charles Cradock, & William Joy, and the survivors and survivor of them," &c. If the words had been "or any or either of them, or the survivors or survivor or any or either of them," that would have answered the plaintiff's purpose, for it would meet the case of one or more of these persons quitting the partnership, or of one of them dying. But looking at the precise words of this condition, the case certainly is not brought within the terms of it, and there must therefore be judgment for the defendant.

The rest of the Court concurred.

Judgment for the defendant.

[587] WEETON AND OTHERS v. WOODCOCK AND OTHERS. Exch. of Pleas. 1839.

—The first count of the declaration alleged, that the plaintiffs had demised to T. a factory, and the warehouse, engine, and engine-house, &c., thereto belonging; it then set out a covenant by T. to keep up a good steam-engine boiler, and to deliver up the premises in good order, with every thing upon them, at the end of the term. There was a proviso for re-entry in case T. should become bankrupt. The declaration then alleged the entry of T., and that he continued in possession until the term was determined by the plaintiff in consequence of T.'s bankruptcy; and averred that a certain steam-boiler theretofore annexed and set up on the demised premises by T., remained and continued so annexed during the term and at the time of its determination, by reason whereof the plaintiffs had become entitled to it, and the same ought to have remained and been left on the demised premises, and not to have been disannexed therefrom. Breach, that the

defendants, intending, &c., wrongfully and without the plaintiffs' consent disannexed and removed the said steam-engine boiler from the demised premises, whereby the estate and interest of the plaintiffs in the factory, &c., was greatly injured and deteriorated:—Held, that this was substantially a count in trespass, and could not be joined with a count in trover.

[S. C. 7 Dowl. P. C. 853; 9 L. J. Ex. 97. See further, 7 M. & W. 14.]

The first count of the declaration alleged, that the plaintiffs by indenture had demised to one Taylor a certain factory then in his occupation, and the warehouse, engine, and engine-houses, &c., to the factory and steam-engine belonging. It then set out a covenant by Taylor to keep up a good steam engine, with a boiler of beaten iron, and at the end of the term to deliver up the premises, and all things thereon, in good repair, and a proviso for re-entry in case of the bankruptcy of Taylor, or non-performance of the covenants. It then averred that Taylor entered and continued in possession until the term was determined by reason and in consequence of the bankruptcy of Taylor, and the non-performance of the covenants; and that, at the time of the determination of the term, "a certain steam-engine boiler theretofore annexed, set up, and placed on the demised premises by Taylor, remained and continued annexed, and set up and placed, after the making of the indenture, and during the term," and was used for working the said demised steam-engine, and was proper and necessary for working the same, and at the time of the determination of the term, was the only boiler on the demised premises capable of supplying the engine with steam; and, "by reason of the premises, the plaintiff had become entitled to the steam-boiler, and the same ought to have remained and continued and been left on the premises, and not disannexed or removed without the consent of the plaintiffs." Breach, that the defend[588]-ants wrongfully, and without the license of the plaintiffs, and against their will, disannexed and removed the steam-engine boiler, by means whereof the estate and interests of the plaintiffs in the factory were greatly injured.^(a) The second count was in trover.

General demurrer, and joinder in demurrer. The point stated for argument on the part of the defendants was, that the first count was in trespass, and could not be joined with a count in trover.

Crompton, in support of the demurrer. There is a misjoinder, as the matters alleged in the first count are matters in trespass. It is not case, on the ground of the injury being to the reversionary estate, or of the damages being consequential, but it states matters of trespass direct and immediate to the possession of the plaintiff. The Court then called on

Cowling to support the declaration. The declaration is good, for the first count is in case and not in trespass. It begins in case, and not in trespass; and even if the cause of action would have been better stated in trespass, yet if the Court think that it is meant as a count in case, they will give judgment for the plaintiff on the other count; for if the first be an informal count, the defendant should have demurred specially to that count only. The first count contains no averment that the boiler was the property of the plaintiffs, and that they were in possession of it. But supposing they can maintain an action of trespass for the disannexing, there are many cases in which a party can waive the trespass and sue in case. [Parke, [589] B. That might perhaps be so as to the personalty, but there are no such authorities as to land.] It is submitted, that even assuming that the plaintiffs must be considered as in possession, there can be no reason for the distinction between land and personal property. If a plaintiff may waive a direct trespass to a chattel, and bring trover for the supposed conversion, why may he not, as in this instance, waive the wrongful entry on the land, and maintain case for the consequential damage arising to his interest in the land, for the disannexing of a fixture which rendered the land more valuable? The authorities repudiate such a distinction. According to Viner's Abr. tit. Actions, M. (c.), pl. 6, certainly it is said, "If a man comes upon my own land and makes a nuisance to my watercourse, as if he makes a lime-pit, &c., I cannot have an action upon the case against him for this, but an action of trespass;" but, in the marginal note, *Cooper v. St. John* (Ayleyn, 84) is referred to, where that case was cited and overruled. So,

(a) See the declaration set out more at length, ante, 143-4. The plaintiff amended by striking out the words "and converted and disposed thereof to their own use."

Booth v. Oliver (1 Viner's Abr. Actions, K. (c.), pl. 3) goes even further than the present case on this point. The language of Tindal, C. J., in *Holland v. Bird* (10 Bing. 15, 3 M. & Scott, 363), is general, and applies to land as well as chattels. He says, "Although a wrongful taking may be a ground of trespass, there are many cases in which a party may waive the trespass and sue in case; such is the action of trover; and no one will deny that trover lies for the subsequent detainer, when the original seizure is an act of trespass." So in *Muskett v. Hill* (5 Bing. N. C. 694), where the grantor of a license to mine re-entered and forcibly expelled the grantee, it was held that case was maintainable, although *Harker v. Birkbeck* (3 Burr. 1556) was cited to shew that trespass was [590] the proper form of action. [Parke, B. In *Muskett v. Hill*, there was only a license to work a mine—there was no possession so as to maintain trespass.] That does not appear, and *Harker v. Birkbeck* is a strong authority to shew that the plaintiff might, in the case of *Muskett v. Hill*, have maintained trespass. [Parke, B. *Harker v. Birkbeck* was the case of an exclusive license, and it was expressly stated that the plaintiffs were in possession of the mine.] *Moreton v. Hardern* (4 B. & Cr. 223; 6 Dowl. & Ry. 275), *Williams v. Holland* (10 Bing. 112; 3 M. & Scott, 540), Com. Dig. Action, M. 2, are also authorities to shew that a party may bring case or trespass at his election. Here all that appears is that the lease was determined; and it was not inconsistent with that, that Taylor should have continued in possession; and if whilst he so continued in possession the assignees had disannexed the boiler, case and not trespass is the proper remedy: *Burchell v. Hornsby* (1 Camp. 360). [Lord Abinger, C. B. There the tenant remained in possession after the expiration of a notice to quit, and Lord Ellenborough said that whilst the possession remained in the tenant, the landlord might be considered as entitled to the reversion. Parke, B. The landlord might in that case treat him as a tenant or not, at his option.] There is nothing to shew that the plaintiffs were in possession, and therefore it must be considered as if they had not obtained actual possession. This is not a demurrer to the count, but to the declaration, and every intendment to make the particular count good should therefore be made. Here there is no averment that the plaintiffs were in possession; the declaration only shews that they were entitled to it. It shews Taylor to have gone into possession, but does not shew him to have left. Neither does it allege [591] that the boiler belonged to the plaintiffs, but only that, in pursuance of the covenant, it ought to have been left there for them, which gave them a kind of lien upon it, which might well be the subject of an action upon the case. [Parke, B. Does not the declaration aver that the boiler was affixed to the freehold? then, if so, it belongs to the landlord after the determination of the term.] *Martyn v. Bradley* (2 M. & Scott, 25) was a similar case to the present. That was an action by landlord against tenant for wrongfully removing, after the expiration of the lease, a pair of mill-stones set up by the tenant during the term. There the declaration was in the same form as the present, and was also a count in trover. Although the plaintiffs here might have shaped their case differently, and said that this was their boiler, yet they might go lower and claim a special property in it: *Pitts v. Gaince* (1 Salk. 10). [Parke, B. But here you allege an absolute property in the boiler, and you bring an action for tearing down a fixture, which is a trespass. Your argument is, that the Court cannot assume it was a trespass, and that it is very uncertain whether it amounts to one or the other.] Yes; and that if the count is ambiguous, it should have been demurred to on that ground. In *Pickering v. Rudd* (4 Camp. 219), where the defendant nailed to his own wall a board which overhung the plaintiff's close, Lord Ellenborough was of opinion that case and not trespass was the remedy.

Crompton, in reply. The question is not whether this is a good count in trespass in point of form, but whether it substantially states matters which are the subject of an action of trespass; and it is clear that it does. The declaration shews a possessory right in the plaintiffs by the [592] determination of the term, and that determination must have been by re-entry, and is so alleged in effect. When once it is shewn that the plaintiffs become possessed by the determination of the term, the law presumes that they continued to be so at the time the injury was committed. When once they got into possession, if a person afterwards entered wrongfully, they could not bring case, the cause of action being in trespass or none at all. If an injury is done to the land of a person out of possession, but who has the possessory right, he must enter, and then bring trespass for the antecedent wrong, his entry being relative back for that purpose; then, after revesting the possession by ejectment, the lessor of the

plaintiff may bring trespass for the mesne profits. In *Hensworth v. Fowkes* (4 B. & Ad. 449; 1 Nev. & Man. 321), Littledale, J., says, "I do not accede to the general position, that whenever there is a trespass, and also a consequential damage, the plaintiff may, at his election, waive the trespass and sue in case. If that were so, whenever there is an assault and a consequent injury, the party might adopt this course, and so entitle himself to costs, if he recovered only one shilling damages:" and Taunton, J., in the course of the argument, made a similar observation. In *Smith v. Goodwin* (4 B. & Ad. 413; 1 Nev. & Man. 371), one of the counts alleged that the defendants took and distrained the goods of the plaintiff for rent of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and vexatiously again took and distrained the same goods for the same rent, and refused to return the same and converted them to their own use; and it was held, on motion in arrest of judgment, that although the second taking of the goods was a tres-[593]-pass, yet case might be sustained; but that was on the ground that the count had alleged a conversion, in respect of which the plaintiff might maintain case. There Parke, J., says, "It seems to me that the 7th count [the count before mentioned] is an informal count in trover, setting forth circumstances which it was unnecessary to state, but which are the subject of such an action;" and he then adds, that it might be considered as an informal count in trover, and after verdict sufficient; and Patteson, J., fully concurs in that view of the case. The true principle was laid down in the case of *Reynolds v. Clarke* (2 Ld. Raym. 1399), namely, that for an act immediately injurious, trespass is the proper remedy, but for an act which is consequentially injurious, case is the proper form of action. Here the count is in truth for an immediate act of trespass. The plaintiffs appear to claim damages merely for the disannexing of the boiler, but they in effect go for the breaking, although they do not call it so. An injury to the freehold in the plaintiff's possession cannot be made the subject of an action upon the case. The case of *Muskett v. Hill* was that of the wrongful conversion of an incorporeal hereditament. An action on the case for an injury to the plaintiff's reversion of a real estate, implies an outstanding estate in another.

LORD ABINGER, C. B. I am of opinion that the first count is substantially a count in trespass. Supposing it to have been the only count in the declaration, and that the cause had gone to trial, the plaintiffs might recover under it damages exceeding the value of the boiler. The plaintiffs may have liberty to amend, on payment of costs.

PARKE, B. I am also of opinion that the first count is [594] a count in trespass, and I think that a special demurrer might have been added, pointing out the ambiguity of the count. If we examine the count, it will clearly appear to be in trespass: it avers that the term in the premises was determined; which of itself imports that the landlord entered and took possession. It then alleges that at the time of the determination of the term, the defendant dis-annexed a certain chattel, by means whereof the estate and interest of the plaintiffs—not their reversionary interest—was injured. The count, therefore, shews an injury to the plaintiffs' possession, and that forms the subject of an action of trespass. Upon this declaration the plaintiffs might have recovered for the trespass, and consequently, such cause of action cannot be joined with case. The authorities cited by Mr. Cowling were cases in which a consequential injury ensued, and there is no doubt that where there is a direct injury, and also a consequential damage, that may form the subject-matter either of case or trespass; but where there is a direct injury to the soil and freehold, there is no other remedy but trespass. The rule is correctly stated by my Brother Littledale, in *Hensworth v. Fowkes*, though the other Judges disagree with respect to the application of it.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend on payment of costs; otherwise,
Judgment for the defendants.

[595] BRADBURY v. EMANS. Exch. of Pleas. 1839.—To an action on a bill of exchange by indorsee against acceptor, the defendant pleaded, that after the bill had been indorsed to the plaintiff, and before it became due, and before he had notice of such indorsement, he gave another bill to the drawer by way of renewal, and in lieu of the first-mentioned bill; and that he had not before or at the time

he accepted the latter bill, or at any time before the commencement of this suit, any notice that the first bill of exchange had been indorsed to the plaintiff, and the defendant did not then, nor until after the same became due, know that the plaintiff was the holder of the bill:—The Court set aside this plea as frivolous.

[S. C. 7 Dowl. P. C. 849; 9 L. J. Ex. 7.]

Assumpsit, by the second indorsee of a bill of exchange, against the acceptor. The defendant pleaded that after the said bill of exchange had been indorsed to the plaintiff, and before the same became due and payable according to the tenor and effect thereof, and before the defendant had notice that the said last-mentioned indorsement had been made to the plaintiff, he the defendant, at the request of one R. P. Thoms, the drawer of the said bill, accepted a certain other bill of exchange, to wit, a certain bill bearing date &c., and drawn by the said R. P. T. upon the defendant, for payment to the said R. P. T. or order, of 96l., three months after the date thereof, and which period had not elapsed before the commencement of this suit; and the defendant then delivered the last-mentioned bill to the said R. P. T., for the purpose of him the said R. P. T.'s indorsing the same to the holder or holders of the said bill in the declaration mentioned by way of renewal, and in lieu of the said last-mentioned bill, he the said R. P. T., then representing that he could prevail upon the holder to renew the bill in the declaration mentioned; and the said R. P. T. then received the bill first in this plea mentioned, for the purpose aforesaid, and then promised to get the bill in the declaration mentioned renewed and withdrawn from circulation, with and by means of the bill in the plea first mentioned. And the defendant further saith, that he had not before, or at the time that he accepted and gave the said bill first in this plea mentioned as aforesaid, or at any other time before the commencement of this suit, any notice that the said bill in this declaration mentioned had been indorsed to the plaintiff, as in the declaration alleged: and the defendant did not then, nor until after the said bill became due, know that the plaintiff was the [596] holder of the bill in the declaration mentioned, but always considered that the same had been renewed, and withdrawn from circulation, according to the promise of the said R. P. T., and never had notice to the contrary before the commencement of this suit. Verification. A rule having been obtained to set aside the plea as frivolous,

James shewed cause. This plea is good to a certain extent, and although it might be held bad upon general demurrer, there is no ground for setting it aside on a summary application. The defendant was not under terms to plead issuably, and it is not sworn that the plea is false, and without that the Court will not set it aside. The practice as to sham pleas is correctly laid down in *Stephen on Pleading* (2nd edition, 493), where it is said, "There are certain pleas of that kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the Courts, and though discouraged, are tacitly allowed: as, for example, the common plea of judgment recovered. But in other cases a sham plea, when ascertained to be so, is not allowed. It is true, as already observed, that it cannot in general, and in the regular course, be proved that the plea is false till the trial; but when a plea is not in the usual and tolerated form of a sham plea, and the matter pleaded is at the same time very improbable, and presumably intended as a plea of that description, the Court will, on motion, supported by affidavit of its falsehood, allow judgment to be signed by the plaintiff as for want of plea, and make the defendant or his attorney pay the costs." And *Thomas v. Vandermoolen* (2 B. & Ald. 197), *Bartley v. Godslake* (id. 199), *Shudwell v. Berthoud* (5 B. & Ald. 750), *Richley v. Proone* (1 B. & C. 286), *Merington v. Beckett* (2 B. & C. 81), [597] *Bell v. Alexander* (6 M. & Selw. 133), *Young v. Gadderer* (1 Bing. 380), are cited in support of that position. [Parke, B. Those are cases where the plea, if true, would be an answer to the action; but that is not the case here.] That is a ground for demurrer, and not for the summary interference of the Court. In *Knowles v. Burward* (2 P. & D. 235), the Court held the plea frivolous; but Lord Denman in that case referred to *Horner v. Keppel* (2 P. & D. 234) where the Court refused to set aside the plea, stating the ground of the decision in the latter case to be, "That the plea traversed matter of fact alleged in the declaration." Now that is the case here, for it contains a traverse of the allegation that the defendant had notice that the bill was indorsed to the plaintiff. [Parke, B. That is a non-traversable allegation.] The mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for

want of a plea. In *Cowper v. Jones* (4 Dowl. P. C. 591), Patteson, J., says: "Unless the defendant was under terms of pleading issuably, or the plea pleaded raised a different issue, the Court cannot interfere. The plea may contain a statement of facts which may or may not be true, and which are not sufficient in point of law as an answer to the action. That, however, is not a reason for setting it aside. I have not the power to do it. I know the Court, some years ago, used to interfere where the plea was frivolous, and authorize the plaintiff to sign judgment as for want of a plea. But the Courts afterwards retraced their steps, on the ground of a doubt they had as to their power so to do. The Court, therefore, now never interferes, unless the defendant is under terms to plead issuably; or under some special circumstances. The mere insufficiency of a plea in point of law does not entitle the plaintiff to sign judgment as for want of a plea."

[598] Barstow, in support of the rule. This plea is not only defective, but, if the truth of every allegation contained in it is admitted, it amounts to nothing at all. It takes issue on a perfectly immaterial allegation; it might as well have traversed the allegation of the damages amounting to 100l.

PARKE, B. We feel no doubt respecting the power of the Court to interfere in cases of this kind; but as there is a similar motion pending in the Court of Common Pleas, and it is desirable that the Courts should act on the same principle, we will defer our judgment until we hear the result of that case.

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said—In this case, which was argued a few days ago, the question was, whether a plea that contained no answer whatever to the action ought to be set aside as frivolous. [His Lordship here read the plea.] We entertained no doubt as to the nature of the plea, and the jurisdiction of the Court to deal with it, and only deferred our judgment for the purpose of ascertaining the opinion of the Judges of the Court of Common Pleas, as a similar case was depending in that Court. We have had an opportunity of consulting with them, and think that the rule must be made absolute.

Rule absolute.

PAYNE v. HALES. Exch. of Pleas. 1839.—To a declaration for goods sold and delivered, the defendant pleaded "that the goods were sold by the plaintiff as agent for one W., and that at the time of the sale the plaintiff and defendant were in partnership together, and that the goods were purchased by the defendant of the plaintiff as such agent for and on account and for the benefit of the said partnership, and as part of the partnership stock:—"Held bad, as amounting to the general issue.

[S. C. 7 Dowl. P. C. 859; 9 L. J. Ex. 89.]

Debt for goods sold and delivered.

Plea, that the goods were sold and delivered by the [599] plaintiff as agent to one J. Waring; and that at the time of the sale and delivery thereof, he (the defendant) and the plaintiff were in partnership together; and that the said goods were purchased by the defendant of the plaintiff as such agent as aforesaid, for and on account and for the benefit of the partnership stock; concluding with a verification. Special demurrer, assigning for cause that the plea amounted to the general issue.

Cowling, in support of the demurrer, was stopped by the Court.

Thomas, in support of the plea. The matters stated in the plea could not be given in evidence under the general issue since the new rules. It admits the contract declared on, but shews that it is such a contract as is not good in law. *Carr v. Hinckliff* (4 B. & Cr. 547; 7 D. & R. 42) shews that matter of law may be pleaded; and since the New Rules, such a defence must be pleaded.

PARKE, B. If the plaintiff was one of the purchasers of the goods, he cannot say that the defendant was indebted to him. That is a defence under the general issue.

The rest of the Court concurred.

Judgment for the plaintiff.

[600] *ANGEL v. IHLER*. Exch. of Pleas. 1839.—Where a cause is tried before the sheriff under a writ of trial, and the sheriff or a Judge of the superior courts refuses to certify for a stay of proceedings under the 18th section of 3 & 4 Will. 4, c. 42, it is still competent to the Court to set aside the verdict and grant a new trial, the 19th section having provided that all the provisions of the 1 Will. 4, c. 7, shall be extended to writs of trial.

[S. C. 7 Dowl. P. C. 846. For previous proceedings see p. 163, ante.]

Action by the indorsee against the acceptor of a bill of exchange, with a count upon an account stated.

Pleas to the first count, first, that the defendant did not accept the bill; secondly, that he accepted it for the accommodation of the drawer, who indorsed it to the plaintiff as a collateral security for his own debt, and that the plaintiff did not use due diligence to obtain his debt from the drawer; thirdly, to the second count, non assumpsit. The cause was tried on the 19th of September before Arabin, Serjt., when a witness clearly proved the defendant's acceptance, and no evidence on the part of the defendant was offered in contradiction, but the jury nevertheless found a general verdict for the defendant. On the 21st of September an application was made to Maule, B., at chambers, to stay the proceedings, in order that the plaintiff might move to set aside the verdict within the first four days of the following term. That application was however refused, the plaintiff not being prepared with the necessary affidavits. The writ was returnable on the 28th of September. Judgment was signed on the 8th of October, and execution issued. Several summonses were afterwards taken out to stay proceedings, but the judge refused to make any order. R. V. Richards having obtained a rule to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff on the first issue; or why a new trial should not be had; or why the plaintiff should not have judgment non obstante veredicto on the second plea,

Kelly shewed cause. This application is too late; it cannot be made after judgment and execution have been signed and executed. In the case of writs of trial, the only mode of staying judgment and execution is by apply-[601]-ing under 3 & 4 Will. 4, c. 42, s. 18, to the sheriff or judge who tried the cause, and if the sheriff or judge be not applied to, or refuse the application, judgment must follow as a matter of course. The 18th section provides, "that at the return of any writ of inquiry or writ for the trial of such issue as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial; or a judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order." Here the learned judge to whom application was made, has refused to stay the judgment and execution. [Parke, B. The 19th section provides that all the provisions of the 1 Will. 4, c. 7, shall, so far as the same are applicable thereto, be extended to judgments and executions upon writs of inquiry and writs of trial; and the 4th section of the last-named statute provides, that, "notwithstanding any judgment signed or recorded, or execution issued, it shall be lawful for the Court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment or grant a new trial or new writ of inquiry; and thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error or otherwise, as the Court may think fit to direct."] That clause does not seem to apply to a case where the judge who tries the cause has power to stay the judgment and execution, but only to cases where the first application is to be made to the superior Courts. [Parke, B. No; it applies to cases whether tried before a sheriff [602] or a judge.] Secondly, if the plaintiff intended to move to enter a verdict on a particular issue, he should have made the point at the trial, and obtained the judge's notes of the evidence; and it is too late to do so now, after the defendant has proceeded to make up the issue, and after the plaintiff has attended several summonses. It is clear that the entry of the issues can

only be amended by the judge's notes, which are not in Court. Thirdly, with respect to the motion for judgment non obstante veredicto, on the ground of the insufficiency of the second plea, the record is not before the Court, and there is no affidavit which sets out the plea in hæc verba. [Parke, B. On a motion of this kind, we must take notice of the postea: it is not the practice to draw up the rule on reading the record. The plea is altogether bad. It is in substance that the acceptor became surety for the drawer; but no time is shewn to have been given to the principal.] The plaintiff was bound under the circumstances to have made this application earlier. After all these steps taken he is too late.

PARKE, B. The rule must be absolute for a new trial, on payment of the costs of the judgment and execution, and of this application: the money levied to be returned to the plaintiff, the defendant first deducting the costs.

Rule accordingly.

WAINWRIGHT v. RAMSDEN. Exch. of Pleas. 1839.—The defendant was the tenant from year to year of a house and premises, at a rent payable half-yearly, on the 1st April and 1st October. The premises being required for the purposes of a railway, the Railway Company, in pursuance of a power given by their act of Parliament, gave the defendant six months' notice to quit, which expired in the middle of a half-year, viz. on the 28th July. The defendant gave up possession to the Company accordingly at the expiration of the six months, without obtaining or requiring compensation for his interest in the premises, which he was entitled to under the act:—Held, that he was liable for the rent of the half-year ending on the following 1st October.

[S. C. 1 Railw. Cas. 714; 9 L. J. Ex. 120.]

Assumpsit for use and occupation. Plea, non assumpsit. At the trial, before the assessor to the sheriff of York-[603]-shire, it appeared that the action was brought to recover half a year's rent, up to the 1st of October, 1838, of a house, shop, and slaughter-house in Wakefield, of which the defendant had been tenant for several years to the plaintiff, at a rent of 15l. a-year, payable half-yearly, on the 1st of April and the 1st of October. The premises in question being required for the purposes of the Manchester and Leeds Railway, and included in the schedule to the Railway Act, 7 Will. 4, c. exi., the Company, on the 28th of January, 1838, gave six months' notice to quit to the defendant, in pursuance of the 146th section of the act,—which provides, that all persons in possession of lands required to be taken or used for the purposes of the act, who should have no greater interest than (inter alios) as tenants from year to year, should give up possession of such property to the Company, &c., at the expiration of six calendar months next after notice to that effect given by the Company, whether given with reference to the time of the commencement of such tenants' holding or not: the sheriff being empowered, on refusal, to deliver possession to the Company. The 147th section provides for the settlement of the interests of such tenants, where they are entitled under the act to compensation, by a jury. The defendant accordingly quitted the premises, and delivered up the key to the Company, at the expiration of the six months, viz. on the 28th of July, 1838, without having previously received any compensation, although entitled to it under the act. It was contended for the defendant, that, under these circumstances, the defendant was not liable in respect of any portion of the half-year's rent in dispute; and the learned assessor being of that opinion, directed a verdict for the defendant.

In the early part of this term, Baines obtained a rule nisi for a new trial, on the ground of misdirection; against which

[604] Wightman now shewed cause, and contended, that the defendant having been evicted by the authority of the Company, under the provisions of the act of Parliament, during the currency of the half-year, was entirely discharged from his liability on the original contract with the plaintiff in respect of that half-year's rent: *Smith v. Raleigh* (3 Campb. 513), *Burn v. Phelps* (1 Stark. N. P. C. 94), *Grimman v. Legge* (8 B. & Cr. 324; 2 Man. & R. 438). The plaintiff had no right, therefore, to recover either the whole half-year's rent, or pro ratâ up to the 28th of July.

Baines, contra. It is laid down in Bacon's Abr. Rent (M.), 2, that whenever the use of the demised premises is taken away from the tenant, without his default, by

act of law, the rent shall be apportioned. Here, at all events, the defendant had an actual beneficial occupation up to the 28th of July. But there is nothing to shew that he was under the necessity of giving up the possession at that time. He was not absolutely bound to quit at the end of the six months, but only on tender of sufficient compensation for his interest in the premises, of which there was no proof. The case is quite consistent with a collusive agreement to defeat the landlord's claim for his rent.

LORD ABINGER, C. B. The rule must be absolute. The defendant, for aught that appears to the contrary, might have remained in until October: at all events, he might have obtained compensation for his interest in the premises.

The rest of the Court concurred.

Rule absolute.

[605] HALL v. REDINGTON. Exch. of Pleas. 1839.—Where the copy of a writ served on the defendant is irregular, the application should be to set aside the service, or the copy or service; an application to set aside the copy served is nugatory.

[S. C. 9 L. J. Ex. 100.]

Ball had obtained a rule to shew cause why "the copy of the writ of summons served on the defendant" should not be set aside for irregularity. The irregularity complained of was, that the writ was intituled "Victoria, by the Grace of, Queen, &c.," instead of following the form given by the Uniformity of Process Act (Victoria, &c.).

W. H. Watson shewed cause. The title of the Sovereign is no material part of the writ or of the direction. [Parke, B. It is part of the form given by the act. Either you should follow the form strictly, or if you give the royal style, you must set it out properly.] At all events, the present application, which is to set aside the copy served, is nugatory: it should have been to set aside the service; setting aside the copy amounts to nothing.

Ball, *contra*, urged that the rule was drawn up in the usual terms; and cited *Chalkley v. Curter* (4 Dowl. P. C. 481).

But per Curiam. We are informed by the Masters that the proper form of motion is to set aside the service. At all events, it should have been to set aside the copy or service. We cannot tell that this is not a true copy; if it is, we cannot set aside the copy.

Rule discharged.

[606] PRENTICE v. ELLIOTT. Exch. of Pleas. 1839.—To an action of assumpsit for use and occupation, the defendant pleaded that he held the premises under a demise from the plaintiff at a certain rent, payable quarterly, and that, before the rent became due, the plaintiff evicted him from the possession of the premises:—Held, that the plea was bad, as amounting to the general issue.

[S. C. 7 Dowl. P. C. 819; 9 L. J. Ex. 42.]

Assumpsit. The first count of the declaration stated, that the defendant, on &c. was indebted to the plaintiff in 10l., for the price and value of the use and occupation of certain rooms and apartments of the plaintiff, in a certain dwelling-house of the plaintiff, by the defendant, and at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed, had, held, used, occupied, and enjoyed.

The defendant pleaded, secondly, as to the sum of 4l. 5s., parcel of the said sum of 10l., that this action, so far as regards the said sum of 4l. 5s., parcel as aforesaid, is brought to recover the said sum of 4l. 5s., parcel, &c., for and in respect of one quarter's rent of the said rooms or apartments in the said first count mentioned, with the apurtenances, commencing from the 25th day of December, 1838, and ending on the 25th day of March, 1839, for and in respect of the use and occupation of the said rooms and apartments, with the apurtenances, by the defendant during that time as tenant thereof to the plaintiff; and that the said rooms and apartments were let to the defendant by the plaintiff, and the defendant, during all the time aforesaid, held

the same under and by virtue of a certain demise thereof theretofore made by the plaintiff to him the defendant, at and under the yearly rent of 17l., payable quarterly on the 25th of December, the 25th of March, the 24th of June, and the 29th of September in every year of the said tenancy respectively; that the plaintiff, after the making of the said demise, and during the said tenancy, and after the commencement of the said quarter of a year commencing from the said 25th day of December, 1838, aforesaid, and ending on the said 25th day of March, 1839, aforesaid, and before the last-mentioned sum of 4l. 5s., parcel &c., accrued due, and after the said 25th day of December, 1838, aforesaid, and before the 25th day of [607] March, 1839, aforesaid, to wit, on the 16th day of February, 1839, aforesaid, with force and arms entered into and upon the said rooms and apartments in the said first count mentioned, with the appurtenances, and then ejected and expelled, put out, and removed the defendant from the possession thereof, and kept and continued him the defendant so ejected, expelled, put out, and removed from thence, until and upon the said 25th day of March, 1839, aforesaid, and from thence hitherto. Verification.

Special demurrer, assigning for cause that the said plea is an argumentative traverse of the contract in the declaration mentioned and declared on, so far as the same contract relates to the said sum of 4l. 5s. in the introductory part of the said last plea mentioned; and also that the said last plea sets up facts affirmatively, which, if they exist, would prevent the same contract, so far as it relates to the said sum of 4l. 5s., from being implied by law, and consequently that the said last plea amounts in effect, and so far as it is pleaded, to the plea of non assumpsit; and also that the said last plea does not confess, or confess and avoid, any matter, statement, or thing in the declaration, or in the first count thereof contained.

Hurlstone, in support of the demurrer, was stopped by the Court, who called upon Dowling, to support the plea. This is a plea in confession and avoidance; it admits the contract alleged in the declaration, but avoids it by shewing that the right to recover the rent is suspended by the eviction by the plaintiff. In *Waddilove v. Burnett* (2 Bing. N. C. 538; 2 Scott, 763; 4 Dowl. P. C. 347), which was an action for use and occupation, it was held that the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him, might be given in evidence under the general issue, if the rent accrued due after the notice; but if the rent accrued due before the notice, the defence [608] must be specially pleaded. That decision proceeded on the ground that an occupation had taken place by permission of the mortgagee, and that he had a right of action up to the time the notice was given; and as to the by-gone rent, the Court considered it as a matter in confession and avoidance only. So here, there has been an occupation up to the time of the eviction.

PARKE, B. This is clearly a bad plea. The promise laid in the declaration arises by implication of law from the fact alleged, viz. "That the defendant held and enjoyed by the sufferance and permission of the plaintiff." The general issue would deny that allegation. The plea shews that the defendant never was liable to pay this rent at all; that he never was indebted, because certain events had occurred after it became due, which freed him from all liability. That is an argumentative plea, amounting to the general issue. The defendant may have leave to amend, on payment of costs; otherwise,

Judgment for the plaintiff.

SHEPPARD v. WOODFORD AND OTHERS. Exch. of Pleas. 1839.—A testator devised certain real estates to three trustees, upon certain trusts, and by his will directed, that in the event of any of the trustees dying or ceasing to act, others should be appointed, so that there might always be three trustees for the purpose of carrying the trusts of the will into execution; and he also directed a transfer of the estates upon every such new appointment. In execution of the trust contained in the will, several copyhold estates were purchased, and the trustees admitted, and the estates were transferred to new trustees from time to time. At length, one of the trustees having died and another declined to act, the third surrendered the copyhold estates to himself and two new trustees, and the three were duly admitted by the lord:—Held, that although one of the surrenderees was also a surrenderor, this was an admittance of all three to a new estate, and that the fine being payable in respect of the admission to that new estate, was correctly

assessed as upon an admission *de novo* of three tenants as joint-tenants of the estate.—The fine payable, according to the custom of the manor, on the admittance of a single tenant in fee, was two years' improved value, and where several persons had been admitted they had paid fines assessed two years for the first life, one half of that for the second, and one half of that last sum for the third :—Held, that that was the proper mode of calculating the fine in the present case.

[S. C. 9 L. J. Ex. 90.]

This action was brought to recover the sum of 1302l. 11s. 8d., for certain fines claimed to be due and payable [609] from the defendants to the plaintiff, as lord of the manor of Bawdsey-Butley-with-Willoughby, in the county of Suffolk, on the admission of them, the defendants, as tenants of certain customary tenements, with the appurtenances, parcel of the said manor. The defendants pleaded—First, that they did not promise in manner and form, &c. ; secondly, that the said fines were great, excessive, and unreasonable ; and thirdly, that the payment of the said fines was not demanded by the plaintiff of the said defendants, or any of them, at any time before the commencement of this suit. The plaintiff joined issue on the two first pleas, and took issue upon the allegations in the third plea. The parties had agreed, under the provisions of the statute, to submit the following case for the opinion of this Court :—

The above-mentioned plaintiff, at the time of the admittance of the defendants hereinafter mentioned, was and still is lord of the manor of Bawdsey-Butley-with-Willoughby, in the county of Suffolk. According to the custom of the manor, a reasonable fine is payable upon the admission of a tenant or tenants to any copyhold tenement of the manor, either on a surrender, descent, or devise.

The defendants are trustees acting under the will of Peter Thellusson, Esq. The said Peter Thellusson, by his will, dated 2nd of August, 1796, gave and devised certain real estates, and all the residue of his personal estate, unto Matthew Woodford, James Stanley, and Emperor John Alexander Woodford, their heirs and assigns, upon trust, as to the personal estates, to lay out the same in the purchase of freehold and copyhold estates of inheritance ; and directed that the said trustees, their heirs and assigns, should stand seised of the real estates thereby devised, and of the freehold and copyhold estates directed to be purchased upon trust, during the lives of the persons therein named, to collect the rents and profits thereof, and from [610] time to time to lay out and invest such rents and profits in such purchases as he had therein-before directed to be made with the residue of his personal estate ; and that upon the death of the survivor of the persons during whose lives the rents were to accumulate, the estates should be conveyed as therein mentioned. And the testator directed, that in the event of any of his trustees dying, or leaving the kingdom, or desiring to be discharged from, or declining or refusing, or being incapable to act in the trusts of the said will, another trustee or trustees should be appointed as therein mentioned, so that there might always be three trustees at the least for the purpose of carrying the trusts of the will into execution, with the usual directions, upon every such appointment of new trustees, for transferring, conveying, and assigning the trust estates and premises, so that the same might become vested in the actual trustees for the time being upon the trusts aforesaid.

The trusts of the will have been in part performed, and are now in the course of performance, under the directions of the High Court of Chancery. As trustees have died or resigned, new ones have been appointed.

In execution of the trusts, various copyhold estates held of different manors, in the county of Suffolk and in other counties, have, at different times, been purchased by the trustees for the time being.

In the year 1816, Sir Ralph James Woodford, Bart., Sir Charles William Flint, Knight, and the defendant Sir John George Woodford, Knight, then John George Woodford, Esq., the then trustees under the said will, in part performance of the trusts thereof, purchased of Robert Cutting and Anne Maria his wife, and of William Shuldham and Mary his wife, the copyhold tenements next mentioned or referred to ; and at a Court of the said manor, held on the 31st day of July, 1816, were admitted to the said copyhold tenements of the said manor, on the surren-[611]-der of the said R. Cutting and Anne Maria his wife, and of the said William Shuldham and Mary his wife, to hold to the said Sir R. T. Woodford, Sir C. W. Flint, and the said defendant John George Woodford, trustees of the last will and testament of the said Peter

Thellusson, their heirs and assigns for ever, upon such trusts, and to and for such intents and purposes, as by the said will were declared, concerning the hereditaments by the said will directed to be purchased, nevertheless at the will of the lord of the said manor.

According to the custom of the manor, a reasonable fine is payable, as hereinafter mentioned, upon the admission of a tenant or tenants in fee to any copyhold tenements of the manor, either on surrender, descent, or devise.

The fine payable, according to the custom of the said manor, on the admittance of a single tenant in fee, is two years' improved value of the lands.

There is no instance to be found on the rolls of this manor, except as hereinafter mentioned, of the admission of several persons as joint tenants in fee upon the joint or sole surrender of one, or of more than one, of the persons so admitted: the person or persons being such surrenderor and surrenderee or surrenderors and surrenderees, having before such surrender been admitted in fee, either alone or jointly with others (including in the case of such joint surrender his or their co-surrenderor); and having in such previous admission paid the proper fine to the lord; nor is provision made by the custom of the manor for such a case; but when several persons have been admitted, none of the said persons having been before admitted, they have paid fines assessed, two years for the first life, one half of that for the second, and one half of that last sum for the third, and so on.

The said Sir R. J. Woodford, Sir C. William Flint, and the defendant Sir John George Woodford, on their said admission paid a fine of 1120*l.*; the fine so assessed was [612] assessed at two years' improved value of such copyhold tenements for the first of the said lives, half of such two years' improved value for the second of such lives, and a quarter of such two years' improved value for the third of the said lives, of the said persons so admitted. In the year 1829 the said Sir C. W. Flint, the said defendant J. G. Woodford, and John Athol Hammett, Esq., (the then trustees under the said will—the said J. A. Hammett having been duly appointed a trustee in the room of the said Sir R. J. Woodford who had died), in execution of the trusts thereof, purchased of John Woolnough the premises next mentioned or referred to; and at a Court held for the said manor on the 6th of October, 1829, were admitted to a certain other copyhold tenement of the said manor, upon the surrender of John Woolnough, to hold to the said Sir C. Flint, the defendant John George Woodford, and J. A. Hammett, (trustees as aforesaid), their heirs and assigns, upon the trusts of the said will, according to the custom, &c.; upon which they paid a fine assessed, amounting to 286*l.* 10*s.*,—which last-mentioned fine so assessed and paid was assessed at two years' improved value for the first of the said lives, half that sum for the second of the said lives, and half of the second sum for the third of the lives, of the said persons so admitted to the said last-mentioned tenements.

Before the surrender hereinafter mentioned, the said Sir C. W. Flint departed this life, and the said John A. Hammett, Esq., resigned the trust of the said will, and the defendants Abraham Wilday Roberts and Edwards Simeon were duly appointed trustees of the said will, in the room of the said Sir C. W. Flint and J. A. Hammett, Esq. At a Court held for the said manor on the 18th of July, 1836, the defendants, the said Sir John George Woodford, Knt., and A. W. Roberts and Edward Simeon, upon the surrender of the said defendant John G. Woodford, were admitted to the said copyhold tenements first above mentioned, [613] and contained; to hold to the said defendants John G. Woodford, A. W. Roberts, and Edward Simeon, (trustees of the said will), their heirs and assigns for ever, upon the trusts of the said will. Upon such admission, a fine amounting to the sum of 1092*l.* 11*s.* 8*d.* was claimed by the plaintiff, being two years' improved value of such copyhold tenements for the first of the lives of the said defendants, and half of such two years' improved value for the life of the second of the lives of the said defendants, and half of the last-mentioned sum for the third of the lives. Thus:—

| | | | |
|--|--------|----|---|
| Two years of the improved value for the first life was | £624 | 6 | 8 |
| Half of that for the second life | 312 | 3 | 4 |
| Half again for the third life | 156 | 1 | 8 |
| | <hr/> | | |
| | £1,092 | 11 | 8 |

which sum was demanded of the defendants before the commencement of this action.

At the same Court, held for the said manor, the said defendants, J. G. Woodford, A. W. Roberts, and E. Simeon, were admitted to the copyhold tenements secondly above mentioned, upon the surrender of the defendant J. G. Woodford, and of the said J. A. Hammett; to hold to the said defendants, J. G. Woodford, A. W. Roberts, and E. Simeon, trustees of the said will, their heirs and assigns for ever, upon the trusts of the said will, according to the custom, &c.; and on such admission, the sum of 210*l.* was claimed by the plaintiff for a fine,—such fine being calculated precisely on the same principle as the fine claimed in respect of the other tenements, and which last-mentioned fine was duly demanded of the defendants before the commencement of this action.

Copies of the several surrenders and admittances are annexed to and form part of the case.

The parties have agreed to refer the amount of the [614] annual value; but for the purposes of this case, and in order to take the opinion of the Court, whether the fine is properly assessed in point of principle, the sum stated as the two years' improved value is to be considered as correct as if proved.

The parties have further agreed that the Court may draw any inference from the facts stated which a jury might draw from the same facts.

The question for the opinion of the Court is,

Whether a fine assessed upon the principles before mentioned is well assessed; if so, as regards either or both of the fines claimed, the judgment of the Court is to be for the plaintiff for either or both of the fines.

If neither of the said fines is well assessed, upon the principles aforesaid, then the judgment of the Court shall be for the defendants.

W. H. Watson, for the plaintiff. It is quite clear that on a surrender and admittance of three new trustees, this fine would have been well assessed, both according to this custom and upon the general law. And it makes no difference that one of these trustees had paid a fine on a former admission, or that one surrenderor is also a surrenderee. There is no decision bearing directly on this case; but it is submitted that this was clearly an admittance to a new estate, and it is in respect of that new estate that the fine is payable. The defendant's argument must go the length of saying, that where a party is solely seised, and he surrenders to himself and two others, a partial fine only would be payable. The risk as to the duration of life is no part of the consideration for the admittance; for the same amount is paid on a transfer from a young to an old life. The true question is, whether the lord is entitled to a fine at all, or not. If he is so entitled, then it is to be computed according to the ordinary method of computation. Where a copyholder is in on his old title, he does [615] not pay a fine; but where a copyholder, being seised, surrenders, and takes a new estate, the lord is entitled to a fine: Coke's Copyholder, s. 56. Whenever a new estate is created, the lord is entitled to a fine: Watkins on Copyholds, p. 292. Here it is clear that a new estate is created, and the lord is therefore entitled to his fine. Lord Coke, in his Complete Copyholder, s. 56, says, "If a copyholder in fee surrendereth for life, reserving the reversion, and the lessee dieth, the copyholder shall not be admitted to his reversion, neither shall he pay a fine, because the reversion was never out of him." There he does not pay a fine, because he is in of his old estate. Joint-tenants are seised per my et per tout; therefore when the surrenderor assigns to himself and others, a new estate is created as to all of them from the time of the assignment; for in the case of a joint-tenancy, the estates must commence at one and the same time. In *Wilson v. Hoare* (2 B. & Adol. 350), a copyhold estate was vested in fourteen trustees, and by a decree of the Court of Chancery, made in a suit to which the lord and the trustees were parties, it was ordered, that when at any time the number of the trustees should be reduced to five, the lord should, with the approbation of a Master in Chancery, nominate nine others to be added to the five, to whose use a new surrender should be made; and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1000*l.* It was held, that 565*l.* was an unreasonable fine on the admission of fourteen trustees; and that the proper mode of assessing the fine was to take for the first life two years' improved value; for the second life one half of the sum taken for the first; and for the third life one half of the sum taken for the second, and so on. That case is observed upon in *Scriven on Copyholds* (vol. 1, 389), and is there said to have established the proper mode of assessing the fine upon an admission of joint-tenants to a copyhold of inherit-

ance. The recent decision of the Court [616] of Queen's Bench in the same case, of *Hoare v. Wilson*, in Trinity Term last, so far as it applies to the former case, was in accordance with it. Lord Denman, C. J., in delivering the judgment of the Court, said: "We agree with the decision of this Court, that a reasonable fine is to be calculated on the number of lives, by beginning with two years' improved value and halving it, and then halving the half of it, and so on in a geometrical series, by which means the fine can never equal four years' improved value."^(a) Whenever any person comes in on a new estate, the lord is entitled to a fine.

Channell, contra. It is admitted that there is no direct authority on the question, and yet cases of this kind must have frequently occurred; and the fact of there being no authorities on the point raises the inference that no such claim has ever been made by the lord. [Lord Abinger, C. B. It may be said, on the other hand, that it is a proof that no resistance has ever been made to such a claim.] The question must be considered in one of two ways—either as a matter of law, or as a question of fact for the jury. In either view, the reasonableness of the fine is a matter for the Court to determine. In looking to the question as to what precise amount is payable, the Court may look to the circumstances of each particular case. *Wilson v. Hoare* is distinguishable from this case, for the facts there were totally different. In this case there has been an admission of three persons, one of whom has paid a fine upon a former admission. Having once paid a fine upon admission it is unreasonable to impose one a second time (see Co. Copyholder, s. 56, p. 129). It is submitted that no fine was payable, except as upon the admission of the two new lives. The question is, not whether [617] any fine is due, but what is a reasonable fine. There is perhaps a difficulty in laying down general rules, but where one of the surrenderees is also a surrenderor, the Court may lay down that as a rule by which the liability to a fine may be governed, and may say that no fine shall be payable in respect of the life of the surrenderor.

Watson was heard in reply.

On a subsequent day in this term, the judgment of the Court was delivered by

LORD ABINGER, C. B. In this case we have arrived at the conclusion, that the mode of calculation of the fines proposed by the plaintiff is correct. It is admitted, that, according to the custom of the manor, such mode would be adopted in the case of an admission *de novo* of three tenants as joint-tenants of an estate. But it is contended, that, inasmuch as one of the surrenderors is also a surrenderee in this case, the admission must be treated as the admission of only two instead of three joint-tenants. But what is the fine due for? Plainly in respect of the admission to the new estate. And here the party who surrenders takes with the other two a new estate by the admittance of the lord. If the value of the lives were taken into consideration, it would subject the lord to great inconvenience. He does not select the new tenants, and could have no means of judging of the value of the additional lives. Even if he knew their ages, which it does not appear how he is to ascertain, he would be unable to judge of their relative health or probability of survivorship. Again, if we are to omit in this calculation Sir John Woodford, who is common to both, is he to be put first or third in the calculation of the fine? In the one case the fine will be three years' value, in the other one and a half year's; or, if, as thrown out in argument, you treat the [618] estate as composed of three portions, and each of the joint-tenants as admitted to one-third, then as the two new tenants would each pay two years' improved value of their respective shares, the fine would be one year's and one-third improved rent of the whole estate. But if the first suggestion were adopted, it would readily afford a mode of practically depriving the lord of all fines after the first admittance. For, suppose twenty joint-tenants once admitted, and on the successive death of each a fresh admission of the remaining nineteen with a new tenant, it is easy to see that even in an estate of the value here stated, the fine would be below the lowest coin known to us, and the lord would have for his successive admittances fines of a farthing each.

It is true that if the new life be put as the first, the lord would have two years' improved rent for each admittance, but we can find no authority for fixing upon the

(a) This case is not yet reported, but the above passage is taken from a M.S. copy of the judgment with which the reporters have been kindly favoured. [See 10 Ad. & E. 245, n.]

one rather than the other rule; and the natural order of the tenants would lead us to place the old tenant first, and to treat the others as added to him.

Upon the whole, we think there ought to be judgment for the plaintiff.

Judgment for the plaintiff.

SWIFT v. KNIGHT. Exch. of Pleas. 1839.—A distringas ought to accord with the writ of summons, although the defendant's name is incorrectly stated, in the latter; but the variance is an irregularity only, and will not render the distringas a nullity; and it is too late to take such an objection after eight days have elapsed from the return of the distringas.

[S. C. 7 Dowl. P. C. 863; 9 L. J. Ex. 6.]

Mansel had obtained a rule calling upon the plaintiff to shew cause why the distringas in this case should not be set aside with costs, for irregularity, on the ground that the distringas varied from the writ of summons, in respect to the title of the cause. In the distringas the defendant was described as "Charles Knight," and in the writ of summons and the plaintiff's affidavits, as "Charles James Jonathan Knight, sued as Charles Knight."

Wordsworth shewed cause. A variance between the [619] name in the distringas and the name in the writ of summons is no ground for setting aside the distringas, as the defendant may remedy any inconvenience by entering an appearance. The stat. 2 Will. 4, c. 39, s. 3, makes it a matter in the discretion of the Court, whether sufficient cause has been shewn for the issuing of the distringas. The Court must have been already satisfied of that, and when once granted, it ought not to be set aside on mere technical grounds. In *Smith v. Macdonald* (1 Dowl. P. C. 688), where an affidavit to obtain a distringas omitted to state that a copy of the writ had been left at the defendant's dwelling-house, the want of that allegation was not considered a sufficient ground for setting aside the distringas. But, at all events, this application is too late. The distringas was returnable on the 4th of November, and this application was not made until the 13th; it ought to have been made within eight days.

Mansel, in support of the rule. The variance is not a mere irregularity, but makes the distringas a nullity. The case of *Borthwick v. Ravenscroft* (ante, 31; 7 Dowl. P. C. 393), shews that the proceedings must be in the same name as in the writ of summons until after an appearance is entered, although the party be incorrectly described in the writ of summons. [Parke, B. The report of *Borthwick v. Ravenscroft* does not enable us to say what name was inserted in the writ of summons.]

Gray, amicus Curie, stated, that the name in the writ of summons was that by which the defendant is stated in the report to have been sued, viz. "Henry Ravenscroft."

PARKE, B. The variance between the writ of summons and the distringas does not make the latter a nullity, but is an irregularity only. Consequently this rule is moved too late.

Rule discharged.

[620] HAYLEY v. RACKET. Exch. of Pleas. 1839.—A sheriff has no right to take poundage from a defendant, on the execution of a writ of ca. sa.

The defendant having been arrested on a ca. sa. for 49l., the sheriff's officer demanded and took from him the sum of 2l. 9s., as the poundage to which he was entitled under the 29 Eliz. c. 4. A rule having been obtained, calling on the sheriff to shew cause why the amount so taken for poundage should not be paid back to the defendant, with costs,

Platt shewed cause. It cannot be disputed that the sheriff is entitled to poundage from some one; and although it is usual for the sheriff to get it from the plaintiff on the execution of writs of ca. sa., the reason is, because the sheriff has not the means of obtaining it by a sale of the defendant's goods. The right to poundage attaches on the execution of the ca. sa. It was the defendant's own laches in not paying the debt, which caused the liability to pay poundage, and therefore the charge ought to fall upon him.

PARKE, B. This rule must be made absolute. The plaintiff, it is true, is empowered by the 43 Geo. 3, c. 46, s. 5, to levy under executions against the defendant's

goods the poundage, fees, and expenses of the execution, over and above the sum recovered by the judgment. But on a writ of *ca. sa.*, the sheriff has no right to levy poundage from the defendant. His duty is merely to take the party, and have his body before the Court at the specified time, in order to satisfy the plaintiff's demand. The sheriff must return the money.

Rule absolute.

[621] BENTHAM v. JOHN COOPER. Exch. of Pleas. 1839.—Assumpsit on a guarantee. On the 27th of September, 1830, the defendant had entered into a bond in the penal sum of 1000*l.* to one T. M., the condition of which recited that C. C. had entered into articles of agreement with the said T. M., whereby the said C. C. became tenant to the said T. M. of certain premises (describing them) on the terms and conditions therein mentioned, and that the said C. C. had further contracted and agreed to take from the said T. M. all the teas and coffees that he could vend or sell by retail or otherwise on the premises, and that it was also agreed that the said C. C., with his brother the defendant, should enter into the above bond for the due performance of the terms and conditions relative to the said premises, and for the true payment of any balance that should be found to be owing for any teas and coffees sold and delivered by the said T. M. to the said C. C. or on any other account whatsoever. On the 20th of December, 1833, the following letter was written by the defendant in London to the plaintiff, who had succeeded T. M. in his business in Liverpool:—"When I had the pleasure of seeing you in London, I then told you I had not the least hesitation in becoming surety to you in the amount required for my brother Charles; but for a protection both to myself and him, I thought it highly necessary I should distinctly understand in what state his affairs were, in order that he may not, by any inadvertence, involve me, at which I am convinced he would grieve as much as myself. I still hold this mind, and before I sign any bond or instrument, I must clearly see my way. In the meantime, in order to convince you it is furthest from my thoughts in any way to retard his business or prospects, I will hold myself responsible to you to the amount of 200*l.* in the event of his inability to meet it, with the full understanding that you are to consider this responsibility in the full and liberal light of the security I before entered into for him with Mr. M., your predecessor, and that when a full statement of his affairs is laid before me, and such proving satisfactory, I then enter into the security you require; that the said sum of 200*l.* be void and of no effect, and not to be in force or added to the aforesaid security:"—Held, that this letter did not shew a consideration in writing as required by the Statute of Frauds, either in express terms or by necessary inference, and therefore that it was void as a guarantee.

[S. C. 9 L. J. Ex. 114.]

Assumpsit. The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would sell and deliver to one Charles Cooper, on credit, at certain prices, all such teas and coffees as he the said Charles Cooper should have occasion for and require of the plaintiff in the way of his the said C. Cooper's trade and business, the defendant then promised the plaintiff to be accountable, at and after the expiration of one calendar month after demand in writing for that purpose made on them the defendant and the said Charles Cooper respectively, in 200*l.*, on or as part of any balance of account between the plaintiff and the said Charles Cooper, for the said teas and coffees so to be sold and delivered by the plaintiff to the said C. Cooper. It then alleged the sale and delivery of certain teas and coffees to C. Cooper, to the amount of 500*l.*; that the period of credit had elapsed, and that a written demand had been made on the defendant. Breach, that the defendant, not regarding his promise, had not accounted for or paid to the plaintiff the said sum of 200*l.*

Pleas—first, non assumpsit; secondly, a denial of the [622] sale and delivery of the teas and coffees; thirdly, that, after the sale and delivery of the teas and coffees, and after the balance became due, and after the expiration of the said credit and the making of the said demand, and before the commencement of the suit, the said C. Cooper paid to the plaintiff the monies so due and owing to him for and on account of the said teas and coffees. Verification.

Fourthly, that the promise in the declaration was a special promise to answer for the debt of another person, and that there was no agreement or memorandum in writing wherein the consideration for the said promise was stated or shewn as required by the Statute of Frauds.

Fifthly, that the credit given was greater than and was not the usual credit given in the trade.

Sixthly, as to 93l. 19s. 2d., part of the said sum of 200l., that the balance due from the said C. Cooper to the plaintiff was 413l. 17s. 10d. and no more; that the said C. Cooper became a bankrupt; that the plaintiff received two dividends upon the said sum of 413l. 17s. 10d. from the assignees of the said bankrupt, amounting together to the sum of 93l. 19s. 2d., and that the defendant is entitled to have that sum deducted from the said sum of 200l.

Seventhly, as to 46l. 5s., other part of the said sum of 200l., that the sum of 413l. 17s. 10d., and no more, was due upon the said balance; that the plaintiff held bills of exchange for that sum, drawn by the said C. Cooper upon and accepted by one Samuel Cooper; that the said Samuel Cooper became bankrupt; that the plaintiff received from the assignees of the said bankrupt's estate a dividend on the said sum of 413l. 17s. 10d., amounting to the sum of 46l. 5s., and the defendant is entitled to have that amount deducted from the said sum of 200l.

On the first and second pleas the plaintiff joined issue. To the third plea he replied, denying the payment of the balance by C. Cooper; to the fourth, that there was an agreement in writing, signed by the defendant, wherein [623] the consideration for the said promise and causes of action is stated and shewn, according to the statute; to the fifth, that the credit in the declaration mentioned was the usual credit in the trade of the said C. Cooper; to the sixth, that the plaintiff did not receive the dividend in that plea mentioned; and to the seventh, a similar traverse. Issue was joined on the replication to the third, fourth, fifth, sixth, and seventh pleas.

The cause came on to be tried before Alderson, B., at the last Spring Assizes for the southern division of the county of Lancaster, when a verdict was found for the plaintiff, with 200l. damages, subject to the opinion of the Court, who are to determine how the verdict and judgment are to be entered, on the following case:—

The plaintiff is a tea and coffee dealer residing in Liverpool; the defendant is a well-known comedian of London. Charles Cooper, mentioned in the pleadings, was a retail grocer residing in Liverpool, and a brother of the defendant.

On the 20th of December, 1833, the defendant wrote and sent to the said C. Cooper a letter, of which the following is a copy:—

“My dear Charles,—I received Mr. Bentham's letter this morning. I have thought it necessary to send ‘the affixed’ to you, that you may at once see what my wishes and sentiments are, and then take it to Mr. Bentham,—only remarking that I ought to feel particularly grateful both for the correspondence of Sam and yourself, as I never have the pleasure of hearing from either but in the event of your wanting some favour. It is very proper, I dare say, that it should be so; but if either Sam or yourself had one-tenth of what I have to do and think of, there may be an excuse; at present there is none. Still believe me, your affectionate brother,

“J. COOPER.”

Addressed, “To Mr. C. Cooper, Tea-dealer,

“Great George Street, Liverpool.”

[624] The letter called in the above “the affixed,” the said defendant on the same day wrote to the plaintiff, and it was delivered immediately to the plaintiff by Charles Cooper.

The following is a copy of the letter from the defendant to the plaintiff, called “the affixed.”

“London, Dec. 20th, 1833,

“63 Great Queen Street.

“My dear Sir,—When I had the pleasure of seeing you in London, I then told you I had not the least hesitation in becoming surety to you in the amount required for my brother Charles; but for a protection both to myself and him, I thought it highly necessary I should distinctly understand in what state his affairs were, that he may not by any inadvertence involve me, at which, I am convinced, he would grieve

as much as myself. I still hold this mind ; and before I sign any bond or instrument, I must clearly see my way. In the meantime, to convince you it is furthest from my thoughts in any way to retard his business and prospects, I will hold myself responsible to you to the amount of 200l., in the event of his inability to meet it,—with the full understanding that you are to consider this responsibility in the full and liberal light of the security I before entered into for him with Mr. Mason, your predecessor ; and that when a full statement of his affairs is laid before me, and such proving satisfactory, I then enter into the security you require ; that the said sum of 200l. be void and of no effect, and not to be in force or added to the aforesaid security. With best wishes,—I am, my dear Sir, your faithful servant,

“JOHN COOPER.

“To Mr. Christ^r. Bentham,

“Tea-dealer, Liverpool.”

The security mentioned in the said letter from the de-[625]-fendant to the plaintiff, as having been entered into for Charles Cooper with Mr. Mason, was a bond, of which the following is a copy.

The case then set out the penal part of a bond, dated Sept. 27, 1830, from Charles Cooper and John Cooper to Thomas Mason, in the sum of 1000l.

The condition was as follows :—

“Whereas the above-named C. Cooper hath entered into certain articles of agreement with the said Thomas Mason, bearing even date herewith, whereby the said Charles Cooper became tenant to the said Thomas Mason of certain premises in St. James's Place, and also in Ranelagh Street, in Liverpool aforesaid, as well as certain premises at Wrexham, in the county of Denbigh, on the terms, conditions, and stipulations therein mentioned and set forth : and the said C. Cooper further contracted and agreed to take from the said T. Mason all the teas and coffees that he could vend or sell by retail or otherwise in the said premises or any of them, at the prices in the said agreement mentioned and set forth ; and it was also agreed that the said C. Cooper, with his brother the said J. Cooper, should enter into the above bond or obligation for the due performance and observance of the terms and conditions relative to the said premises or any of them, and for the true payment of any balance or sum that shall be found to be owing for any teas and coffees sold and delivered by the said Thomas Mason to the said Charles Cooper, or on any other account whatsoever. Now the condition of the above-written bond or obligation is such, that if the above bounden C. Cooper and J. Cooper, or either of them, their or either of their heirs, executors, or administrators, do and shall, within one calendar month after demand in writing for that purpose, well and truly pay or cause to be paid to the said Thomas Mason, his heirs, executors, administrators, or assigns, such sum or sums of money, [626] not exceeding in the whole the sum of 500l., as at the time of such demand shall be due from the said C. Cooper, his executors or administrators, to the said Thomas Mason, on or as part of the balance of the account between them, either for teas or coffees, or on any other account whatsoever ; and if the said C. Cooper shall well and truly perform, fulfil, and keep all and singular the clauses, conditions, and stipulations in the said agreement hereinbefore referred to, then this obligation shall be void, or else remain in full force and virtue.”

(Signed)

“CHARLES COOPER, (L.S.).

“JOHN COOPER, (L.S.).”

The plaintiff, after receiving the letter from the defendant, sold and delivered teas and coffees to C. Cooper on the usual credit. On the 1st of October, 1835, C. Cooper was duly declared a bankrupt, and at that time the sum of 413l. 17s. 10d. was due and owing from the said C. Cooper on a balance of account for teas and coffees sold and delivered to him by the said plaintiff as aforesaid.

The plaintiff then held for the amount two bills of exchange drawn by C. Cooper upon and accepted by S. Cooper, in the pleadings mentioned, a tea-dealer residing in Bath, for the amount of and against the said debt.

Samuel Cooper also was duly declared bankrupt, and the said two bills were dishonoured.

The plaintiff proved upon the estate of C. Cooper for 413l. 17s. 10d., and before

the commencement of this action received dividends on the same, amounting to 7s. 4½d. in the pound.

The plaintiff also proved in respect of the said bill upon the estate of Samuel Cooper for 413l. 17s. 10d., and before the commencement of this action received a dividend on the same, of 4s. 7½d. in the pound.

After deducting the total amount of the dividends in [627] both the estates the balance claimed by the plaintiff is 165l. 4s. 4d.

The pleadings are to be considered part of the case.

The questions for the opinion of the Court are, what verdict upon the above facts is to be entered on the issues respectively, and what judgment is to be given on the record.

Wightman for the plaintiff. The first question for the Court to determine is, whether the action is maintainable at all on this declaration, and whether the facts set forth in the case sufficiently support the promise as laid; it is submitted that they do, and that the action is maintainable. The declaration sets forth a guarantee, the consideration for which is the sale and delivery of certain teas and coffees on credit; and that is a sufficient consideration to support the promise in the declaration. The letter of the 20th December, 1833, was an arrangement providing for the altered situation of the parties, and contained enough to shew their intention, and it was unnecessary for the plaintiff to enter into what that "full and liberal light of the security before entered into" with Mason was. The question undoubtedly is, what was the object and intent of the letter, and not what was the object of the bond; but although the object of the bond is immaterial, yet the two instruments may be taken together to explain what was intended by the letter; and if that be done, the consideration will sufficiently appear. [Parke, B. Where does any consideration at all appear? It is impossible to make out what the consideration was, even if you could use the bond in illustration of the letter: and certainly, if you exclude the recital, there is no consideration. The rule is clear, that the consideration must appear either by express words or reasonable intendment.] The bond would shew that teas and coffees were to be supplied on credit, which would constitute a sufficient consideration.

Crompton, for the defendant, was stopped by the Court.

[628] LORD ABINGER, C. B. We are asked to construe this letter upon a state of facts which the case does not suggest or warrant; and even if it did, it would be necessary to shew that that state of facts was known to Mr. Cooper the defendant. This letter shews he had little or no communication with his brother, but he refers to conversations he had had with the plaintiff. Even if it could be inferred from the letter, that he had had communications with his brother, it is impossible for us to say that he was aware of any change of circumstances having taken place, as it is not stated that any change had taken place. The letter refers to the obligatory part of the bond only, and has no reference to the facts stated in the recital, shewing the consideration. If it had had reference to that part of the bond, then the question might arise, whether the letter was sufficient to support the contract alleged in the declaration. It appears to me that we cannot fairly so construe this letter, and if so, the guarantee is void, as no sufficient consideration is shewn on the face of it.

PARKE, B. I think it impossible to come to any satisfactory conclusion as to what the parties meant, upon the statement of documents and facts in this special case. In order to make the declaration consistent with the guarantee, it must appear on the face of the writing, either in express terms or by necessary inference, that the consideration stated in the declaration was the consideration, and the only consideration, for the guarantee. We have only to consider whether we can here draw that inference. I think it is impossible for us to do so, and therefore that the guarantee is void. The effect will be that the verdict must be entered for the defendant on the 1st, 4th, 6th, and 7th issues, and for the plaintiff on the rest.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant accordingly.

[629] LANGTON v. LAZARUS. Exch. of Pleas. 1839.—Assumpsit by the indorsee against the acceptor of a bill of exchange. Plea, that before the bill became due, and whilst it was "in full force and effect," the date of it was altered by the

drawer, whereby it became void :—Held, that the plea was bad, because it did not allege the alteration to have been made after acceptance.

[S. C. 9 L. J. Ex. 89.]

Assumpsit by the indorsee against the acceptor of a bill of exchange, for the sum of 45l., dated the 29th of November, 1838.

Plea, that before the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the 1st day of November, 1838, the same bill was altered, to wit, by the said John Smith, (the drawer), in a material part thereof, in this, to wit, that whereas the same bill, when the same was made by the said John Smith as in the declaration mentioned, bore date on a certain day therein in that behalf mentioned, to wit, on the 29th day of October, 1838, the same date was, whilst the same bill was in full force and effect as aforesaid, to wit, on the day and year in this plea first mentioned, altered, to wit, by the said John Smith, to another and different and much later date, to wit, to the said 29th day of November, 1838, whereby the same bill then became and was and is void in law. Verification.

Special demurrer, assigning for causes that the plea is an argumentative traverse of the allegation that the defendant accepted the bill, and that it should simply have traversed that allegation; that the plea does not allege that the alteration was made by Smith after the defendant had accepted or become a party to the bill; and that the allegation that the alteration was made "whilst the said bill was in full force and effect" as in the plea mentioned, is ambiguous in its meaning whether the alteration was whilst the bill was in full force and effect as in the plea mentioned, or as in the declaration mentioned; and that the plea does not state that the defendant was not a consenting party to the alteration, and does not state that the [630] alteration was without his consent or knowledge, and that it does not shew how the bill was void.

Joinder in demurrer.

Chandless, in support of the demurrer. The plea is clearly bad. The alteration is not stated to be made after the bill was accepted. In order to make the alteration available as a defence, it must be shewn that the date of the bill was altered after it was accepted by the defendant. The allegation that the bill was altered whilst the bill was in full force and effect is uncertain and ambiguous. [Lord Abinger, C. B. How could it be in force unless it was in circulation, and when an action could have been brought upon it?] It may not be in force until it imposes some legal obligation, but such obligation may arise before the bill is accepted—it may have been drawn and indorsed over, so as to be binding upon some other party, before acceptance. If the date was altered after acceptance, the plea ought to have averred that fact. *Culvert v. Baker* (4 M. & W. 417) is an authority to shew that this defence is admissible under a plea that the defendant did not accept the bill *modo et formâ*. [Parke, B. That is no authority for saying that the alteration of a bill may not be pleaded as a defence in this form.]

The Court were of opinion that the plea could not be sustained, and J. Henderson, who appeared in support of it, prayed leave to amend.

Per Curiam. You may have liberty to amend by stating the alteration to have been made after acceptance.

Leave to amend accordingly.

[631] *SIMPSON v. HEATH*. Exch. of Pleas. 1839.—A defendant may be taken in execution after the expiration of a year from the judgment, upon a *ca. sa.* sued out within the year, although not returned and filed within the year; and no *scire facias* is necessary in such case.

[S. C. 7 Dowl. P. C. 832; 9 L. J. Ex. 129; 3 Jur. 1127.]

E. V. Williams had obtained a rule nisi to set aside the execution issued in this cause for irregularity. Final judgment was signed on the 14th of March, 1837; on the 26th of December following a *capias ad satisfaciendum* issued, returnable immediately after its execution, upon which the defendant was arrested on the 26th of July, 1838. The objection was, that the writ of execution not having been returned and

filed within a year after the judgment, it ought to have been revived by scire facias; and it was stated to the Court that Patteson, J., in *Collins v. Yewens*,^(a) had intimated an opinion that this was necessary, and that Littledale, J., had so decided in a case before him at chambers.

Humfrey shewed cause. The question is, whether the defendant can be taken upon a writ of execution more than a year old. Under the old practice, founded upon the Statute of Westminster 2nd, 13 Edw. 1, c. 45, a writ was considered stale after a year and a day. But now, by the 3 & 4 Will. 4, c. 67, s. 2, "All writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof." The express object of this enactment appears to have been to avoid the inconvenience and expense of the former practice, under which a writ ran for a year only, and other continuing writs must then be sued out. [Parke, B. The object of the statute was to place final process on the same footing as mesne process; but nothing is said as to the duration of the writ.] The practice has always been, since [632] the statute, not to return the writ until after its execution. Where the time of executing the writ is not limited except by the means the sheriff has of taking the party, there seems no reason why the writ should not continue in full force until he has had an opportunity of executing it. [Parke, B. This rule was granted, not in consequence of any doubt the Court entertained on the point, but upon the ground of some supposed decisions the other way at chambers.]

E. V. Williams, in support of the rule. The old practice was not founded on the Statute of Westminster 2nd. From the earliest periods known to the common law, it was an established rule, that if, in personal actions, a year elapsed between the time of signing judgment and of issuing execution, the law presumed that the judgment was satisfied, or at least that the defendant might have some cause to shew against the issuing of the execution. Then came the statute, giving the plaintiff a sci. fa. after the expiration of the year: its object being, as is stated in *Mitchell v. Cne* (2 Burr. 660), to prevent a surprise upon the defendant. The only exception was in real actions, where the judgment was in rem; there the execution might be sued out at any time. But upon this rule an exception was engrafted, where the writ was issued within the year, and continued by subsequent writs. Of this practice the first trace appears in *Sir W. Waller's case* (2 Leon. 77; 3 Leon. 259; 4 Leon. 44), T. T., 31 Eliz. There it was moved, "That if one hath judgment in debt, and upon that, within the year and day, sues a capias ad satisfaciendum, although he doth not prosecute the same by the space of two or three years, yet, when he pleaseth, he may proceed thereupon, and shall not be put [633] to a scire facias; for a writ of execution, once sued forth, shall be a continual claim, and the party shall never be put to a scire facias: and of such opinion was Philips." But Manwood, C. B., said,—“I grant that if one hath sued forth a writ of execution, and that be continued by vicecomes non misit breve, for two or three years, yet the plaintiff may proceed thereupon, and shall not be put to a scire facias; but if such writ be sued forth and not continued, but discontinued by a year and a day, he shall be put to a scire facias; for it is negligence of the plaintiff in not continuing it, which, within the year and the day, he might, without order of the Court; but after the year, not by any order of the Court.” The same practice is recognised in *Oguel and Paston's case* (2 Leon. 84). In *Aires v. Hardress* (1 Stra. 100), a fieri facias was taken out within the year, and nulla bona returned; this writ was continued down for several years, and then a capias ad satisfaciendum issued; and whether this was regular or not was the question. The Court took time to inquire into the practice, and afterwards Parker, C. J., said,—“If this were a new case, they should think it hard to take away all scire facias; but the practice has gone so far that there is no overturning it now.” The precedents there cited were merely of continuances of writs issued within the year, and returned; it certainly does not appear when returned. In *Blayer v. Baldwin* (2 Wils. 82; Barnes, 213), it was expressly held, that a writ of execution could not be continued unless the first writ were returned and filed: it is not laid down that this must be done within the year, but that would seem to be the necessary inference. This subject

(a) 3 Per. & D. 439. When the present rule was obtained, that case was not reported: it does not appear from the report that the learned Judge expressed the opinion attributed to him.

was fully investigated in the case of *Karver v. James* (Willes, 255). There the question was, whether the Statute of Limitations could be saved by a writ which had never been returned; [634] and Willes, C. J., was of opinion that it could not. He refers to a decision to that effect in the House of Lords, reversing a previous decision in the Common Pleas; and observes, "that it would be greatly inconvenient if a plaintiff might sue out a writ, and keep it in his pocket for six years together, of which the defendant could not possibly have any notice." The same point was determined in *Brown v. Babington* (2 Ld. Raym. 883), and *Attwood v. Burr* (7 Mod. 5), where Lord Holt states the reason for the practice to be, that until the return of the first writ the Court is not in possession of the cause, so as to award an alias or pluries; which is adopted by Lord Kenyon in *Harris v. Woolford* (6 T. R. 617). [Parke, B. The meaning of that is, that unless the first writ be returned, the plaintiff cannot sue out a continuing writ. The Court must have all the writs returned, in order to make the whole succession of writs, however numerous, appear as one writ.] The rule appears to go further: viz. that until the writ be returned there is nothing of record, and the Court can take no notice of the issuing of the writ. Similarly, the Court is not seised of the execution, until the writ of execution be returned; therefore it is unavailable unless returned within the year. But another material reason for the rule is that given by Willes, C. J., in *Karver v. James*, and also by Buller, J., in *Bates v. Jenkinson* (ibid. 619), viz. the inconvenience and injustice arising from the plaintiff's being permitted to keep the writ for any length of time in his pocket without having it returned. The same doctrine applied to the writ of journeys' accounts; the first writ must have been returned and filed before it could be continued: *Spencer's case* (6 Rep. 10 b.).

The older authorities, therefore, appear strongly to favour the practice contended for; and it is so laid down [635] also in several of the books of practice. In the note to *Underhill v. Devereux* (2 Saund. 68 d.), it is stated that "the continuing of a writ of execution differs in one respect from that of a writ of mesne process; in the latter the same species of writ must be continued down,—but with respect to executions it is held, that one sort of writ sued out, returned, and filed, will support the awarding of a different kind of execution afterwards: thus a capias ad satisfaciendum, or elegit, may issue after the year, upon a fieri facias sued out, returned and filed within the year." The practice is similarly stated also in Archbold's Practice (p. 374, 3rd edit.), and in Sellon's Practice (p. 544). [Parke, B. It is not so stated by Mr. Tidd.] The passage on this subject in Tidd's Practice (p. 1103) is almost in the same words as another passage in the notes to Saunders (2 Saund. 72 c.), which refers to the previous note already cited. [Parke, B. Can you point to any authority which says that the writ must be returned and filed within the year? What principle is there for it? Why is the writ not good beyond the year?] Because the arrest takes place at a time when, on looking to the records of the Court, a year's interval has elapsed since the last entry of record. [Parke, B. Yes; but the plaintiff has taken steps to satisfy his judgment, at a time when no presumption of payment existed. Your position is, that if you act on a ca. sa., you must make the arrest within the year, though the writ is returnable beyond the year.] The argument is, that in order to avoid the inconveniences which have been adverted to, the plaintiff is not at liberty to arrest, unless either a year has not passed, or there has been some record of a step taken to enforce the judgment within the year; and that if a plaintiff take out a writ under the new act, returnable immediately, it must be [636] returned within the year. The argument on the other side goes to this, that if the writ be taken out within the year, it may be executed at any time, however remote. [Parke, B. So it may, according to your argument, if the party go through the form of returning it.] But then there would be something of record to shew the issuing of the writ, and that the judgment was not satisfied. The practice contended for on the other side is at variance with the spirit of the 3 & 4 Will. 4, c. 42, s. 3, which limits proceedings in debt, scire facias, and covenant, to twenty years. It never could have been intended by the Legislature, that a plaintiff should be permitted to sue out a writ of execution, and keep it unexecuted for more than twenty years. Formerly, if a plaintiff delayed to execute a writ of inquiry till a year after interlocutory judgment, he was put to his scire facias: *How v. Acton* (12 Mod. 500). [Parke, B. That is not now the rule; a term's notice is sufficient.]

Cur. adv. vult.

The judgment of the Court was delivered on the subsequent day by

PARKE, B. The question in this case was, whether a defendant could be taken in execution on a writ of ca. sa., returnable immediately after the execution thereof, sued out within a year and day after judgment, but not executed until long after the expiration of that time.

We are of opinion that the proceeding was regular; that it was unnecessary to have the writ returned and filed within the year and day, and a new writ grounded on it, and that no sci. fa. was necessary.

This appears to us to be clear on reference to the older authorities. In Lord Coke's reading on the Statute of Westminster 2nd, 2 Inst. 469, it is stated that at common law, in personal actions, if the plaintiff, after judgment given, [637] or recognisance acknowledged, sued out no process of execution within the year, he could have no scire facias, but was driven to his original. The Statute of Westminster 2nd gave the scire facias instead; it recognises the right to sue out process within the year: if the record is of older date, he is to have the writ of sci. fa.

Lord Coke afterwards says, in the same reading, that "if the plaintiff taketh his process of execution within the year, though it be not served within the year, yet if he continue the same, he may have process of execution at any time after the year." In Gilb. Execut. 94, it is said, "though there was a year and a day to execute a judgment, yet if there was execution taken out, and that was continued beyond the year, there was no occasion for a sci. fa., for then at common law there was a presumption" [clearly a misprint for *the* presumption] "that the judgment was satisfied, because there appeared an execution taken out, and it was the default of the minister that the writ was not served."

The result of these authorities is this, that if the plaintiff sue out process within the year, no sci. fa. is necessary, and he may act on that process. But if that process expire, he must continue it properly, and then execute that continued process. The object of the continuance is to connect the writ which is executed, with that which issued in due time.

The case in Leonard, cited by Mr. Williams (*Sir W. Waller's case*), is an authority only for the necessity of a continuance when the first writ was not acted upon. Philips was of opinion that suing out the first writ was enough to authorize a fresh writ; Manwood admitted that if the first writ was sued out in the year, and continued, it was enough; but if sued out and not continued for less than a year and a day, he might continue by leave of the Court; if beyond that time, the process was discontinued, and he was put to sci. fa.

After this the practice seems, from the case of *Weldon* [638] v. *Greg* (2 Sid. 59), to have been, after a fi. fa., to enter continuances at any time. But in *Karver v. James* (Willes, 259), and in *Blayser v. Baldwin* (2 Wils. 82; Barnes, 213), it was settled, that to warrant continuances the first fi. fa. must be returned and filed.

It is, therefore, undoubtedly requisite, in order to avoid the necessity of a sci. fa., to sue out a writ of execution within the year; and in order to connect the writ on which the arrest takes place with that sued out, it is also necessary to have proper continuances, and for the purpose of those continuances to have the first writ returned and filed: but we have not found any authority whatever, (except the recent alleged decision before a single Judge, and the statement in the more modern books of practice), that the returning and filing should be within the year. The issuing the writ within the year, if the same writ is acted upon,—or if a different writ, then the issuing of a writ in time, properly connected with that and acted upon,—is enough. Under the old practice, and indeed still, a writ of execution might be made returnable with an interval of several terms; and consequently, if such a writ was sued out within the year, a defendant might be taken upon it long after the year, if before the return of the writ. Under the new practice established by the act of Parliament making the process of execution returnable immediately, a defendant may also be taken, upon a similar writ sued out within the year, a considerable time afterwards. This circumstance arises from the Legislature not having limited the duration of these writs, as they have done those of mesne process, to four months.

If this be an inconvenience (it is probably more nominal than real, as a defendant will be entitled to relief on audita querela or motion to the Court) the Legislature must rectify it.

Rule discharged.

[639] **LOVATT AND OTHERS v. HAMILTON AND OTHERS.** Exch. of Pleas. 1839.—The defendants, by their broker, entered into a contract for the sale to the plaintiffs “of 50 tons of palm oil, to arrive per the ‘Mansfield,’ &c. &c. In case of non-arrival, or the vessels not having so much in after delivery of former contracts, this contract to be void.” At the time this contract was entered into, the defendants had several vessels on the coast of Africa for the purpose of obtaining palm oil, and amongst others the “Mansfield” and the “Watt.” After the date of the contract, the “Mansfield” was loaded with 315 tons of palm oil, and sailed homewards. On her arrival at Cameroons the defendants’ agent ordered the captain of the “Mansfield” to transship part of her cargo to the “Watt,” which was the larger vessel. This transshipment was accordingly made bona fide and without fraud, for the purpose of enabling the “Watt” to proceed home with a full cargo. The “Watt” proceeded on her voyage, and arrived in Liverpool on the 8th of April, 1838, and the “Mansfield” on the 20th of May following. The “Mansfield,” on her arrival, had on board 235 tons of palm oil, but the contracts made previously to the above contract amounted to 28 tons leaving only 7 tons applicable to this contract, which were delivered by the defendants to the plaintiffs:—Held, in an action for the non-delivery of the oil, first, that the arrival of the oil in the “Mansfield” was a condition precedent, and that the plaintiffs were not entitled to the oil brought by the “Watt.” Secondly, that the contract for the 50 tons was entire, and that the plaintiffs were not entitled to the 7 tons brought by the “Mansfield” over what was required to satisfy former contracts.

[Applied, *Johnson v. Macdonald*, 1842, 9 M. & W. 600.]

This was an action of assumpsit for the non-delivery of oil, which was tried before Williams, J., at the Liverpool Summer Assizes, 1838, when a verdict was found for the plaintiff with 49l. 10s. damages, subject to the opinion of this Court upon the following case:—

The plaintiffs are partners and carry on business at Liverpool as soap manufacturers; the defendants are merchants in partnership, and trade extensively to the coast of Africa. Messrs. N. Waterhouse & Son were the defendants’ brokers, duly authorized to make the contract hereinafter mentioned on their behalf. On the 1st of November, 1837, the plaintiffs and the defendants, through the said brokers, entered into a contract for the sale by the defendant to the plaintiffs of the oil in question in this cause, and the following contract note was sent to the plaintiffs, signed by the said brokers:—

“Lovatt, Brothers, & Taylor.

“1, Old Hall Street, 11th Month, 1837.

“Respected Friends,—We have this day sold you the following goods: viz. 50 tons of palm oil, to arrive per ‘Mansfield,’ at 32l. per ton, casks to be returned to and paid for by Hamilton, Jackson, & Co., at 20s. per ton nett. In case of non-arrival, or the vessels not having so much in after delivery of former contracts, this contract to be void.”

[640] “Payment, half by three months’ acceptance, less three months’ interest, and half by four months’ acceptance, less two months’ interest.—And remain, very truly, Your friends,
“N. WATERHOUSE & SON.”

A contract note signed by the brokers was also sent on the same day to the defendants, which corresponded with the above, except that the word “vessel” was used instead of the word “vessels.”

At the time the above contract was entered into, the defendants had certain vessels on the coast of Africa for the purpose of obtaining palm oil, and bringing the same to Liverpool, and amongst other vessels the “Mansfield” and the “Watt.” After the date of the contract, the “Mansfield” had loaded on board of her at Old Calabar, on the coast of Africa, a cargo of palm oil, upwards of 315 tons. On the 17th of December she sailed from Old Calabar to Cameroons, having taken in her water at Old Calabar, and arrived at Cameroons, on the coast of Africa, on the 22nd of December, 1837. On her arrival at Cameroons, Captain John Lillie, the defendants’ resident agent there, directed the captain of the “Mansfield” to transship part of the

cargo into the "Watt." The "Watt" is the larger of the two vessels, being capable of containing about 600 tons; the "Mansfield" was capable of containing about 350 tons. The "Mansfield" was nearly a full ship when this transshipment was made; the "Watt" was then about half full. Lillie had previously transshipped oil from two other vessels of the defendants, called the "Lisbon Packet" and the "Gannet," into the "Watt," as part of the "Watt's" homeward cargo. The oil shipped on board the "Mansfield," the "Watt," and the other vessels, was to be ultimately conveyed to Liverpool; and the oil shipped on board the "Mansfield" had been put on board her with the intention of its being carried home in her, and not [641] with the intention of any part of it being transshipped. It had been stowed in the "Mansfield" in the manner in which oil is stowed in a vessel to be carried home to England as part of her homeward cargo, and not in the mode in which oil is put on board a vessel or tender for transshipment. By the direction of Captain Lillie, 80 tons of palm oil were transshipped from the "Mansfield" into the "Watt" on the 22nd of December, 1837, and some watercasks were taken out of the "Mansfield," and some fresh water taken in. Previous to the transshipment into the "Watt" from the three vessels, the casks containing the oil so transshipped were marked with the initial letter of each respective vessel's name, to denote that the same was received from such vessel respectively. This was done with reference to the commissions due to the persons who had respectively purchased the oil.

The transshipment from the "Mansfield" into the "Watt" was made *bonâ fide* by Lillie, for the purpose of getting the "Watt" off, as she could not have been safely sent home without the oil from the "Mansfield."

The transshipment was not made fraudulently, nor with any view to any contract as to the "Mansfield" cargo, nor had Lillie, at the time of making it, any knowledge of the contract with the plaintiffs, nor had he received any communication from the defendants as to the transshipment or contract. Captain Lillie made the transshipment entirely out of his own head, and his only authority to make it was his general authority to act in the superintendence of the defendants' vessels at Cameroons, which were under his control. Such transshipment from a vessel like the "Mansfield" to one like the "Watt" is not usual in the trade, though sometimes made from one vessel to others in the same employment. The "Watt" proceeded on her voyage home with the oil received by her from the above vessels, and arrived in Liverpool on the 8th of April, 1838. On [642] her arrival in Liverpool, the plaintiffs applied to the defendants' brokers by letter, as follows:—

"Naylor Street, 11th April, 1838.

"Gentlemen,—We will thank you to inform us per note, whether it is your intention to deliver the 50 tons of palm oil we bought from you on the 7th November last, out of that portion of the 'Mansfield's' cargo now landing ex 'Watt.'—Yours respectfully,

"LOVATT, BROTHERS, & TAYLOR."

The persons who had purchased the cargoes of the "Mansfield," the "Lisbon Packet," and the "Gannet," received from the defendants their commissions on the oils transshipped from those vessels respectively into the "Watt." When the "Watt" delivered her cargo to the defendants at Liverpool, they knew from marks on the casks that the palm oil so transshipped from the "Mansfield," the "Gannet," and the "Lisbon Packet," had been received by the "Watt" from those vessels. The contracts made previously to the above-mentioned contract with the plaintiffs amounted to 228 tons, and no more. The "Mansfield" arrived in Liverpool on the 20th day of May, 1838, having on board 235 tons of palm oil. She did not take in any further quantity after the transshipment of that part of her cargo which was transshipped into the "Watt." Upon the arrival of the "Mansfield" in Liverpool, and before the commencement of this action, 7 tons of the palm oil brought by her, being the difference between 228 and 235 tons were delivered by the defendants to the plaintiffs. Messrs. Waterhouse & Co. made an advance on the outward cargo of the "Mansfield," which was to be repaid out of the returns of that cargo. After the arrival of the "Mansfield" at Liverpool, Messrs. Waterhouse & Co. claimed to have a lien on part of her cargo, which had been transshipped into the "Watt," [643] and made application to the defendants thereon. As soon as the claim was set up, the defendants immediately objected to it, and paid the amount of the advances. The above sum of 494l. 10s. are the damages calculated on the non-delivery of the 43 tons.

The questions raised in the case, upon which any discussion was made, were—first, whether the arrival of the oil at Liverpool in the “Mansfield” was a condition precedent to the plaintiffs’ right to the delivery of it, or whether the arrival of the oil in the “Watt” did not entitle them to it; and, secondly, whether they were not entitled to the 7 tons which arrived by the “Mansfield,” beyond what was necessary to satisfy the former contracts.

Cresswell, for the plaintiffs. The arrival of the “Mansfield” with the 50 tons of oil on board was not a condition precedent to the plaintiffs’ right to the delivery of it. The arrival of the ship was not the material part of the contract, but the arrival of the oil. *Boyd v. Siffkin* (2 Camp 328). The defendants did not mean to insure the ship’s arrival with that quantity on board. If this vessel had been wrecked on the coast of Ireland, and the oil had been brought to Liverpool in another ship, the plaintiffs could not have refused to accept it. The meaning of the contract is, “I agree to sell such a part of the ‘Mansfield’s’ cargo of oil, not exceeding 50 tons, as shall arrive and remain after the delivery of former orders.” This cargo was taken on board the “Mansfield,” not for the purpose of transshipment, but as a homeward-bound cargo. In *Idle v. Thornton* (3 Camp. 374), where the contract was for the sale of tallow from a particular ship on her arrival before a given day, and the vessel was wrecked off the coast of Ireland, but the cargo saved, and might have been forwarded to the port of London by the [644] given day—the purchasers not having offered the vendors an indemnity if they would bring the tallow to London; it was held, that the vendors were not liable for the non-delivery. Lord Ellenborough there says, “In construing such a contract, I must consider that it was the intention of the parties that it should be void, unless the commodity, in the ordinary course of trade and navigation, arrived at the port of destination by the appointed day.” He never raises a doubt, if it had been forwarded in due time, that the purchasers would be entitled to it. He seems to consider it part of the contract that the vessel shall arrive in the ordinary course of trade and navigation. Suppose this vessel had met with an accident which rendered her unable to proceed, and her cargo had been put into another vessel, which arrived safe and in due time,—that would be an arrival in the ordinary course of trade and navigation. The contract was to sell oil procured as the cargo of the “Mansfield,” which the oil in question was. [Lord Abinger, C. B. The contract is to be void “in case of non-arrival, or the vessel’s not having so much in after delivery of former contracts.”] It is a very different thing to say what is to make the contract void, and what is the contract. The contract is to sell 50 tons of oil to arrive by the “Mansfield.” It did substantially arrive by the “Mansfield,” as it had formed part of her homeward-bound cargo, and had her initial letter on the casks. If the defendants were prevented from performing their contract by the act of their own agent, they cannot avail themselves of that as a defence. It is not necessary to make it out to have been a fraudulent interference: if a party’s own act deprives him of the power to fulfil the contract, he cannot avail himself of that as a defence: *Shep. Touch., Condition, 145*.

The Court were clearly of opinion that the arrival of the oil in the “Mansfield” was a condition precedent, and that [645] the plaintiffs were not entitled to the oil brought by the “Watt.” They were also of opinion that the contract for the 50 tons was entire, and that the plaintiffs were not entitled to the 7 tons which did arrive by the “Mansfield.”

Judgment for the defendants.

Wightman was to have argued for the defendants.

SIR FRANCIS SYKES, BART. v. GILES. Exch. of Pleas. 1839.—The plaintiff having employed an auctioneer to sell certain timber growing on his estate, the following, amongst other conditions, were read at the sale, in the presence of the defendant:—“That each purchaser should pay down a deposit of 10l. per cent. in part of the purchase-money, and pay the remainder on or before the 17th of August; but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of 5l. per cent. will be allowed.” Also, “That each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as shall be approved by the vendor or his agent, for the performance of his agreement, pursuant to the above conditions.” The defendant became the purchaser of one lot, and paid the deposit

Some days after the sale, which was on the 14th of February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase-money, dated on the day of the sale, on one J. M., payable six months after date to his own order, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted on his own account. The bill became due on the 17th of August, when the amount of it was duly paid to the holder. It was never transferred to the plaintiff:—Held, that, under these circumstances, the delivery and payment of the bill of exchange was not a valid payment of the residue of the purchase-money for the timber purchased by the defendant, the auctioneer having no authority to receive payment of such residue, or to take any security for the payment of it; but that even if he were authorized by the conditions to receive payment, the payment required was a payment in cash, and he had no authority to take a bill of exchange.

[S. C. 9 L. J. Ex. 106. Followed, *Williams v. Evans*, 1866, L. R. 1 Q. B. 352.]

By an order of the Lord Chancellor, the following case was sent for the opinion of this Court:—

In the month of February, 1838, Mr. Whitley, the steward and farm-agent of Sir Francis Sykes, who for many years had the management of the plaintiff's estates, employed Samuel Musgrove and Wm. Quelch, then carrying on business as auctioneers under the firm of William Quelch & Co., to sell for the plaintiff, by public auction, on the 14th of that month, a quantity of beech timber trees, the property of the plaintiff, growing at Basildon and Ashampsted, in the county of Berks.

[646] Messrs. Quelch & Co. accordingly advertised the trees for sale by printed hand-bills, which were posted up and published in the neighbourhood and elsewhere, and the following is a copy of one of them:—

“Capital Beech Timber—Basildon and Ashampsted. To be sold by auction by Wm. Quelch & Co. on Wednesday, February 14, 1838, at the Red Lion, Upper Basildon, at one o'clock, 200 loads of prime beech timber, with lop and top, growing at Long Dean, Mean Down, Hither Down, Basildon, and Layfield Ashampsted.

“A Catalogue Lot 1.—100 prime beech trees, with lop and top, standing in Layfield Copse, Ashampsted, numbered 1 to 100; (and, after enumerating other lots), lot 8.—100 ditto, standing in Long Dean Copse, numbered 1 to 100. The foregoing beech timber is considered to be of superior growth and quality, and worth the attention of dealers and others. A liberal credit, on payment of 10 per cent deposit, and approved security. Mr. Whitley, at Kiln Farm, will appoint a person to shew the lots, of whom catalogues may be had; also at the White Hart, Newbury; Chequers, Speenhamland; Lamb, Wallingford; Catherine Wheel, Henley; place of sale; and of the auctioneers, Bridge Street, Reading.”

The sale of the trees accordingly took place on the 14th February at the place above mentioned, and the following were the conditions of sale, which were publicly read, in the presence and hearing of the defendant, by the auctioneer in the sale room to the company present, and just before the commencement of the sale:—

“Conditions of sale of 211 loads of beech timber at Basildon and Ashampsted, February 14th, 1838.

“First, that no person shall advance less than ten shillings at each bidding, and no bidding shall be retracted.

“Second, that the highest bidder shall be the purchaser; and if any dispute shall arise between two or [647] more bidders, the lot in dispute shall be immediately put up again.

“Third, that each purchaser shall pay down a deposit of 10l. per cent in part of the purchase-money, and pay the remainder on or before the 17th day of August; but in case any purchaser shall prefer to pay the whole amount of his purchase-money at an earlier period, discount, after the rate of 5l. per cent per annum, will be allowed.”

The fourth condition restricted the purchaser from doing wilful damage; and the fifth provided that, in case of bankruptcy or insolvency, all the right, title, interest, and property of such purchaser in and to all such trees, &c., as should not have been carried away, should thenceforth cease and determine; the vendor making such an allowance out of the purchase-money in respect of the same trees, &c., as two

indifferent persons, to be appointed arbitrators in the usual manner, or their umpire, should award.

The sixth was, "that each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as shall be approved by the vendor or his agent, for the performance of his agreement, pursuant to the above conditions; which agreement and bond shall be prepared by the vendor's solicitor at the mutual expense of the vendor and purchaser, and shall be executed by such purchaser before any of the timber shall be cut; and if any purchaser shall neglect to execute such agreement and bond for the space of fourteen days from the day of sale, the deposit money shall be forfeited, and the timber sold by and for the benefit of the vendor; and the deficiency, if any, at such second sale, shall be made good by the purchaser at this sale so making default."

The defendant became the purchaser of the beech trees comprised in lot 8, knowing the plaintiff to be the vendor of it, for the sum of 42l., under the above conditions; and at the time of the purchase, he paid to the auctioneers, Messrs. Quelch & Co., on account of it, a deposit of 4l. 4s., [648] (being 10 per cent. on the amount of the purchase-money), pursuant to the third condition, leaving the residue of the purchase-money, amounting to 37l. 16s., unpaid: and the following memorandum was given to the defendant by Mr. Rackstraw, the auctioneer's clerk, in the presence of Mr. Whitley, the plaintiff's steward, who is since dead, and there is no other fact in evidence that he knew of the memorandum or its contents, or what, if any, bills were taken at the sale:—

"Lot 8—forty-two pounds.

"Deposit—four pounds four shillings.

"Thirty-seven pounds sixteen shillings by bill at 6 months, due 17th day of August, payable at Messrs. Simmonds', Bankers, Reading.

"Feb. 14th, 1838.

"W. RACKSTRAW."

Neither the plaintiff, nor any agent on his behalf, applied to the defendant for, or required the defendant to enter into any agreement, or give any bond with or without sureties, until the 28th of August, 1838, up to which time no timber had been cut.

Some days after the sale, the defendant, at the request of the said Messrs. Quelch & Co., drew a bill of exchange for 37l. 16s., bearing date the 14th day of February, 1838, on John Marks, and payable to the order of the defendant six months after date; which bill the said defendant indorsed and handed over to the said Messrs. Quelch & Co., and which bill was duly paid when due.

Quelch & Co., being in difficulties, indorsed over the bill to one Robert Snare, to whom they were indebted on their own account, and on the 6th day of June, 1838, became bankrupts.

No application for payment of the said sum of 37l. 16s. was made by the plaintiff, or any one on his behalf, to the defendant, until the 13th day of August, 1838.

[649] The bill was never transferred to the plaintiff, nor did he receive the purchase-money for the timber, nor was he in any way aware, nor had he any suspicion, of the bill of exchange having been given as aforesaid, till long after it had been paid away and negotiated by Quelch & Co.

The question for the opinion of the Court is,—

Whether, under the foregoing circumstances, the delivery and payment of the bill of exchange for 37l. 16s., as above set forth, was a valid payment to the plaintiff of the residue of the purchase-money for the timber comprised in lot 8, purchased by the defendant as above mentioned.

Hoggins, for the plaintiff. The auctioneers had no authority, either express or implied, to take this security. The conditions were a notice to all the world that the auctioneers had a limited authority only. The sixth condition expressly points out what security shall be given—namely, an agreement and bond, with such sureties as shall be approved by the vendor or his agent. The auctioneers were only agents to sell and receive the deposit money, but not to judge of the sufficiency of the security. They had no authority beyond that, and were not the vendor's agents for any other purpose; and even if they were such agents as contemplated by the sixth condition, they would have had no authority to take a bill of exchange as a security, but only a security of the nature mentioned in the condition.

Lee, for the defendant. Whether the auctioneers were agents or not, the payment

was in pursuance of the provision in the third condition of sale, as payment of the remainder of the purchase-money was not to be made until the 17th day of August, when the bill of exchange would be payable. This was in fact payment. [Lord Abinger, C. B. Suppose the purchaser was to pay on the 17th of August, to whom was he to pay—to the auctioneers or the [650] vendor? Parke, B. If an auctioneer is employed to sell goods for ready money, then he is the agent of the vendor to receive the money; but here the conditions point out to whom the money is to be paid. The term “agent” in the sixth condition means some other agent than the auctioneer. It is clear that the vendor reserved to himself the receipt of the money.] Then the case states that Whitley, the plaintiff’s agent, was present at the sale, and that the contract was entered into in his presence. So there is the entering into the contract, the payment of the deposit, and the giving of the bill with the assent of Whitley, which amounted to an agreement by him, on behalf of the plaintiff, to that mode of payment. In *Cupel v. Thornton* (2 Car. & P. 352), Lord Tenterden held that an agent authorized to sell goods had, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale. [Parke, B. In this case the auctioneer is not such an agent.] In *Williams v. Millington* (1 H. Bl. 81), it was held that an auctioneer employed to sell the goods of a third person by auction, might maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property. [Lord Abinger, C. B. The rule of law is, that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest.] In *Bunney v. Poyntz* (4 B. & Adol. 568; 1 Nev. & M. 229), it was held that the agent of the vendor having taken the promissory note of the vendee in payment, and negotiated it, the lien of the vendor did not revive upon the dishonour of the note, which was outstanding in the hands of an indorsee. [Parke, B. In all those cases there was a general authority. Here these auctioneers had not such an authority, but a limited one only.] This is a case of great hardship on the defendant, who has already paid the money.

[651] LORD ABINGER, C. B. There is no doubt that this is a case of great hardship, the defendant acting honestly and fairly, having before paid the money. An auctioneer has authority to sell under the instructions he has received, and here those instructions appear from the conditions of sale. By the conditions in the present case, the vendee is to pay a deposit of 10 per cent., and the remainder on or before the 17th of August, but he is not to pay it to the auctioneers. As soon as the sale has taken place, and the deposit money paid, the authority of the auctioneer is at an end, and he had no authority to make any contract for payment of the remainder. The conditions do not specify who is the agent of the vendor; but the agency of the auctioneer being at an end, he had no authority to receive the money, and most clearly not to take the bill of exchange. The cases which have been cited, when properly examined, do not impugn this view of the case.

PARKE, B. The cases which Mr. Lee has relied upon are clearly distinguishable from the present. There the authority was a general one. The question here is, what authority the auctioneers had. The extent of that authority, in the absence of any proof of general authority, must depend upon the conditions of sale. The only authority given to the auctioneer by these conditions is, to receive the deposit money; the vendor reserves to himself or his agent the power to receive the remainder of the purchase-money. As no agent is named for that purpose, the payment must be to the principal or some general agent, which the auctioneer certainly was not; for the word “agent” in the sixth condition clearly does not refer to him. By the third condition, the remainder of the money is to be paid on or before the 17th of August, but such payment is not to be to the auctioneer, but the vendor. Then, that part of the condition which provides that the purchaser may, if he shall prefer it, pay the whole money at an earlier period, [652] must also be construed to mean that he shall pay it to the same person, that is, the vendor or his agent. But even if the auctioneer had had authority to receive the remainder of the purchase-money, he had no authority to receive it in this way, by means of a bill of exchange. Cash payment was intended, and not a bill of exchange. My opinion however is, that, under the terms of the conditions of sale, the vendor is to receive the purchase-money, and not the auctioneer. The general rule may be different, but this case turns on the peculiar construction of the conditions of sale.

GURNEY, B., and ROLFE, B., concurred.

The following certificate was afterwards sent :—

“We have heard this case argued by counsel, and have considered the same, and are of opinion, that, under the circumstances stated in the case, the delivery and payment of the bill of exchange for 37l. 16s., as set forth therein, was not a valid payment to the plaintiff of the residue of the purchase-money for the timber comprised in lot 8, purchased by the defendant, as therein mentioned.

“Dated 20th day of November, 1839.

“ABINGER.

“J. PARKE.

“J. GURNEY.

“R. M. ROLFE.”

[653] CORLETT, Public Officer of the North and South Wales Bank, v. CONWAY, Executor of Barbara Yonge, Deceased. Exch. of Pleas. 1839.—In a count on a guarantee for the repayment of bills, &c., drawn and subscribed by M. & E., it was alleged that they accepted a bill, and by a memorandum added to such acceptance, expressed the same to be payable at a particular place :—Semble, that the count was bad on special demurrer, for want of an averment that the bills were subscribed by M. & E.

[S. C. 9 L. J. Ex. 105.]

Assumpsit. The first count of the declaration stated that on &c., Barbara Yonge, by a certain memorandum in writing, bearing date &c., and duly signed and subscribed by the said Barbara Yonge, requested and authorized the Company or co-partnership called the North and South Wales Bank, and the Directors and Managers thereof, to pay any bill or bills, orders, checks, or liabilities drawn or subscribed by certain persons to wit, one Daniel Maddock and one Owen Edwards, for any sum or sums of money not exceeding the sum of 5000l. in the whole, and the said B. Yonge thereby guaranteed the repayment thereof, or any balance thereof, and legal interest, commission, and charges which might accrue due thereon; and thereupon, in consideration of the premises, and that the said Company or co-partnership, at the request of the said B. Yonge, would make payments according to the terms of the said memorandum in writing, the said B. Yonge promised the said Company or co-partnership to guarantee the repayment thereof, or any balance thereof, and legal interest, commission, and charges which might accrue due thereon, according to the terms and within the limits in the said memorandum in that behalf mentioned and expressed, according to the form and effect of the said memorandum in that behalf; that afterwards, and in the lifetime of the said B. Yonge, to wit, on &c., one Hugh Price, made and drew a certain bill of exchange in writing, and directed the same to the said Daniel Maddock and Owen Edwards, and thereby required the said D. Maddock and Owen Edwards at sight to pay to the order of the said Hugh Price the sum of 4700l. sterling, value received [654] in the St. Mungo steam-boat, sold to the said D. Maddock and Owen Edwards, for themselves and the other partners of the Clwyd and Liverpool New Steam Packet Company; and the said D. Maddock and O. Edwards then, to wit, on the day and year last aforesaid, accepted the said bill, and by a memorandum added to the said acceptance expressed the same to be payable at the North and South Wales Bank; and the plaintiff avers, that the said Company or co-partnership, confiding in the said promise or guarantee of the said B. Yonge, afterwards and in her lifetime, to wit, on &c., duly paid the said amount of the said bill of exchange, being a less sum than the said sum of 5000l., upon sight thereof, for and on behalf and at the request of the said D. Maddock and the said Owen Edwards to William Fletcher, agent of the Liverpool Branch of the Bank of England, to whom the said Hugh Price had then indorsed the same, and which said William Fletcher, as such agent, was then the holder thereof, they, the said D. Maddock and O. Edwards, not having otherwise paid the same. The count also averred that the money had not been repaid; that B. Yonge had notice thereof, and that neither she nor her executor, the defendant, had paid the plaintiff.

Special demurrer, and joinder in demurrer.

The points for argument on the part of the defendant were, (inter alia), that the count was insufficient for not averring that any “bill, order, check, or liability” was “drawn or subscribed” by Daniel Maddock and Owen Edwards, for any sum within the meaning of the guarantee of the testatrix, and in not averring that the acceptance was in writing.

J. Henderson, in support of the demurrer. The averments in the declaration do not bring the plaintiff's claim within the letter or meaning of the guarantee. [Parke, B. The question is, whether the acceptance of the bill payable [655] at the North and South Wales Bank is a liability or cheque within the meaning of the guarantee.] The terms of the guarantee plainly require a writing by Maddock and Edwards. Their acceptance is not stated to have been in writing, and an oral acceptance would bind them if the bill were drawn in Ireland, *Mahoney v. Ashlin* (2 Barn. & Adol. 478), or abroad, and non constat that this was an inland bill. [Lord Abinger, C. B. The count, after stating the acceptance, proceeds thus: "and by a memorandum added to the said acceptance, expressed the same to be payable at the North and South Wales Bank." How could a memorandum be added to an oral acceptance?] It might be a question for a jury whether such a memorandum, unsigned, was intended to operate per se as an acceptance within the 1 & 2 Geo. 4, c. 78, s. 2, or to be subsequently completed by signature: *Dufaur v. Orenden* (1 Mood. & Rob. 90). The count does not, nor could it, describe the transaction as a bill drawn by Maddock and Edwards; and it is not averred in these pleadings, nor is it shewn by statements raising a necessary implication, that Maddock and Edwards ever subscribed. [Parke, B. It is not necessary that the acceptance of an inland bill should be subscribed; it is sufficient for the purposes of the act if a drawee merely writes the word "accepted."]

Wightman, for the plaintiff, prayed leave to amend by introducing an averment of subscription.

Leave to amend on payment of costs.

[656] HUGHES v. THORPE. Exch. of Pleas. 1839.—A member of a banking company wrote to the manager of it, respecting a mistake which had been made in not debiting his account and crediting the bank for the payment of the several calls due from him, and added, "Please debit me with the amount of the calls due on my 200 shares. I think it will be 500l. the second call on the first hundred shares: and 1000l. on the two calls on the second hundred shares; and advise me in a private letter. Your bank shall be credited here upon that date." To this letter no answer was sent:—Held, not sufficient evidence of an account stated.—By 6 Geo. 4, c. 42, s. 10, (the act for the better regulation of co-partnership banks in Ireland), it is enacted, that all actions and suits, &c., against any person who may be indebted to any such co-partnership, and all proceedings at law or in equity under any commission of bankrupt, and all other proceedings at law or in equity to be commenced or instituted, for or on behalf of any such co-partnership, against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for recovering any debts, &c., due to such co-partnership, shall, from the passing of the act, be commenced or instituted and prosecuted in the name of any one of the public officers &c., of the said co-partnership:—Quære, whether the act confers upon the company a right to bring an action in the name of its public officer against one of its members for a debt due to the co-partnership.—To an action brought by the Agricultural and Commercial Bank of Ireland, in the name of its public officer, the defendant pleaded, that the co-partnership consisted of more than six persons and was established after the passing of the 6 Geo. 4, and that the establishment or houses of business of the said co-partnership had been "from the time of the formation thereof until the commencement of this suit, and then were, at places in Ireland less than fifty miles from Dublin, contrary to the provisions of the statute:—Held, that in order to support this plea, it was incumbent on the defendant to shew that there was such a branch bank for the whole time viz. from the time of the original formation of the company down to the time of the commencement of the suit.—Sembles, that the existence at any time of such an establishment would be no defence to an action; but it must at least be shewn to have existed either at the time the contract was made, or at the commencement of the action.

[S. C. 9 L. J. Ex. 109.]

Assumpsit for money had and received to the use of the Agricultural and Commercial Bank of Ireland, and on an account stated with them. The action was brought in the name of the plaintiff, as one of the public registered officers of the said Bank.

To this declaration the defendant pleaded, first, *non assumpsit*; secondly, as to 1500*l.* parcel &c., payment before action brought; thirdly, that the said co-partnership in the declaration mentioned was and is a co-partnership consisting of more than six persons, carrying on business as bankers in Ireland; that the said co-partnership was constituted and established after the passing of an act of Parliament of the 6 Geo. 4, for the better regulation of co-partnerships of certain bankers in Ireland; and that the establishments or houses of business of the said co-partnership had been from the time of the formation thereof until the commencement of this suit,—and then [657] were, at places in Ireland less than fifty miles from Dublin, contrary to the provisions of the statute, &c.

The plaintiff joined issue on the first of these pleas, traversed the second, and replied *de injuriâ* to the third; and issues were joined on the replications to the two last pleas.

The cause came on to be tried at the Liverpool Spring Assizes, 1838, before Coleridge, J., when a verdict was found for the defendant on the first issue, as far as the same related to the first count; and for the plaintiff upon the first issue, as far as related to the second count; with 1500*l.* damages. Upon the issue on the second plea the verdict was found for the plaintiff; and upon the issue upon the third plea, for the defendant; with leave to the plaintiff to move to enter a verdict for him on the issue on the last plea; and with leave to the defendant to move to enter a verdict for him on the issue as to the first plea, so far as regarded the second count.

Upon the said motions being made, and the plaintiff also moving for judgment notwithstanding the verdict found for the defendant on the last plea, the Court directed the facts to be turned into the following case:—

By the statute 6 Geo. 4, c. 42, s. 2, it is enacted, that from and after the passing of that act it shall and may be lawful for any number of persons united or to be united into any society or co-partnership in Ireland, consisting of more than six in number, and not having the establishments or houses of business of such society or co-partnership at any place or places less than fifty miles distant from Dublin, to carry on the trade and business of bankers in like manner as co-partnerships of bankers consisting of not more than six in number may lawfully do, and to borrow, owe, or take up any sum or sums of money on their bills or notes, payable on demand, or at any time after the date, or after sight, and to make and issue such notes or bills accordingly at any place in Ireland exceeding the distance [658] of fifty miles from Dublin;—all the individuals comprising such societies or co-partnerships being liable and responsible for the due payment of all such bills and notes in manner hereinafter provided, anything contained in an act made in the Parliament of Ireland in the 21st & 22nd years of the reign of his late Majesty King George the Third, intituled “An Act for establishing a Bank by the name of the Governor and Company of the Bank of Ireland,” or in the hereinbefore-recited act of the 1st & 2nd years of his present Majesty’s reign, or in any other act or acts, or any law, usage, or custom to the contrary in anywise notwithstanding. By section 6 of the same act, provision is made for the returning to and registering, at the stamp office in Dublin, the names of the firm and partners, and the public officers of such companies; and by section 7 of the same act, the stamp office are to give certificates of such entry and registry, which are to be sufficient evidence of the appointment and authority of such public officers.

By section 10 of the same statute, it is enacted “that all actions and suits, and also all petitions to found any sequestration or any commission of bankruptcy against any person or persons who may be at any time indebted to any such society or co-partnership, and all proceedings at law or in equity under any sequestration or commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such society or co-partnership against any person or persons, bodies politic or corporate, or others, whether members of such society or co-partnership or otherwise, for recovering any debts or enforcing any claims or demands due to such society or co-partnership, or for any other matter relating to the concerns of such society or co-partnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid, for the time being of such society or co-partnership, as the [659] nominal plaintiff or petitioner, for and on behalf of such society or co-partnership; and that all actions or suits and

proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such society or co-partnership or otherwise, against such society or co-partnership shall and lawfully may be commenced, instituted, and prosecuted against any one of the public officers nominated as aforesaid for the time being, of such society or co-partnership as the nominal defendant for and on behalf of such society or co-partnership; and that all indictments, informations, and prosecutions, by or on behalf of such society or co-partnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property, of or belonging to such society or copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such society or co-partnership, shall and may lawfully be had, preferred, and carried on in the name of any one of the public officers nominated as aforesaid, for the time being, of such society or co-partnership; and that in all indictments and informations to be had or preferred by or on behalf of such society or co-partnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such society or co-partnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such society or co-partnership, to be the money, goods, effects, bills, notes, securities, or other property, of any one of the public officers nominated as aforesaid for the time being of such society or co-partnership; and that any forgery, fraud, crime, or other offence committed against or with intent to injure or defraud such society or co-partnership, shall and lawfully may, in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against or with intent to injure [660] or defraud any one of the public officers nominated as aforesaid for the time being of such society or co-partnership, and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such society or co-partnership, it shall and may be lawful and sufficient to state the name of any one of the public officers nominated as aforesaid for the time being of such society or co-partnership; and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding commenced against or by or on behalf of such society or co-partnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such society or co-partnership for the time being."

By the 11 Geo. 4 & 1 Will. 4, c. 32, after reciting the above-mentioned act, amongst other things it is enacted, that it is and shall be lawful for any number of persons united or to be united in any society or co-partnership in Ireland, as in and by the said acts, or either of them, is mentioned or provided, consisting of more than six in number, and not having the establishments or houses of business of such society or co-partnership at any place or places less than fifty miles, of the late Irish measurement, distant from Dublin, to pay in Dublin, for the purpose of withdrawing them from circulation in Dublin, or within fifty miles of the late Irish measurement thereof, by any bankers, agents, or correspondents, or any other person or persons on behalf of such society or co-partnership, whether such bankers, agents, correspondents, or other person or persons shall be members or a member of such Society or co-partnership, any bills and notes of such society or co-partner-[661]-ship made payable to bearer on demand; yet so nevertheless that all such bills and notes so paid in Dublin, and withdrawn from circulation as aforesaid, may be re-issued at the place where such bills or notes were originally issued.

On the 5th April, 1836, the defendant wrote and sent to Mr. Mitchell, the then Director of the Agricultural and Commercial Bank of Ireland, the following letter, which was proved at the trial.

"Northern and Central Bank of England,
"Manchester, April 5, 1836.

"Dear Sir,—I find there is some mistake upon the payment of my calls on your shares, for our Mr. Lyle informs me he has not debited my account, and credited you, for the payment of the several calls due; when I received my last scrip, the letter stated that I was debited in 1000l. for the additional one hundred shares I took, but

by some oversight this has not been carried through your books. Please debit me upon that date with the amount of the calls due on my 200 shares. I think it will be 500*l.* the second call on the first hundred shares, and 1000*l.* for the two calls on the second hundred shares : and advise me in a private letter. Your bank shall, of course, be credited here upon that date.—Yours, &c.”

The Agricultural and Commercial Bank of Ireland never were credited with the above sum, or any part thereof, by the Northern and Central Bank ; nor was the said sum, or any part thereof, ever paid to the Agricultural and Commercial Bank of Ireland. The defendant, on the 26th of February, 1836, was a shareholder in the Agricultural and Commercial Bank of Ireland to the extent of one thousand shares. James Devyer, the Chairman of the Board, and William Mitchell, the general Manager of that Bank, gave him the following certificate :—

[662] “No. 185.

“Dublin, 63, Fleet Street, Feb. 26, 1836.

“John Thorpe, Esq., Banker, Manchester, stands recorded in the books of the Agricultural and Commercial Bank of Ireland as a partner holding one thousand shares in the said Bank, designated ‘British Stock.’

“JAMES DEVYER, Chairman of the Board.

“Entd., Edwd. Markman.

“WILLIAM MITCHELL, General Manager.”

The Agricultural and Commercial Bank of Ireland had a Branch at Drogheda, of which a Mr. Dowd was the Manager. Drogheda is within 24 Irish miles and within 30 English miles of Dublin. The business of the said Bank commenced at Drogheda in January, 1836, and terminated in September, 1837. During that time Mr. Dowd received his orders from the Committee of the said Bank, who held their meeting in Dublin. He discounted bills of exchange and carried on business to a considerable extent for the Bank at Drogheda, but did not issue any of their notes after November, 1836. On the 15th November, 1836, he received the following letter of instructions from Mr. Mitchell, the General Manager of the Agricultural and Commercial Bank :—

“Manager of Drogheda Branch Agricultural
and Commercial Bank of Ireland.

“Dublin, 63, Fleet Street, 15th Nov. 1836.

“Sir,—The Provincial Bank of Ireland having manifested considerable hostility to this native institution, and having through their agents encouraged a press upon us, amounting to 573,000*l.* since the 4th of October, the committee declined yesterday to pay that institution and the Bank of Ireland 22,000*l.* presented for payment ; having determined to suspend exchanges in Dublin until the cause of the pressure was examined into and ascertained : under these circumstances the directions of the Board to you are—

“To keep your Branch open as usual, and to assure the full and speedy payment of the notes and all demands.”

[663] “Not to issue any more of the Company’s notes. To pay (except to banks or large holders) your own issue, so far as your assets extend, and to receive the notes of the Company in payment of bills and debts due to the Company. To apply the cash assets and the bills as they fall due and are received, to the progressive discharge of the note-holders presenting in small sums ; but for large sums give an order on Dublin, or exchange the notes, at the option of the holders, for a bill or bills to the amount of notes presented.

“The Board likewise impress upon you the vital expediency of having the third instalment on the stock paid up at once, so as to increase the assets of the Company, with a view to the resumption of business as speedily as possible. A general meeting of the shareholders in your locality should be immediately called, and every exertion made to increase the resources of the Company ; and you are authorized, independent of the instalments, to receive any money by way of loan or deposit, on the security of the Company, with a view to the speedy payment of the note-holders requiring it.

“You are to keep your Branch open during the usual hours, and use every exertion to keep up public feeling.

"Please forward, in the course of post, an account of the notes on hand, signed and re-signed, and also your assets generally.—I am, Sir, your most obedient servant,
"W. MITCHELL, General Manager.

"To J. D. Dowd, Esq.,
"Manager, Agricultural and Commercial
Bank of Ireland, Drogheda."

Mr. Dowd had a special cash credit for 5000*l.* with the branch Bank at Straban, which is more than fifty miles from Dublin, and never had any name or notice on the door of his office in Drogheda; and all agency for the [664] Agricultural and Commercial Bank at Drogheda was discontinued between August and September, 1837.

The present action was commenced on the 19th day of January, 1838.

The Court is to be at liberty to draw any inference which it ought to draw, and either party may refer to the pleadings as a part of this case.

The questions for the opinion of the Court are, whether the verdict on the first and last issues respectively is to be entered for the plaintiff or defendant, and whether the plaintiff is entitled to judgment non obstante veredicto on the third plea, in the event of the verdict on the issue on that plea standing for the defendant.

The following were the points marked for argument on the part of the plaintiff:—The plaintiff will contend that the 10th section of the 6 Geo. 4, c. 42, enables the Company to bring actions in the name of their registered public officer, against persons who are themselves members of the Company; and that the fact of the Company having at one time had a branch Bank within fifty miles from Dublin, does not prevent their having the right of bringing such actions, at all events after the discontinuance of such branch Banks. That the third plea was not proved, inasmuch as (amongst other things) it averred that the establishments of the Bank had been within fifty miles from Dublin, and that they continued so until the commencement of the action; whereas there was only one of the establishments within fifty miles from Dublin, and that was discontinued long before the commencement of the action. And that the third plea, if proved, was no answer in law to the declaration, the infringement of the directions of the statute being no bar to the action.

Crompton, for the plaintiff. First, the 10th section of the act 6 Geo. 4, c. 42, conferred upon the Company the [665] right to sue their own members, either at law or in equity, in the name of their public registered officer. Secondly, the third plea was not supported by the evidence, as the proof was that there was only one establishment within fifty miles of Dublin, and that was discontinued before the commencement of the action. But, thirdly, even if enough were substantially proved to support the plea, it is no answer to the action that the Company had a banking establishment within fifty miles of Dublin, contrary to the directions of the statute, as the act does not make contracts entered into with the partnership void.

Wightman, for the defendant. The act in question confers no new rights upon the Company, either at law or in equity, but only gives them power to sue in the name of their public officer in cases where, before the passing of that act, they might have sued as a partnership firm. Their remedies in all other respects remain the same as before the act, the object of which was to obviate difficulties in the way of their suing on account of the number of persons in the firm, and where the whole body were bound to sue as plaintiffs. And it is clear that before this statute they could not have maintained such an action as the present. Then, secondly, the third plea was sufficiently proved; because it was enough to prove that the Company had a banking establishment within fifty miles of Dublin after their formation as a Company, and before the commencement of the suit; and it was not necessary to shew its continuance up to the time when the action was brought. Thirdly, there was no evidence to support the count upon the account stated. The letter which the plaintiff relies upon as shewing that, does not contain any clear or certain acknowledgment of a debt; he merely says that he thinks the amount of the calls will be 500*l.*

Crompton, in reply. As to the last point, the letter is [666] good evidence of an account stated. It is sufficient if the precise sum can reasonably be inferred or ascertained, where there is a general and unqualified admission of a debt being due. The words are, "Please debit me with the amount of the calls due on my 200 shares;" that is a clear acknowledgment of the existence of a debt. [Parke, B. To make it available as an acknowledgment of a debt, should it not state the amount of the calls?]

He says — "I think it will be 500l.," and the fact of there being no reply to that letter, which shews its correctness, is evidence to satisfy a jury that that was the precise amount due. Besides, the learned Judge who tried the cause was satisfied with the evidence, and this objection not having been taken at the trial, the defendant ought not to be allowed now to enter into that question. Then, as to the construction of the act. It is clear that the legislature intended to give the Company the right now claimed. From the language of the 10th section, it is evident that proceedings in equity may be taken by the public officer against a member of the Company; but before this act one partner could not sue an individual member of the firm in equity, for the bill was always filed by the rest of the partners against the one. The statute, therefore, does give a remedy which the Company had not before. The object of the act was to remove the objection as well at law as in equity, and also upon criminal proceedings, of proceeding against one of their own body.

LORD ABINGER, C. B. It appears to me that there is not sufficient evidence of an account stated. Such evidence ought to be clear and certain; but the utmost that this letter amounts to is, that the defendant thinks he is indebted in a certain amount; that he think so at the time. It was suggested by Mr. Crompton, that as the Company had not replied to the defendant's letter, it might be considered as settled between the parties, that the sum therein [667] mentioned was the true amount of the debt. But that does not alter the case, for as they do not reply confirming the statement in the letter, the precise sum still remains a mere suggestion in the defendant's mind, and does not amount to a conviction. I therefore think the letter insufficient as an account stated. With respect to the other point, as to the Company's suing in the name of their public officer, it becomes unnecessary to take that into consideration, because I am clearly of opinion that the third issue must be found for the plaintiff.

PARKE, B. I am of the same opinion, and think this letter is not sufficient evidence of an account stated. It is quite clear, from the terms of the letter, that the defendant did not know exactly how much money was due from him to the Company. In order to constitute an account stated, there must be a statement of some certain account of money being due, which must be made either to the party himself or to some agent of his. This letter was sent to the agent, but it contains no admission of any sum of money certain being due.

It is unnecessary at present to offer any opinion upon the construction of the act of Parliament, whether it enables the Company to sue one of its members for a debt due from him to the Company. That is a point which, I think, admits of considerable doubt, and upon which I have not made up my mind. I believe the intention of the legislature was to give such a power, but I have considerable doubt whether the words admit of it.

Then, as to the third issue, I am clearly of opinion that it ought to be entered for the plaintiff. The averment in the plea is, "That the co-partnership was established after the passing of the 6 Geo. 4, and that the establishment of houses of business of the said co-partnership had been, from the time of the formation thereof until the commencement of this suit, and they were, at places less than fifty [668] miles from Dublin." Under that allegation, it was incumbent on the defendants to shew that there was a house of business for the whole time within fifty miles of Dublin. The existence at any time of a branch Bank within the fifty miles would not, I think, be an answer to the action. It must have been in existence either at the time when the contract was entered into, or at the commencement of the suit. If the plea had averred that the Company, from the time of its formation up to the time of entering into the contract, and from thence until the commencement of the suit, had had an establishment within fifty miles of Dublin, then, if it would be a good defence to shew that at the time this contract was entered into, they had a house of business within fifty miles of Dublin, the plea would be supported upon that issue. As the issue now stands, however, nothing short of proving the whole allegation would satisfy the terms of the plea; and as that is not proved, it follows that the issue must be entered for the plaintiff. It has been suggested that the plea is divisible in the way I have pointed out, but I think the form of the allegation does not admit of that; and therefore, under this plea, it is incumbent on the defendant to shew that there was a branch Bank from the time of the original formation of the Company down to the time of the commencement of the suit. The plea does not aver that the

Company borrowed gold to take up any of their notes, nor is it proved that they did take up any of their notes; but on that it is altogether unnecessary to pronounce any opinion.

GURNEY, B., and ROLFE, B., concurred.

The verdict to be entered for the defendant on the first issue, and for the plaintiff on the third.

[669] *ELWELL v. THE GRAND JUNCTION RAILWAY COMPANY.* Exch. of Pleas. 1839.—Declaration in ease against the Grand Junction Railway Company, for the loss of goods delivered to them as common carriers, to be safely and securely carried and conveyed. Plea, that the delivery and receipt of the goods were and happened after the passing of the 4 Will. 4, c. lv., and that at the time of such delivery the plaintiff became and was a passenger by the railway, and that the goods were delivered to be conveyed with him as such passenger, and that no part thereof were articles of clothing of the plaintiff. To this plea there was the general replication *de injuriâ*:—Held, on special demurrer, that the replication was ill, inasmuch as the plea did not consist of matter of excuse, but amounted to the general issue.

[S. C. 9 L. J. Ex. 134.]

Assumpsit. The declaration stated that the plaintiff, after the passing of a certain act of Parliament, intituled “An Act for making a Railway from the Warrington and Newton Railway, at Warrington, in the county of Lancaster, to Birmingham, in the county of Warwick, to be called the Grand Junction Railway,” to wit, on the 9th of November, 1838, caused to be delivered to the defendants, to wit, as common carriers, and the defendants then, to wit, as such carriers, received into their care and custody a certain umbrella of the plaintiff, and a certain trunk of the plaintiff, containing divers goods and chattels of the plaintiff, to wit, (describing the contents), and a certain portmanteau of the plaintiff’s containing divers other goods and chattels of the plaintiff’s, to wit, (describing them), to be safely and securely carried and conveyed by the defendants, to wit, as such carriers as aforesaid, from Wolverhampton to Birmingham, viz. by a certain railway made and constructed under the provisions of the said act, and at Birmingham aforesaid, to be delivered by the defendants for the plaintiff, to wit, for certain reward to the defendants, and it then became and was the defendants’ duty safely and securely to carry and convey and deliver the said trunk and portmanteau, and the said respective contents, and the said umbrella as aforesaid: yet the defendants, not regarding their duty in that behalf, did not nor would safely or securely carry or convey the said trunk and portmanteau and their said respective contents, and the said umbrella, from Wolverhampton aforesaid to Birmingham aforesaid, nor at Birmingham aforesaid safely or securely deliver the same for the plaintiff; but then so negligently, carelessly, and improperly behaved and conducted themselves in that behalf, that by and through the carelessness, negligence, and default of the defendants in the premises, the said [670] trunk and portmanteau, and their said respective contents, and the said umbrella, then became and were and are wholly lost to the plaintiff.

Plea, to so much of the declaration as relates to the said trunk of the plaintiff, and the said goods and chattels therein contained, that the said delivery and receipt thereof in the declaration mentioned were and happened after the passing of an act of Parliament made and passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled “An Act to enable the Grand Junction Railway Company to alter and extend the line of such railway, and to make a branch therefrom to Wolverhampton, in the county of Stafford, and for other purposes relating thereto,” and that the said trunk, and the said goods and chattels therein contained, were delivered and received as in the declaration mentioned, for the purpose of being carried and conveyed as in the declaration mentioned, by, upon, and along the said railway, in and upon a certain train of railway carriages, and that the same were so carried and conveyed; and that the plaintiff, at the time of the said delivery, to wit, on &c., became and was a passenger by the said train from Wolverhampton to Birmingham aforesaid, to be carried and conveyed by the defendants thereby for reward to the defendants in that behalf, and travelled as such passenger to Birmingham aforesaid by such train, and that the said trunk, and the said goods and chattels

therein contained, were so delivered and received as in the declaration mentioned, for the purpose of being carried and conveyed with the plaintiff as such passengers as aforesaid, in and by the same train with him, and were accordingly so carried and conveyed, and that the said trunk, and the said goods and chattels therein contained, were not nor was any part thereof articles of clothing of the plaintiff. Verification.

To this plea the plaintiff replied *de injuriâ*.

Special demurrer, assigning for cause that the replication [671] is improper, because the plea does not consist of matter of excuse only, and because the plea denies that the defendants ever incurred any liability to the plaintiff as alleged in the declaration, and amounts to a denial also of the averment of duty as alleged therein, and of the averment that so much of the goods and chattels in the declaration mentioned as are mentioned in the introductory part of the said last plea, were delivered and received on the terms and in the manner and for the purposes alleged in the declaration; and because the last plea contains matter of law, and because the defendants therein justify under the authority of the statute mentioned in the plea.

Joinder in demurrer.

Cowling in support of the demurrer. The replication is bad. The general replication is improper where the plea amounts to the general issue, which is the case here. The plea does not consist of matter of excuse only, but alleges facts which amount to a denial of all original liability. The plea is founded on the stat. 4 Will. 4, c. lv., s. 68, which enacts, "that, without any extra charge, it shall be lawful for any passenger travelling upon or along the said railway, to take with him his articles of clothing, not exceeding forty pounds in weight, and four cubic inches in dimensions; and the said Company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to, any articles, matters, or things whatsoever, carried upon or along the said railway, with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid." This mode of pleading arises from the circumstance of the plaintiff having declared in case, and not in *assumpsit*. The defendants say that they never entered into a contract to take care of the goods. The plea is a [672] denial of all liability—a denial of the averment of duty in the declaration. The plea may be bad in that respect; *Cane v. Chapman* (5 Ad. & Ellis, 647; 1 Nev. & Per 104); but if bad at all, it is so as being an argumentative traverse of the matters of fact, in respect of which the duty is alleged to arise, and as amounting to the general issue. [Parke, B. The effect of the act is, that unless a special contract is entered into, the Company is not liable.] If the ground of the action were the breach of a special contract safely to carry and deliver the goods, the form of action should be *assumpsit* and not case. [Parke, B. The question is, what is the plaintiff to prove under the averment of duty, and what does the plea traverse? Clearly the liability in respect of the goods. The effect of that argument is to shew, that the plea amounts to the general issue. [In *Solly v. Nish* (2 C. M. & R. 355), where the general replication was held ill, because the plea was not matter of excuse, but a denial of the promise to the plaintiff, and amounted to the general issue, the Court were of opinion that the objection to the plea could only be taken advantage of on special demurrer.]

R. V. Richards, *contrâ*. The plea is a bad plea in denial; it is in confession and avoidance; and wherever that is the case the general replication is proper: *Bardons v. Selby* (1 C. & M. 500). The plea admits the liability of the Company as carriers, but shews matter of discharge. [Parke, B. Under not guilty, what must be proved?] The plaintiff must have proved the delivery of the goods to the defendants, and the defendants must have proved as a defence that the goods were of a particular description not within the 68th section, which exempted them from all liability.

PARKE, B. No; that would lie upon the plaintiff. [673] Under not guilty, the plaintiff must have shewn that the case was not within the provisions of the 68th section of the act. He must shew the existence of a special contract, in order to make the Company liable. The plea is an argumentative traverse of the goods having been delivered to be carried, and of the defendants' liability, and amounts to the general issue. The replication is therefore bad, and you had better amend.

Leave to amend on payment of costs (see *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749), otherwise

Judgment for the defendants.

PONSFORD *v.* O'CONNOR. Exch. of Pleas. 1839.—A commission to examine witnesses, directed to the judges of a foreign court, may be issued without the usual clause requiring the commissioners to be sworn.

[S. C. 7 Dowl. P. C. 866 ; 9 L. J. Ex. 99.]

Warren moved for a rule to shew cause why the plaintiff should not be at liberty to issue a commission for the examination of witnesses, directed to the judges of the Royal Bavarian District Court and Town Court at Munich, in Bavaria ; and why in such commission the usual clause, rendering the commissioner's oath necessary, should not be dispensed with. He referred to *Clay v. Stevenson* (3 Adol. & Ellis, 807), in which the Court of King's Bench ordered a similar commission to issue to the Judges of the Court of Commerce at Hamburgh, without the usual clause requiring the commissioners to be sworn. [Parke, B. Your application is that a commission may issue to the Judges of the Court at Bavaria, authorizing them to examine witnesses, but omitting all words of command.] Yes. The judges of those courts may think that the Courts here have no authority to command them.

[674] PARKE, B. You may take your rule in that form.

Rule granted.

No cause being shewn, the rule was subsequently made absolute.

WOOD *v.* HOTHAM. Exch. of Pleas. 1839.—Where, by the terms of the order of reference, an arbitrator is to be at liberty to raise any point of law for the opinion of the Court, he is not bound to do so ; such a clause is only an enabling one, and not compulsory.

[S. C. 9 L. J. Ex. 3.]

This was an action of indebitatus assumpsit for copyhold fines. At the trial before Tindal, C. J., the cause and all matters in difference were referred to an arbitrator, with power for him to set out the copyhold premises, "and the said arbitrator to be at liberty to raise any point of law for the opinion of the Court, at the request of either of the said parties." The arbitrator proceeded with the reference, and by his award found a gross sum to be due from the defendant to the plaintiff, and, in pursuance of the power contained in the submission, set out the copyhold premises, but refused to raise any question for the opinion of the Court, although an objection was made on the reference that it was doubtful whether certain of the premises were copyhold or freehold, and he was requested to state that question for the opinion of the Court.

Kelly now moved to set aside the award, on the ground that the arbitrator, by refusing to raise the question for the opinion of the Court, had not complied with the terms of the order of reference. He contended that the terms of the submission did not leave it in his discretion whether he should state any point for the opinion of the Court or not, when he was requested to do so by one of the parties ; and at all events, as he had exercised his discretion, in part, by setting out the copyhold premises, the power to do which was [675] comprised in the same sentence with the power to raise any point of law for the opinion of the Court, he was bound to do so in the latter respect also.

Sed per Curiam. It is quite clear that the power is distributive, and that the arbitrator was not bound to raise any question of law for the opinion of the Court. The clause is an enabling, not a compulsory one. The power to state a case for the opinion of a Court is not obligatory. Even without any such clause in the order of reference, the arbitrator has power to state a case for the opinion of the Court.

Rule refused.

PROTHEROE *v.* MAY AND OTHERS. Exch. of Pleas. 1839.—The grant of an exclusive license to use a patent does not invalidate the patent itself, although the patent may be vested in twelve persons ; and it is wholly immaterial to its validity, in what number of persons such a license is vested, whether exclusive or not.—

Such a license would not be invalid, if the districts or district covered by the license included the whole extent of the patent.

[S. C. 9 L. J. Ex. 121.]

By order of the Vice-Chancellor, the following case was sent for the opinion of this Court.

On the 24th of August, 1838, letters patent were duly granted under the Great Seal of Great Britain by her Majesty, bearing date on that day, to Arthur Dunn, thereby enabling him to use and manufacture a certain new and useful invention which he had discovered, of certain improvements in the manufacture of soap.

[The case then, after stating the prayer for the letters patent, set out the grant thereof, which was in the words following:]

"Know ye therefore, that we, of our special grace, certain knowledge, and mere motion, have given and granted, and by these presents for us, our heirs, and successors, do give and grant unto the said Arthur Dunn, his executors, administrators, and assigns, our especial license, full power, sole privilege and authority, that he the said Arthur Dunn, his executors, administrators, and assigns, and every [676] of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said Arthur Dunn, his executors, administrators, or assigns, shall at any time agree with, and no others, from time to time and at all times during the term of years herein expressed, shall and lawfully may make, use, exercise, and vend his said invention within that part of our United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick-upon-Tweed, and also in all our colonies and plantations abroad, in such manner as to him the said Arthur Dunn, his executors, administrators, and assigns, or any of them, shall in his or their discretions seem meet; and that he the said Arthur Dunn, his executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage, from time to time coming, growing, accruing, and arising, by reason of the said invention, for and during the term of years therein mentioned: to have, hold, exercise, and enjoy the said license, power, privileges, and advantages therein before granted or mentioned to be granted unto the said Arthur Dunn, his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date of these presents next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided," &c. &c. The grant proceeded in the usual terms, but the following clauses only are material to be stated:—"Provided nevertheless, and these our letters patent are upon this express condition, that if at any time hereafter these our letters patent, or the liberties and privileges hereby by us granted, shall become vested in or in trust for more than the number of twelve persons or their representatives at any one time as partners, dividing or entitled to divide the benefits or profits obtained by reason of these our letters patent, (reckoning executors or administrators as and for the single person [677] whom they represent, as to such interest as they are or shall be entitled to in right of such their testator or intestate), that then these our letters patent, and all liberties and advantages whatsoever hereby granted, shall utterly cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: Provided, that nothing herein contained shall prevent the granting of licenses in such manner and for such consideration as they may by law be granted: Provided also, that if the said Arthur Dunn shall not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed, by an instrument in writing under his hand, and cause the same to be enrolled in our High Court of Chancery within six calendar months next and immediately after the date of these our letters patent, then our letters patent, and all liberties and advantages whatsoever hereby granted, shall utterly cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And lastly, we do by these presents, for us, our heirs and successors, grant unto the said Arthur Dunn, his executors, administrators, and assigns, that these our letters patent, on the enrolment and exemplification thereof, shall be in and by all things good, firm, valid, sufficient, and effectual in the law, according to the true intent and meaning thereof, and shall be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the said Arthur Dunn, his executors, administrators, and assigns,

as well in all our courts of record as elsewhere, and by all and singular the officers and ministers whatsoever of us, our heirs and successors, in that part of our said United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick-upon-Tweed, and also in all our colonies and plantations abroad aforesaid, and amongst all and every the subjects of us, our [678] heirs and successors, whatsoever and wheresoever, notwithstanding the not full and certain describing the nature or quality of the said invention, or of the materials thereto conducing and belonging. In witness," &c.

A proper and sufficient specification of the said patent invention was duly enrolled in the High Court of Chancery, within the time limited by the said letters patent for that purpose.

Before the month of July, 1839, and at the time of granting the license next after mentioned, the said letters patent, and the liberties and privileges thereby granted, became and were vested in twelve several persons, partners, dividing or entitled in their own rights respectively, and not by representation, to divide the benefits or profits obtained by reason of the said letters patent. On the 1st July, 1839, the said twelve patentees, or persons in whom the said letters patent were so vested as aforesaid, signed and executed an instrument in writing, whereby, after reciting that they had agreed with Samuel Guppy and Philip Protheroe to grant unto them an exclusive license for the use and exercise of the said invention within the city of Bristol, and at such other place or places within thirty-five miles therefrom, as described on the map with a compass, having Bristol for its centre, as they should think proper, and in consideration thereof the said Samuel Guppy and Philip Protheroe had agreed to be bound by such terms, restrictions, stipulations, and agreements thereafter mentioned and expressed: it was by the said license witnessed, that in pursuance of the said agreement, and in consideration of the covenants, provisions, and agreements thereafter contained, they the said twelve patentees, or persons in whom the said letters patent and the liberties and privileges thereof were so vested as aforesaid, did give and grant unto the said Samuel Guppy and Philip Protheroe, and the survivor of them, during the [679] remainder of the term of 14 years mentioned in the said letters patent, and for which the said letters patent were granted, the full and free liberty, sole and exclusive license and authority, to and for them the said Samuel Guppy and Philip Protheroe, and the survivor of them, for their and his own use and benefit, subject to the provisoes and stipulations thereafter contained, to use the said discovery or invention within the city of Bristol, and at such other place or places within thirty-five miles from the said city as aforesaid, as the said Samuel Guppy and Philip Protheroe, or the survivor of them, should think proper. And, in consideration of the license and authority thereinbefore given and granted, they the said Samuel Guppy and Philip Protheroe did for themselves jointly, and each of them did for himself separately, covenant with the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, and assigns, that they the said Samuel Guppy and Philip Protheroe, and the survivor of them, should and would, during the term for which the said letters patent had been granted, continue to manufacture, by means of the said patent process and according to the said specification, weekly and every week, thirty tons of soap at the least, and such further quantity, not exceeding 100 tons per week, as they the said Samuel Guppy and Philip Protheroe, or the survivor of them, should think fit: and that they the said Samuel Guppy and Philip Protheroe, and the survivor of them, should not in any one week exceed the quantity of 100 tons, without the consent in writing of the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns. And also that they the said Samuel Guppy and Philip Protheroe, and the survivor of them, his executors and administrators, should and would well and truly pay or cause to be paid unto the said twelve patentees or [680] persons in whom the said letters patent were vested, the sum of 2l. of lawful English money, for every ton of soap which they the said Samuel Guppy and Philip Protheroe, or the survivor of them, should from time to time manufacture by means of the said patent process, during the term for which the said license was thereby granted, and should and would make such payments on the first day of every month, the first of such payments to be made on the 1st day of August then next; and should and would, for the first year of the said term, pay unto the said twelve patentees or persons in whom the said letters patent were vested, their executors,

administrators, or assigns, the sum of 60l. per week, whether or not so much as thirty tons of soap weekly should have been manufactured by the said Samuel Guppy and Philip Protheroe, or the survivor of them, under and by virtue of the said license thereby granted. And further, that they the said Samuel Guppy and Philip Protheroe, and the survivor of them, should and would, at or before the respective times appointed for payments as aforesaid, deliver or cause to be delivered unto the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, or unto some person or persons duly authorized by them in writing under their hands to receive the same on their behalf, a just and true account in writing of all the soap which should have been manufactured by them the said Samuel Guppy and Philip Protheroe, or the survivor of them, for the month next preceeding the rendering of every such account, together with true copies of all returns made and rendered to the excise for the like period, and should and would verify any and every such account and copy respectively by affidavit or statutable declaration, if required. And further, that in case they the said Samuel Guppy and Philip Protheroe, or the survivor of them, should at any time or times refuse or neglect to deliver or cause to be [681] delivered such a just and true account as thereinbefore mentioned, at the times and in the manner thereinbefore appointed for that purpose, or should wilfully or knowingly mis-state or omit any such account, then and in every such case, and so often as the same should happen, (subject to all other rights and remedies for breach of the said covenant or otherwise), the said Samuel Guppy and Philip Protheroe, or the survivor of them, his executors or administrators, should and would on demand well and truly pay or cause to be paid unto the twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, in addition to the monies which would otherwise become payable to them under and by virtue of these presents, the sum of 250l. as and for liquidated damages. Provided always, and it was thereby declared and agreed by and between the said parties thereto, that it should be lawful for the said Samuel Guppy and Philip Protheroe, and the survivor of them, at any time after the expiration of one year from the date thereof, to relinquish and give up the license thereby granted, on giving to the said twelve patentees as aforesaid, their executors, administrators, and assigns, three calendar months' previous notice in writing thereof, and that upon and after the expiration of such notice, the said license should cease, determine, and be utterly void to all intents and purposes whatsoever, but without prejudice and except as aforesaid. And the said Samuel Guppy and Philip Protheroe for themselves jointly, and each of them separately, did further covenant with the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, and assigns, that they the said Samuel Guppy and Philip Protheroe, or the survivor of them, should not at any time or times thereafter wilfully or knowingly do or cause, or permit or suffer to be done, or wilfully or knowingly concur in or do any act, [682] deed, matter, or thing whatsoever contrary to the restrictions and provisions contained in the said letters patent, or in the said license, or whereby or by reason whereof the validity or continuance of the said letters patent, or the rights and privileges thereby granted, or any of them, could or might in any respect be endangered or called in question; but should and would by every lawful means in their power assist the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, at their expense and to be done under their direction, in supporting the same, and in the use and exercise of this invention, and also give notice to them of any infringement of the said letters patent by any person or persons whomsoever within the knowledge of the said Samuel Guppy and Philip Protheroe, or the survivor of them, as soon as the same should come to their or either of their knowledge; and should and would keep and preserve regular account books, and therein daily cause just and true entries to be made of all soap manufactured by them, or either of them, from time to time as aforesaid, and permit and suffer the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, and assigns, and their clerks and agents, from time to time and at all seasonable hours in the day to take copies thereof and extracts therefrom. Provided nevertheless, and it was thereby further agreed and declared, that if the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, should at any time thereafter during the said term of fourteen years give or grant any license or authority to any other person or

persons to use or exercise the said invention in England, Wales, Scotland, or Ireland, without similar restrictions and corresponding minimums and maximums with the excise returns in the ratio thereinbefore [683] stated or mentioned to the said Samuel Guppy and Philip Protheroe, or at a less rate per ton than the sum of 2*l.* thereinbefore named, that then and from thenceforth the covenants and restrictions thereinbefore contained, so far as the same should be omitted, modified, or altered in any such future license to be granted as aforesaid, should be relinquished and become null and void as against them the said Samuel Guppy and Philip Protheroe, and they should, from and after the granting of any such license as aforesaid, be bound to pay, under and by virtue of the present license, such sum only per ton of soap to be thereafter manufactured by them, as any future licensee should be bound to pay by virtue of any such license to be granted as aforesaid, it being the intention of the parties thereto that the said Samuel Guppy and Philip Protheroe should be in all respects on as favourable a footing as all other licensees; and the said twelve patentees or persons in whom the said letters patent were so vested as aforesaid, severally and respectively, and for their several and respective executors, administrators, and assigns, did covenant to and with the said Samuel Guppy and Philip Protheroe, and the survivor of them, and the executors and administrators of such survivor, that they the said twelve patentees aforesaid, their executors, administrators, or assigns, should not nor would, nor should nor would any or either of them, at any times or time during the remainder of the said term of fourteen years for which the said letters patent were granted as aforesaid, if the license thereby granted should so long continue, make or grant any licenses or license whatever to any persons or person to use or exercise the said patent invention in the said city of Bristol, or within thirty-five miles thereof, without the consent of the said Samuel Guppy and Philip Protheroe, or the survivor of them, first had and obtained; and further, that the said twelve patentees respectively, their re-[684]-spective executors, administrators, and assigns, should not nor would, nor should nor would any or either of them, at any times or time during the remainder of the said term of fourteen years for which the said letters patent were so granted as aforesaid, if the license thereby granted should so long continue, themselves or himself use or exercise the said patent or invention or manufacture in the said city of Bristol, or within thirty-five miles thereof: Provided always, and it was thereby declared and agreed by and between the said parties, that if the said Samuel Guppy and Philip Protheroe, or the survivor of them, should omit, refuse, or neglect to commence and continue the manufacture of soap at the time and according to the stipulations and agreement thereinbefore contained, or should make default or breach in the performance of any of the said clauses, covenants, and agreements therein contained, then and in any such case it should be lawful for the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, to give unto the said Samuel Guppy and Philip Protheroe three months' notice in writing under their respective hands to revoke and make void the license, power, and authority thereinbefore given and granted, and that thenceforth every covenant, clause, matter, and thing therein contained should cease, determine, and be void, save and except and without prejudice to the right of them the said twelve patentees or persons in whom the said letters patent were vested, their executors, administrators, or assigns, to recover all and every sum and sums of money, which should be then due and payable to them under and by virtue of the present license."

Under the said license the said Philip Protheroe and Samuel Guppy have used and exercised the said patent invention within the city of Bristol, and such other places within thirty-five miles thereof as they have thought fit, [685] and they have since assigned the said license and the benefit thereof to or in trust for a company or co-partnership, consisting of more than twelve persons, who are now using and exercising the same, and have duly paid the rents made payable by virtue of the said license.

On the 2nd of July, 1839, the said twelve patentees or persons in whom the said letters patent and the liberties and privileges thereof were so vested as aforesaid, gave and granted twelve other similar exclusive licenses to use and exercise the said patent right and invention, in twelve several districts, other than the said city of Bristol and places within thirty-five miles thereof, of which said twelve licenses eleven were granted severally to eleven individuals, (that is to say, each to one distinct person), and the twelfth was granted to a certain partnership, consisting of thirteen persons.

The districts covered by the licenses are parts of England only—they do not comprise the whole of England.

The questions for the opinion of this Court are :—

1st. Has the grant of the said first-mentioned exclusive license to the said Philip Protheroe and Samuel Guppy, invalidated the letters patent of itself, without reference to the subsequent facts?

2nd. Has the assignment to and vesting of the said first-mentioned license in the said partnership of more than twelve persons, invalidated the letters patent of itself, and without reference to the other facts stated?

3rd. Has the grant of the said twelve last-mentioned exclusive licenses, or of any and which of them, invalidated the said letters patent?

4th. If the third question should be answered in the affirmative, would the result be the same if the last of the twelve licenses had been granted to a less number than twelve persons?

[686] 5th. If all the grantees of all the licenses were to coalesce and become jointly interested in such licenses, would the letters patent be thereby invalidated, if not otherwise invalidated?

6th. Would the letters patent, if not otherwise invalidated, have been so if the districts covered by the licenses had included the whole of England, Wales, and Berwick-upon-Tweed?

7th. Would they have been so, if such districts had included the whole of England, Wales, Berwick-upon-Tweed, and the colonies?

Roupell, for the plaintiffs. The points for the consideration of the Court are in substance two only : 1st, whether under the present form in which patents are granted, as contrasted with the form in use before the year 1832, an exclusive license to use a patent invention can or cannot be legally granted, and so as not to invalidate the patent, when the patent itself is vested in twelve persons. 2nd, whether an exclusive license, if granted, can be legally assigned, so as to become vested in more than twelve persons, without invalidating the patent. He was proceeding to argue these points, when he was stopped by the Court, who called upon

Rotch, for the defendants. [Parke, B. Do you mean to contend that the license is to be considered as part of the patent? If not, how can it invalidate it?] That has been considered as doubtful, and is untouched by any decision. He intimated that the parties merely wished to have the opinion of the Court.

The Court expressed a decided opinion that an exclusive license was no more than a common license, and that it was wholly immaterial to the validity of the patent in what [687] number of persons a license was vested, whether such license were an exclusive license or not; and they said that the questions must all be answered in the negative, except the 4th, which required no answer, not having arisen before the Court.

The following certificate was afterwards sent :—

“We have heard this case argued by counsel, and considered the same, and are of opinion—

“1st. That the grant of the first-mentioned exclusive license to the said Philip Protheroe and Samuel Guppy did not invalidate the letters patent.

“2nd. That the assignment to and vesting of the said first-mentioned license in the said partnership of more than twelve persons, did not invalidate the letters patent.

“3rd. That the grant of the said twelve last-mentioned exclusive licenses, nor of any of them, did not invalidate the said letters patent.

“4th. That if all the grantees of all the licenses were to coalesce and become jointly interested in such licenses, the letters patent would not be thereby invalidated.

“5th. That the letters patent would not be invalidated, if the districts covered by the licenses had included the whole of England, Wales, and Berwick-upon-Tweed.

“6th. That they would not have been so, if such districts had included the whole of England, Wales, Berwick-upon-Tweed, and the Colonies.

“Dated this 20th day of November, 1839.”

(Signed)

“ABINGER.

“J. PARKE.

“J. GURNEY.

“R. M. ROLFE.”

[688] IN THE EXCHEQUER CHAMBER.

[In Error from the Court of Exchequer.]

RUTLAND v. DOE D. WYTHE AND OTHERS. Exch. Chamber. 1839.—A testator by his will empowered his devisee for life of real estate, to demise and lease for 21 years, “so as upon such lease there were reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that in every such lease there should be contained a clause of re-entry for non-payment of the rent.” In exercise of this power a lease was made for twenty-one years, to hold from the 11th of October, 1833, at the yearly rent of 903l., payable by equal half-yearly payments, viz. on the 6th of April and the 11th of October in every year, by equal portions, “except the last half-year’s rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the term:”—Held, on error, that this lease was not a good execution of the power.—The lease contained a proviso for re-entry, if the rent should be unpaid for forty-two days after it became due:—Held, that this period was not unreasonable, and that the lease was not objectionable on that ground.

[S. C. 9 L. J. Ex. 341.]

A writ of error having been brought on the judgment of the Court of Exchequer in this case, (a) it was argued in Michaelmas Vacation, 1838, by

Biggs Andrews, for the plaintiff in error. The judgment of the Court below was erroneous on two grounds:—First, the reservation of the last half-year’s rent, by making it payable on the 1st of August, was not according to the power, but contrary to it, and by way of anticipation. Secondly, the proviso for re-entry in case the rent should be in arrear for so long a period as forty-two days, was an unreasonable provision as against the remainder-man. First, the reservation of the last half-year’s rent is not in pursuance of the power. In construing the power, the intention of the will is to be looked to. Now, what is the intention and effect of this will, independently of the power? It is clearly to give to Philip Mallett Case an estate for life, and no more; and the moment the tenant for life died, the remainder-man would (without the power) come into the immediate substantial [689] enjoyment of the estate. Then does the power enlarge the estate of the tenant for life in point of enjoyment? It is submitted that it does not, and was not so intended; and then, inasmuch as this lease would in its operation have the effect of enlarging the interest of the tenant for life, it is an excessive execution of the power, and is therefore void. The object of the power was only to enable the tenant for life to grant a lease for a certain time, not defeasible on his death. It was not intended to enlarge his estate, but to give him the best enjoyment of the property during his life, by the receipt of the rents and profits; and from the moment of the death of the tenant for life, it fell to the use and enjoyment of the remainder-man. The estate was never intended to be barren to the remainder-man, even for a single day after the death of the tenant for life. The power was given to enable the tenant for life to lease for a fixed time, so as not to injure the remainder-man. Now this lease is a violation of that power. If the tenant for life died on the 2nd of August, the remainder-man ought to have the estate immediately, whereas, according to this lease, he cannot have it till the 11th of October. The judgment of the Court below appears to have gone partly upon the improbability of the tenant for life dying the day after the last half-year’s rent became due; but that is not a legal ground on which to form a decision. [Lord Denman, C. J. Is there any instance of a rent being held to be properly reserved where it was made payable on the first day of a term?] There is not: on the contrary, *Doe d. Harries v. Morse* (2 C. & M. 247) and *Doe v. Giffard* (5 B. & Ald. 371) are authorities to shew that such a reservation would make the lease void. In the latter case the lease was dated September the 14th, and the premises were demised for twenty-one years from the day of the date of the lease, the rent being made payable

(a) See the report in the court below, 2 M. & W. 661, where the case is set out at length.

[690] on the 29th of September and the 25th of March; the first payment to be made on the 25th of March then next. It was objected that, inasmuch as the term would expire on the 14th of September, there would be no rent payable under the lease from the 25th of March preceding the expiration of the term; and on that ground Lord Ellenborough was of opinion that the lease was void. So here, there is no rent payable after the 1st of August, and the term would not expire until the 11th of October; therefore there would be a portion of the year during which no rent would be payable, and during which the remainder-man could make nothing of the estate. In *Doe v. Morse*, the power to lease was, so as there should be reserved and made payable during the continuance of such lease or leases, by half-yearly payments, the best and most improved yearly rents. There it was held, that a lease dated the 11th of January, reserving rent payable on the 1st of May and the 29th of September, the first payment to be made on the 1st of May, was not a due execution of the power, and was therefore void. Lord Lyndhurst, C. B., says, "By the terms of the power the tenant for life had a right to grant the leases, reserving rent payable half-yearly; and in this case the lessor granted a lease by which he reserved the rent payable, not half-yearly, but at intervals very distinguishable from half-yearly reservations. It has been said that it is impossible to divide the year into proper half-yearly days of payment, and therefore that the power must be construed to mean the usual half-yearly days of payment. I admit, if it had been shewn that the days of payment in the lease were the usual corresponding half-yearly days of payment, the Court would so construe the power as to hold that a reservation on those days would be within it: but there is nothing to shew that." Bayley, J., says, "According to the terms of the power, the party is to reserve the best yearly rent. That cannot be considered the best reserved yearly rent [691] within the meaning of this power, which is not reserved payable at the conclusion of the year." . . . "It is plain, that the power ought not to be so executed as to reserve an unfair advantage to the tenant for life, to the prejudice of the remainder-man." And speaking of the lease in that case, he observes, "the tenant for life might obtain a year's rent for less than a year's occupation." Bolland, B., also says, "Had the lessor been dealing with property of his own, he might have reserved the rent at any period of the year: but he has other interests to observe, and he was bound not to put those of the remainder-man or reversioner in jeopardy."

The power is introduced to enable the tenant for life to make the full benefit of his own interest, but not for a day beyond his own life; and if the effect of the lease is to derive a benefit beyond his own life, it is an injury to the remainder-man—it is not a good execution of the power, and therefore void; and it is equally so, if such may be the effect of it, for any portion of time, however small. Secondly, as to the proviso for re-entry in case the rent should be unpaid for forty-two days. That is an unreasonable time. [Lord Denman, C. J. Can the question of reasonableness be a question of law? It must depend upon a great number of facts, the condition and state of the parties, and many other things.] If so, the proper way would be for the Court to grant a venire de novo, and to have it found by the jury whether the time was reasonable or not. But the point was decided in the Court below. Suppose the lease had contained the words "reasonable time," instead of "forty-two days," what construction would the Court put upon it? Would they hold this to be a reasonable time? The object of these powers of re-entry is, that if the rent be not paid within the time specified, the lessor may obtain possession of the premises, and make them available by letting them again. In *Smith v. [692] Doe d. Earl of Jersey* (7 Price, 281; 3 Bligh, 280; 2 B. & B. 476; 3 Moore, 339), fifteen days appears to have been held to be a usual time; but the time here mentioned was quite unreasonable.

Maule, for the defendant. This power was well executed, and the judgment of the Court below was right. The case has been argued on the other side, as if the question was, whether the mode in which the power has been executed was the most beneficial to the remainder-man; but that is not the question, at least not the only question. The real question is, whether the power has been pursued. The estate here granted, coupling the power with the devise, is in reality a sort of estate tail. The view with which the question should be looked at, to form a right construction of an ambiguous power, is to see what was the intention of the party creating the power. His intention here was to benefit the holder of the life estate. The rent, which in the power is called a yearly rent, may be reserved payable half-yearly:

Smith v. Doe d. Earl of Jersey. The yearly rent within the meaning of this power is a rent payable within the year: *Lord Tankerville v. Wingfield* (2 Brod. & B. 498, n.). Where the terms of the power have been literally complied with, it never has been held that the lease was void. If the conditions which it was thought fit to impose have been performed, then the lease will be sustained. The Court will not go beyond the literal fulfilment of the conditions. On the other hand, even where the literal conditions have been violated, unless the remainder-man has been substantially injured, the Court will look to the intent of the party creating the power, and will endeavour to uphold the lease. The language of Bayley, B., in *Doe v. Morse*, has been too closely scanned. The scope of his judgment is put forward as an answer to the argument, that the substance of the power had been [693] complied with, although the form had not. The words of his judgment must be applied to that argument. In *Doe v. Giffard*, the rent was made payable by two half-yearly payments, but it was only to be paid for twenty years and a half; it amounted to a forgiving or condonation of rent for the first half-year: it was never to be paid at all. Then, assuming this to be the correct principle, are the terms of the power violated? It requires "the best improved yearly rent" to be reserved. Now here the best rent is reserved either yearly or during the year. There is a distinction between a yearly rent and a rent payable yearly. A yearly rent is a rent for a year, but payable at any time in the year. The parties might certainly have reserved the rent in this case half-yearly or quarterly: nothing is said as to the time at which the rent shall be payable. It is a rent for a year, payable within a year; and the terms of the power are literally complied with. In the last year the rent is payable on the 1st of August, which is beneficial for the remainder-man. Suppose an assignment of the lease to have taken place, and the rent to have been made payable on the last day of the year, the assignee might clear every thing off the premises the day before, and the remainder-man would be altogether ousted of his remedy by distress. Then it is said that the greater or less probability of the tenant for life dying after the day on which the last half-year's rent was reserved, and before the expiration of the term, cannot be made use of as a legal argument; but in a case of doubtful construction, such an argument may properly be resorted to. Here the construction is doubtful, and the power is ambiguous. [Coltman, J. Do you go the length of saying that a reservation of rent on the first day of the term would be good?] Undoubtedly, unless there were fraud; but it is not necessary to go to that extent in the present case. [Lord Denman, C. J. Here there is a clear reason for this reservation of rent on the first of August, in the last [694] year of the term, provided it be legal.] Certainly. It is submitted that both the intent and meaning, and the words, of this power have been complied with, and that this reservation of rent would be no injury, but rather a benefit to the remainder-man.

Then as to the clause of re-entry, in case the rent should be unpaid for forty-two days—that is a reasonable time. In *Jones v. Verney* (Willes, 169), there was a similar clause of re-entry for non-payment of the rent, and, as observed in Sugden on Powers (4th ed. 635), "no objection appears to have been made on that ground, although the case was much considered;" and Sir E. Sugden adds, "Indeed, if such an objection were to prevail, it would invalidate nine-tenths of all the leases in the kingdom granted under powers." [Lord Denman, C. J. We think you need not trouble yourself on this point.]

Andrews, in reply. The reservation of rent in this lease was not a compliance with the power, because there is an event which may happen, in which the remainder-man would not get the rent which he ought to have. If the tenant for life died on the 2nd of August, and there were no lease, the remainder-man would enter and take possession of the estate, and get into the immediate receipt of the rents and profits. Now is the remainder-man to be in a worse situation because a lease has been granted? If such an event had happened under the present lease, he would be kept out of possession, and out of the receipt of rent, for a period of ten weeks: and the tenant for life would get more than his estate for life. [Lord Denman, C. J. Suppose the last half-year's rent were made payable on the 9th of October?] It would clearly be a bad reservation. According to the words of the power the rent is to be payable during the continuance of the lease; but according to the argument on the other [695] side, there is to be a period when the rent is not to be payable, which absolutely contradicts the terms of the power.

Cur. adv. vult.

The judgment of the Court was now delivered by

TINDAL, C. J. The plaintiff in error seeks to recover certain premises which have come to him as remainderman under a will, and grounds his right on two objections to a lease granted by the tenant for life, by virtue of a power given to him in the will. The former objection we pass over, being satisfied that it is untenable, viz. the interval to which the power of distress is limited, after non-payment of the stipulated rent.

The other objection is founded on the mode of reserving the last half-year's rent. The power and the lease are set forth in the report of the case in 2 Meeson & Welsby's Reports, 661; the former requiring, that upon every such lease there be reserved and made payable during the continuance thereof the best improved yearly rent, without taking any sum of money by way of fine or income for or in respect of such lease; the latter reserving the rent on the 6th of April and the 11th of October in every year, with the exception of that for the last half-year, which is made payable, not on the 11th of October, the concluding day of the half-year, and of the lease, but on the 1st of August preceeding, with power of distraining for it if unpaid at that time.

We do not think that the money thus agreed to be paid in advance can be properly called a fine or income; but whether it does not cause a part of the term to be exempt from rent, so that the rent cannot be said to be made payable during the continuance of the lease is a much graver question.

The only case in which such a mode of reserving the [696] rent has been held good, is that of *Isherwood v. Oldknow* (3 M. & Selw. 393): but the circumstances of that case are peculiar; they were brought forward by Lord Ellenborough, and are fully explained as distinguishing that case from *Doe d. Harris v. Morse* (2 Cr. & M. 274), by Lord Lyndhurst.

Doe v. Wilson (5 Barn. & Ald. 381), and *Doe v. Giffard*, referred to in the argument of that case, are quite in the opposite direction; and, from the cases which are collected in the 17th chapter of Sir E. Sugden's work on Powers, sec. 6, the conclusion to be drawn appears to be, that the reversioner's interest is to be taken as much care of as that of the tenant for life; that a lease under a similar power, which fails so to protect him, is void; and that the rent must be reserved payable during the continuance of the term.

The case which was much relied on for the plaintiff, that of *Doe d. Harris v. Morse*, appears to be directly in point—at least, if there is any distinction in principle between that case and the present, it is difficult to discover it. The power was substantially the same. The lease in that case reserved the rent in equal moieties on the 1st of May and the 29th of September, "intervals (Lord Lyndhurst said) very distinguishable from half-yearly reservations," adding, that "the power in that respect was not executed according to the terms of the settlement." "The tenant for life (observed Mr. Baron Bayley, who entered more fully into the reasons) might thereby obtain a year's rent for less than a year's occupation." It cannot be denied, that the same thing may happen in the present case in the last year; and the amount of loss to be hazarded, and the degree of deviation from the power, cannot be allowed to make any difference.

The observation of Mr. Baron Bayley, that the power had not in that case been substantially and honestly exercised, does not appear to infer his opinion to have been [697] that the duty of the Court is to inquire in each case whether, though the power had been in fact exceeded, there may not still have been a substantial compliance, or an honest disposition to comply therewith. This would throw on the Court a most inconvenient burden, and, by referring the question to an unsatisfactory test, would at least tend to multiply litigation, while it might tempt fraudulent tenants for life to substitute, for a strict compliance with the power, such stipulations as may appear to them likely to be deemed equivalent in case of legal proceedings. The giver of the property has as much right to impose conditions on his gift—such, for instance, as restrictions on the power of leasing, which he attaches to an estate for life—as to select the object of his bounty; and there can be no real difficulty in submitting to them, where parties mean to act right.

It was observed by Mr. Baron Parke, during the argument of the present case, that the great inconvenience of not being able to distrain for the last half-year's rent during the term, had probably escaped the attention of Mr. Baron Bayley in the

case referred to. It might have been answered, that this inconvenience cannot be removed, without the risk of placing in the discretion and power of the tenant for life a considerable sum of money, which properly belongs to the reversioner. And it was observed by the learned counsel, that it would follow from the doctrine contended for, that rent might be reserved beforehand; and we think there is very great weight in this answer.

It was also observed, in the giving of the judgment of the Court below, that the mode of reserving the rent "can only be detrimental to the remainder-man, on the supposition of the tenant for life dying after the day on which the half-year's rent is reserved, and before the expiration of the term, a supposition very highly improbable."

But it appears to us that the securities provided against that danger, however remote, are binding on those who [698] accept the property subject to them. A similar observation would have been true in *Doe v. Morse*, and in most other cases connected with the subject; but the same answer is applicable. There is no difficulty in making leases to correspond in all respects with the leasing power; but to sanction any departure from it, is to defeat the settlor's intention in each particular case, and encourage laxity, if not contrivance, in all.

For these reasons, we think the judgment of the Court below must be reversed.
Judgment reversed.

CHANTER v. LEESE AND OTHERS. [In Error from the Court of Exchequer.]
Exch. Chamber. 1839.—By agreement, not under seal, between the plaintiff and A., B., and C., of the one part, and the defendants of the other part, reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention: that the plaintiff and A. had obtained a patent for another invention, the plaintiff and B., for another, and the plaintiff and C., for another; it was agreed between the said parties, that, for the considerations therein mentioned, it should be lawful for the defendants exclusively to use, manufacture, and sell any or all of the said patent inventions, within certain limits, during the continuance of the several patents, on certain terms: viz. that an office and warehouse should be prepared for the sale of articles connected with the inventions, and that books of account of the sale of each of the inventions should be kept there by the defendants, and be open at all times to the inspection of the parties thereto, of the first part; and the defendants should pay to the plaintiff 400l. a year, as a consideration for the license for the sale, &c., of all the aforesaid patents, and that such sum should be charged as a payment by the defendants in their books of account; that they should pay A. a certain rateable sum on all machines used, &c., on his patent principle; that they should also pay the plaintiff a moiety of the net profit to arise from all the said inventions, (except those in which B. & C., were interested); to the plaintiff and B. two-thirds of the net profits to arise from theirs; and it was agreed that either of the parties might determine the agreement at the end of five, seven, or ten years. In an action on this agreement, by the plaintiff alone, to recover a half-yearly payment of the 400l., the defendants set out the plaintiff's patent for the improvement in furnaces, and pleaded that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff at the time of the making the agreement well knew:—Held, that the declaration was bad on the ground of variance, inasmuch as it stated the agreement to be made between the plaintiff and the defendants, whereas there were other parties to it of the first part besides the plaintiff, from whom the consideration for the defendant's promise moved as well as from the plaintiff.—Held, also, that the plea was a bar to the action.—Sembles, that the action ought to have been jointly brought by all the parties to the agreement of the first part.

[S. C. 9 L. J. Ex. 327: in Court below, 4 M. & W. 295; 150 E. R. 1440 (with note).]

This case having been brought by writ of error into the Exchequer Chamber, was there argued in the Vacation [699] after Hilary Term, 1839, by the Attorney-General for the plaintiff, and by Cowling for the defendants; but the arguments, which were

in substance the same as in the Court below, are so fully adverted to in the judgment, that it has been thought unnecessary to detail them at length.

The Court took time to consider, and the judgment was now delivered by

TINDAL, C. J. The declaration in this case states an agreement between the plaintiff of the one part, and the defendants of the other part. The first plea is non assumpservit. At the trial an agreement was given in evidence, which was made between the plaintiff and others of the one part, and the defendants of the other part. The execution of the agreement by the defendants was proved, but the learned Judge was of opinion that the variance was fatal; on which the counsel for the plaintiff applied to amend, by inserting the names of the other parties to the agreement. The learned Judge refused to amend, and directed the jury to find a verdict for the defendants, but at the same time to find that the defendants executed the agreement produced, which was set out on the postea. The Court of Exchequer, upon argument, held that the variance was material, and gave judgment for the defendants, according to the very right, under the 24th section of 3 & 4 W. 4, c. 42; upon which judgment a writ of error has been brought and argued. The judgment is, in the present case, in support of the verdict, but if it had been otherwise, no doubt can be entertained but that a Court of Error can review the judgment, the verdict being in the nature of a special verdict.

We are, however, of opinion, that the verdict and judgment are both right. The agreement shews distinctly, that the consideration for the defendants' promise moved not [700] from the plaintiff alone, but from the plaintiff and the other parties who joined with him. It was therefore most material that the names of all the contracting parties should appear on the record; not only with a view to the defence which might be pleaded, but also to the evidence which might be adduced. It may easily be conceived that evidence might be admissible against joint contractors, which would not be admissible against the present plaintiff alone; and in many other respects it may have been most material that the agreement should have been stated as it really was. On this ground, therefore, we think that the judgment for the defendants on that part of the record must be affirmed. It is not necessary to determine whether, if the agreement had been truly set out in the declaration, the plaintiff could have sued upon it alone; but we should have felt no doubt upon that point, if that question had been directly raised.

Upon the demurrer, two questions arose: first, whether it was necessary for the plaintiff to aver that the defendants had enjoyed the use of the patents under the agreement; and, secondly, whether the plea shewing that one of the patents was void, was a sufficient answer to the action.

We do not think it necessary to determine the first question, inasmuch as we are of opinion in favour of the defendants upon the second.

There is no assignment of the patents by deed in this case; no interest in them passed to the defendants, but the whole matter rests in contract. The defendant is not in a situation with respect to the plaintiff similar to that of a tenant towards his landlord, and is in no way estopped from shewing any failure of the consideration for his promise to pay the annuity to the plaintiff, which may be sufficient to bar the plaintiff of his action. It is admitted by the demurrer that a partial failure of the consideration has taken place, namely, that one of the six patents is [701] void. The learned counsel for the plaintiff argued that, as no fraud is alleged, the defendant may have known that it was so void, and yet have entered into the agreement. We dissent, however, altogether from this reasoning. The patent being void, no benefit in respect of it could accrue to the defendants; and we think we are not to presume that any such improvident bargain took place. But it was further contended, that it must be taken on these pleadings that the other five are good, and also that the defendants have enjoyed the use of them, and consequently that they are bound to perform their part of the agreement by paying the annuity, and must bring a cross action for damages in respect of the one void patent. This reasoning would undoubtedly apply, if the consideration had been divisible, and the money payable by the defendants had been apportioned by the contract to the different parts of the consideration; in which case the principles laid down in *Boone v. Eyre* (1 H. Bl. 273, note; 2 W. Bl. 1312), and other authorities of that class, would have governed the present decision. But here it is plain, that the enjoyment of all the six patents is the consideration for every part of the defendant's promise, and that the annuity to be paid is neither apportioned by the

contract, nor capable of being apportioned by a jury. And this is apparent by reading the agreement itself as stated in the declaration, in which the six patents are so closely connected with each other, that the benefit expected by the defendants under the agreement is obviously to result from the use of all of them jointly, in such manner as the defendants may think fit, and the inability to use any one would manifestly endanger great part, if not the whole, of that benefit. All the patents but one are admitted by the pleadings to be valid, but there is no admission that they have been enjoyed by the defendants, no averment to that effect being introduced into the declaration. We see, therefore, that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, by failing partially, fails entirely; and it follows that no action can be maintained for the money. Even if it had appeared affirmatively that the other five patents had been enjoyed, we are of opinion that no action could be maintained on the agreement for the annuity, whatever question might be raised in some other form as to some right of compensation for such enjoyment. Upon the whole, we are of opinion that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

NOTE TO THE CASE OF SIMPSON v. NICHOLS, 3 M. & W. 244.

The Reporters have been informed that they were under a misconception in attributing to Baron Parke, in his judgment in the above case, the expression of an opinion that the case of *Williams v. Paul*, 6 Bing. 653, "might perhaps be supported" on the ground "that though the contract was illegal, being made on a Sunday, the property in the goods passed, although no action could be maintained for them." His Lordship's argument was, that although the contract was void, as being made on a Sunday, yet as the property in the goods passed by delivery, the promise made on the following day to pay for them could not constitute any new consideration; and therefore he doubted whether the case of *Williams v. Paul* could be supported in law.

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of EXCHEQUER and EX-
CHEQUER CHAMBER, from Hilary Term,
3 VICT., to Trinity Term, 3 VICT., both
inclusive. By R. MEESON, Esq., and W. N.
WELSBY, Esq., of the Middle Temple, Barristers-
at-Law. Vol. VI. London, 1841.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF
EXCHEQUER AND EXCHEQUER CHAMBER, HILARY TERM, 3 VICTORIE.

REGULE GENERALES. Hilary Term, 3 Viet. 1840.

It is ordered, That every person who shall intend to apply for admission as an attorney of this Court, and who shall not have been admitted an attorney and solicitor of any other Court, shall, (in addition to the notices to be given to the Examiners, Masters, &c., as required by a rule of Hilary Term, 6 Will. 4, 1836, read in all the Courts), for the space of one full term previous to the term in which he shall apply to be admitted, cause his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articked, [2] written in legible characters, to be affixed in the Exchequer Office of Pleas, in such place as public notices are usually fixed; and also enter or cause to be entered, in two books to be kept for the purpose, one at the Chambers of the Lord Chief Baron, and the other at the Chambers of the other Barons of this Court, his name and place and places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articked.

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|-----------------|--------------|
| ABINGER. | J. GURNEY. |
| J. PARKE. | R. M. ROLFE. |
| E. H. ALDERSON. | |

[Pp. 2 to 8 contain REGULA GENERALES and FORMS OF WRITS.]

[9] STAPLETON v. JOHN NOWELL AND JONATHAN NOWELL. Exch. of Pleas. 1840.
—A plea of payment into court, by two defendants, pleaded to one or more indebitatus counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in; and does not admit the defendants' joint liability to any greater amount, although the plaintiff gives evidence aliunde to fix one of the defendants with liability to a greater amount.

[S. C. 8 Dowl. P. C. 196; 9 L. J. Ex. 32; 4 Jur. 90. Approved. *Perren v. Monmouthshire Railway and Canal Company*, 1853, 11 C. B. 862.]

Indebitatus assumpsit for wharfage, and on an account stated. The particulars stated, that the action was brought for wharfage, to the amount of 50l., due from the defendants to the plaintiff. The defendants pleaded payment into Court of 10l., and no damages ultra; to which the plaintiff replied, damages ultra. At the trial before

Alderson, B., at the Middlesex Sittings after Michaelmas Term, it appeared that the plaintiff was the proprietor of a wharf on a canal, and the defendants were contractors for supplying the London and Birmingham Railway Company with waggons and various other articles. The plaintiff's counsel put in a letter from the defendant Jonathan Nowell, in answer to a demand by the plaintiff for payment of the 50l., in which he stated that "he was sure the charge for wharfage must have been made through some mistake, as his wharfage account with the plaintiff had been settled, and no fresh liability had been incurred. It was true there were a few waggons on the wharf, but they could be removed if the plaintiff desired it." It was proved also, that goods of the kind supplied by the defendants, amongst them some waggons, were seen on the wharf at that time. No evidence was given to shew the joint liability of the defendant John Nowell, but it was insisted for the plaintiff, that by the payment of money into Court the joint liability of the defendants was admitted. The learned judge was of a different opinion, and accordingly directed a nonsuit.

Kelly now moved for a new trial, on the ground of misdirection. Taking the plea of payment into Court and the evidence together, a liability, at least to some amount, was established against both the defendants. The payment of money into Court by them both, under a joint plea, was an admission of their joint liability, and rendered [10] the admission contained in the letter of the one evidence against the other. *Ravenscroft v. Wise* (1 C. M. & R. 203; 2 Dowl. P. C. 676) is expressly in point. That was an action of indebitatus assumpsit against four defendants for wages due under a written contract. The defendants paid money into Court; and it was held that they were thereby precluded from shewing that one of them was not a party to the contract. [Alderson, B. That case must now be considered as having been overruled by *Kingham v. Robins* (5 M. & W. 94), in which the whole doctrine as to the effect of payment of money into Court was fully considered.] There was not in that case any question of joint or several liability; the question was, whether the defendant was liable at all, the jury having negatived the existence of any contract for the fixtures claimed by the plaintiff. But here there was evidence aliunde against one of the defendants; the only question was, whether the other was jointly liable with him. [Alderson, B. Where is the distinction in principle? If the plea of payment into Court cannot render a man liable who would not otherwise be liable at all, how can it render one man jointly liable with another, who is not proved to be so?] The act of payment into Court is evidence independent of the plea: it is evidence of an admission of liability to some part of the plaintiff's demand, amounting to the sum paid in. There is, therefore, an admission here of a partnership liability as to some demand for wharfage; then the other evidence shews it to be an entire contract. It is the same as if the two defendants had made a payment in consequence of a *vivâ voce* demand on both. [Alderson, B. You cannot draw from a plea the same inference as from an act done. If, in trespass, the defendant pleaded not guilty and a justification, no use could be made of the admission in the latter plea to disprove the former; but if he were to say in conversation, "I did the act complained [11] of, but I was justified in doing it," that would be good evidence for that purpose.] Here the plea, having been pleaded after the demand of a specific amount made upon both the defendants, assumes the character of an act done. Here, also, a contract has been proved. In *Kingham v. Robins*, the plaintiff attempted to prove a contract and failed.

ALDERSON, B. If this question were now to be considered for the first time after the case of *Ravenscroft v. Wise*, I should have been very desirous, whatever were my own opinion of the authority of that case, to give Mr. Kelly a rule, for the purpose of re-considering it. But after the case of *Kingham v. Robins*, and the authorities there cited, and the full discussion which this subject then underwent, I think the case of *Ravenscroft v. Wise* must be considered as virtually overruled. The doctrine laid down by the Judges in the case of *Kingham v. Robins*, appear to me to have put the principles of law applicable to this subject on a clear and simple foundation. Nor were they then laid down for the first time, for I distinctly recollect Mr. Justice Bayley, then on the Northern Circuit, stating the rule very clearly, and almost in a similar case, that payment of money into Court admits the contract set forth in the declaration, for this reason, that the payment admits that something is due, and therefore must admit that the contract was made by which alone anything is due, from the defendant to the plaintiff. But that does not apply to the case of an indebitatus count, because that is not confined to one contract, but may extend to an indefinite

number of contracts between the parties; and therefore the payment of money into Court only in substance admits, that on some one or more of these contracts or causes of action, stated in the general count, the defendant is liable to the plaintiff. The plaintiff here says, On one or more of several contracts I have a [12] cause of action. The defendants say, On one or more of those several contracts the plaintiff has a cause of action to the extent of 10l.; but on the residue of the contracts he has no such claim. The plaintiff, therefore, must shew affirmatively that there is some contract on which both the defendants are liable, beyond the amount of the 10l. paid by both the defendants into Court. If he proves no contract at all against both defendants, he fails altogether. If he proves that there is a contract on which both the defendants are liable, he must shew that upon that contract more is due than is covered by the payment into Court. Here the plaintiff proved a *prima facie* case against one of the two defendants, but none against the other; but he says, as John Nowell has paid money into Court, he must be taken as having admitted the particular contract on which Jonathan Nowell was proved to be liable. But both defendants may be jointly liable on one contract, and for a sum not greater than that paid into Court, and Jonathan Nowell alone upon the contract proved. Now the plaintiff undertakes to satisfy the jury affirmatively that he is entitled to recover against both upon that contract. If it be left in ambiguity whether he is so entitled or not, he cannot succeed. Therefore, as it is equally consistent with the facts here proved, either that both defendants are indebted or only one, the jury cannot say affirmatively whether John Nowell is liable on this contract, and ought to be directed to find for the defendants. If so, the plaintiff ought to be nonsuited. On these grounds I retain my opinion, that the nonsuit was right.

GURNEY, B. I think the nonsuit was right, and I can add nothing to the reasons given for it by my Brother Alderson.

ROLFE, B., concurred.

Rule refused.

[13] *EASTWICK v. HARMAN*. Exch. of Pleas. 1840.—Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict.

[S. C. 8 Dowl. P. C. 399; 9 L. J. Ex. 137.]

Debt for wages, money paid, and on an account stated. Pleas—first, *nunquam indubitatus*: secondly, payment before action brought; thirdly, a set-off for money had and received by the plaintiff to the use of the defendant: on which issues were joined. The particulars of demand were as follows:—"This action is brought for the recovery of the sum of 11l. 10s. 4d., with interest thereon from the day the same became payable to the day of payment thereof, being the balance now remaining due from the defendant to the plaintiff on the following account, viz:—

| | | | |
|--|-------|----|----------|
| "For money paid by the plaintiff for the use of the defendant, in and during the years 1838 and 1839 | £23 | 2 | 0 |
| By cash received at various times during the same period on account thereof | 19 | 5 | 0 |
| | ————— | | £3 17 0 |
| Also for wages due from the defendant to the plaintiff, for services performed for 16 months in the same years | £22 | 13 | 4 |
| By cash received by the plaintiff's attorney from the defendant's attorney, in the month of July instant, on account thereof | 15 | 0 | 0 |
| | ————— | | 7 13 4 |
| | | | ————— |
| | | | £11 10 4 |

"The following were the particulars of the defendant's set off:—

| | |
|---|----------|
| [14] "Cash paid to the plaintiff at several times in 1838 and 1839 | £30 10 0 |
| April, 29, 1839.—By cash received by the plaintiff for the use of the defendant | 1 13 0 |
| July 10.—By ditto paid to Mr. Lyde | 15 0 0 |
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| | £47 3 0" |

At the trial before Gurney, B., at the Middlesex Sittings after Michaelmas Term, it appeared that the plaintiff had been in the defendant's service as coachman and groom, from February, 1838, to June, 1839. His wages for that period amounted to the sum of 22l. 13s. 4d., mentioned in the particulars, and he proved also the payment of a sum of 1l. on account of the defendant. It appeared also, that on application being made, before the action was brought, by the plaintiff's attorney (Mr. Lyde) to the defendant for payment, and no answer being received, a writ was sued out; but before service of it; the plaintiff's attorney received an answer from the defendant's attorney, desiring that the defendant might be furnished with the plaintiff's account, and it should be arranged. The plaintiff's attorney wrote in answer, (without stating that a writ had been sued out), "to save further trouble, I enclose a receipt for 15l., and you must also allow me what you like for my attendances." The defendant's attorney accordingly saw the plaintiff's attorney, and told him "they should tender more than was due;" and the plaintiff's attorney said he should admit the tender, and desired him to pay the 15l., which was the sum given credit for in the plaintiff's particulars. The defendant's attorney accordingly gave a cheque for the 15l., which was expressed in the receipt to be received on account and without prejudice. The writ was, however, subsequently served, and the action proceeded with. For the defendant, it was contended, that as the plaintiff, by his particulars, admitted the receipt of this sum of 15l., he must be taken to exclude it from his de-[15]-mand, although received after the commencement of the action. Evidence was also given of payments to the plaintiff at different times during the period of his service, amounting altogether to about 22l., and of a conversation with him shortly before the commencement of the action, in which he stated, that he should sue the defendant for 27l., the whole amount due to him before he received any money; but that if he had signed his name to any paper, or there had been any witness when he received money from the defendant or any of his family, he should have had nothing to receive. The learned Judge left it to the jury to say, upon the evidence, whether, excluding the payment of the 15l. from their consideration, they were satisfied that anything remained due to the plaintiff, or whether he had been paid all that was due to him: and the jury found a general verdict for the defendant.

Humfrey now moved for a new trial, on the ground of misdirection. The 15l. not having been paid until after the commencement of the action, the defendant was not entitled to take advantage of it under this plea, which is a plea in bar of payment before action brought. That issue, therefore, was wrongly found for the defendant. [Alderson, B. Does not the case fall within the rule of Trinity Term, 1 Vict., the payment being credited in the particulars?] That rule was never intended to apply to a payment after action brought. Its object is to meet cases where the plaintiff, "to avoid the expense of a plea of payment," has given credit in the particulars: that must apply to payments before action brought. In order, therefore, to sustain this plea, the defendant was bound to prove payment before action brought. [Alderson, B. It is clear from the particulars, that the plaintiff goes for a balance, after admitting this as a proper payment. The particulars put you in the same position as if the defendant had paid money into Court, and the plaintiff had gone on afterwards and had recovered no more: in that case he [16] would have had to pay all the costs.] But in that case there is a period at which the plaintiff has an opportunity of staying his hand, and of obtaining his costs down to the time: in this case he had no such option. Whatever, therefore, might be the effect of the evidence, independently of the 15l., the plaintiff was clearly entitled to recover in respect of that sum.

ALDERSON, B. I think there ought to be no rule. It seems to me, that where

the limit of the plaintiff's claim is defined by the bill of particulars, and he is going only for a balance, after crediting payments, whenever made, the plea of payment is to be taken with reference to that balance. If so, the verdict is certainly right, because the defendant has proved payment to a greater amount than the balance claimed. If this were not so, gross injustice might follow. It is the same as if the plaintiff had two demands, and by his particulars said, I do not go for one of them, but only for the other. That is one view of the case. But, moreover, the plaintiff has had the advantage of having it left to the jury, whether, exclusively of the 15l., and supposing it to have been paid solely as the price of peace, any money was due to the plaintiff at the time of action brought. On that point there was evidence both ways, and the jury might infer from the subsequent payment that there was something due; but there was also evidence on which they might find that the whole amount due had been paid; and even if we were dissatisfied with their verdict, the amount claimed is under 20l. I see no misdirection: the learned Judge may have made strong observations on matters of fact, but there was no misdirection in point of law.

GURNEY, B. I think I gave the plaintiff too great an advantage by excluding the 15l.; but, independently of that, the plaintiff had clearly no claim by his own admissions.

Rule refused.

[17] CLASSEY v. DRAYTON. Exch. of Pleas. 1840.—An affidavit in support of a rule to set aside an interlocutory judgment must state in express terms that judgment has been signed: and it was held not to be sufficient to state that a rule to compute had been served on the defendant.

[S. C. 8 Dowl. P. C. 184; 9 L. J. Ex. 145.]

Fitzherbert had obtained a rule to shew cause why the interlocutory judgment signed in this cause (an action on a bill of exchange) should not be set aside for irregularity.

Butt, on shewing cause, objected that the affidavit in support of the motion did not shew that any judgment had been signed. It was only stated that a rule to compute principal and interest had been served on the defendant, but there was no direct statement of the signing of the judgment.

Fitzherbert, contra, urged that this was sufficient, because the service of the rule to compute implied a previous judgment. He submitted also, that as the judgment was an act of the Court, it need not appear by affidavit.

The Court, however, held the affidavit to be clearly insufficient, and the rule was Discharged.

PUGH v. KERR, Esq. Exch. of Pleas. 1840.—In a cause in which the venue was laid in Middlesex, the Court, on the 30th of January, made absolute a rule for changing the venue, obtained by the defendant, "on payment of the costs of the application, and of all costs reasonably and bona fide incurred and rendered useless by that rule." The plaintiff's witnesses were at that time on their way from Wales to London, the sittings commencing on the 1st of February. The defendant drew up the rule and served it on the plaintiff, and served notice of taxation for the 1st of February. The plaintiff thereupon withdrew the record, and sent back her witnesses into the country. On the 8th of February, the costs were taxed under the rule at 209l. 11s.: on the 11th, the defendant gave notice that he abandoned the rule, and the Court held that he had a right to do so, the rule being only conditional. The cause was tried at the Middlesex Sittings after Trinity Term, and a verdict found for the plaintiff:—Held, that the 209l. 11s. were not, under the circumstances, costs in the cause.

[S. C. 8 Dowl. P. C. 218; 9 L. J. Ex. 255; 4 Jur. 152.]

The Court having decided in this case that the rule for changing the venue, obtained by the defendant, was con-[18]-ditional only, and that the defendant had a

right to abandon it (5 M. & W. 164), the cause was tried at the Middlesex Sittings after last Trinity Term, before Gurney, B., when the plaintiff obtained a verdict, damages 65l. 10s. The costs were taxed on the 14th of November, before Master Walker, the same officer who had taxed the costs under the rule to change the venue: and without going into any fresh taxation of those costs, he allowed the whole sum of 209l. 11s. before taxed, as costs in the cause. Cresswell having obtained a rule to shew cause why the Master should not review his taxation, on the grounds, first, that under the circumstances, these were not recoverable as costs in the cause, and secondly, that the Master had, on the original taxation of them, refused to hear affidavits tendered by the defendant, to shew that they were unnecessarily incurred,—

Jervis and Welsby shewed cause. These are clearly costs in the cause. The rule is, that the plaintiff is entitled to recover, as costs in the cause, all monies reasonably expended, without any default on his part, in the conduct of the cause. The plaintiff here was guilty of no default or misconduct in respect to these costs; they were necessarily incurred for the purpose of being ready for trial here, in case the venue should not be changed. It will be said that the plaintiff ought to have kept her witnesses in town and gone on to trial; but the record was withdrawn under the *bonâ fide* belief that the defendant was bound and would abide by the rule for changing the venue, which he had actually drawn up and served; and the plaintiff had no notice until the 11th of February, several days after the cause would have been tried in due course, of the defendant's intention to abandon the rule. There could be no complete taxation under that rule, [19] until the witnesses had returned into the country. The test, whether it would have been an erroneous proceeding on the plaintiff's part to try the cause here, was properly applied, in order to determine whether the change of venue was absolute or only conditional; but the question now is, whether there was any actual default on the part of the plaintiff.^(a)

Cresswell and Peacock, *contrâ*. No part of this sum of 209l. 11s. is costs in the cause, payable by the defendant. The plaintiff had a right to try the cause in Middlesex, subject to the right of the Court to change the venue. It was originally entered for trial in Middlesex; the record was then withdrawn, and it was re-entered and tried at a subsequent sittings in Middlesex. It did not stand over as a remanet, or by the act of the Court, but by the will of the plaintiff. It is said that the record was withdrawn under an expectation that the venue would be changed according to the rule: but the defendant is not therefore liable to the costs. They were thrown away, because the plaintiff, having a right to go on and try the cause, chose, nevertheless, to withdraw the record, relying on the expectation that the defendant would abide by a rule which the Court has already decided he was not bound to abide by. At least the plaintiff should have tried the cause in the country, and given the defendant the benefit of the change of venue. [Alderson, B. The question is, whether the withdrawing of the record, after the conditional rule to change the venue, was any default in the plaintiff?] The defendant contends that it was, because the plaintiff had no right to treat it as an absolute change of venue. The plaintiff ought, at all events, to have been prepared to tax the costs forthwith, whereas the attorney got the taxation postponed, under the pretext that the costs could not [20] be ascertained until the witnesses had returned into the country. But further, these costs were specially provided for by the Court on the rule to change the venue, and therefore are not costs in the cause.

ALDERSON, B. It is of some importance to lay down an accurate rule as to what are costs in the cause; we will therefore take time to see if there is any settled practice on the subject.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by—

ALDERSON, B. In this case we are, after full consideration, of opinion that the costs of preparing for the trial, respecting which the dispute has arisen, are not costs in the cause; and it would be therefore unnecessary to send back the second question to the Master, for the purpose of his examining into the point intended to have been raised on the part of the defendant, in case our opinion had been against him on this point. But as to that point, after consulting Master Walker respecting the circumstances attending this taxation, we think that he substantially examined into the facts,

(a) It is not necessary to report the arguments on the other point.

and that the defendant is not entitled to the rule on that ground; and therefore so much of the costs of the rule as belong to that part of it must be paid by the defendant.

There is no doubt that the costs of all interlocutory proceedings in a cause, not otherwise specially provided for by the Court, are, according to the practice of the Court, costs in the cause; and this we have had certified to us by the Masters of all the Courts, to whom we have applied. But there are two objections to applying that rule to the present case. The first is, that, strictly speaking, there has been no interlocutory proceeding here, for the defendant [21] has only applied for a conditional rule, and, being ultimately dissatisfied with the conditions imposed by the Court, has declined to act upon it: and this, as the Court have already determined, he had a right to do. The venue which he sought to change has remained unchanged, and the cause has been tried according to the original state of the declaration. But, secondly, we think these costs, incurred by the plaintiff in preparing for trial, have been specially provided for by the Court, for the Court made the payment of them a condition precedent to the defendant's acting upon the rule; and it is only because the plaintiff has committed a default in not enforcing her rights, as secured to her by the terms of the offered rule, that she is in the present difficulty. If she had persisted, as she well might, in trying her cause, until the defendant had paid those costs, the present question could not have arisen; and it is obvious that if the Court, instead of the terms proposed, had made the defendant's rule absolute for change of the venue, declaring the costs incurred by the plaintiff in preparing for trial to be costs in the cause, the plaintiff would have complained, and with great justice, of such decision. However much, therefore, we regret that the defendant obtains an apparent advantage, from the unfortunate trust which the plaintiff put in his good faith, and which has not been, it should seem, kept with her; yet, inasmuch as these costs are not, in our judgment, costs in the cause, we must make this rule for reviewing the Master's taxation absolute. The result will be, that the Master will tax for the plaintiff the costs of the former rule drawn up by the defendant, though not acted upon, and the costs of that taxation also, which he has unnecessarily caused the plaintiff to incur, and also so much of the costs of the affidavits on this rule as are applicable to the question of reviewing the taxation of the costs, on the ground of Master Walker's supposed omission to inquire into the bona fides of the plaintiff in bringing up her witnesses to town. But the Master [22] must disallow the costs of those witnesses, as they were specially provided for by the former rule, and lost by the plaintiff's own neglect.

Rule absolute accordingly.

SEWELL v. RABY. Exch. of Pleas. 1840.—By the deed of consecration of a chapel, built by subscription, of which the plaintiff was one of the founders, the chapelwardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expenses, was to go towards the re-payment of the expense of building the chapel. S. and G., the chapelwardens for 1838, at the close of their year of office, had in their hands a surplus of 22l., payable to the plaintiff as one of the founders. The plaintiff and defendant were the succeeding chapelwardens. G. handed over the money to the defendant, together with his accounts, with a direction not to pay it over to the plaintiff until the determination of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expenses of building the chapel:—Held, that the plaintiff could not sue the defendant for the amount, as money had and received to his use, before the determination of that cause.

Debt for money had and received, and on an account stated. Plea, *nunquam indebitatus*. At the trial before Maule, B., at the last Liverpool Assizes, the facts appeared to be as follows:—

In the year 1831, a subscription was entered into for the purpose of building a new chapel at Trumhere, in Cheshire. The plaintiff, a gentleman residing there, was one of the principal promoters of the undertaking, and the land purchased for the purpose was conveyed to him and four other persons as trustees. By the deed of consecration, dated the 15th of October, 1831, two of the trustees, Messrs. Walker

and Warrington, were appointed wardens of the chapel until the following Easter, and provision was made for the future election of wardens by the proprietors of pews; and it provided, that the occupiers of pews should pay the rents to the wardens for the time being, who were to provide, out of such rents, for payment of the salaries of the minister and clerk, of the expenses of repairs, &c. &c.; and subject thereto, the founders of the chapel were authorized to let the pews to inhabitants of the township of Tranmere, in order ultimately to repay the expense of building the chapel, and, in the meantime, legal interest upon the sums advanced for that purpose. In December, 1838, the then chapelwardens, [23] Messrs. Sibson and Gilbert, stated their account as to the pew-rents, by which it appeared that, after providing for the several payments directed by the deed of consecration, there remained in their hands the sum of 22l. 18s. 4½d., due to each of three of the trustees, of whom the plaintiff was one. They tendered this balance to the plaintiff, but he then declined to receive it until the determination of an action then pending, which had been brought against the plaintiff by his co-trustee, Warrington, for money advanced by him for the plaintiff towards the building of the church. In March, 1839, Sibson and Gilbert went out of office, and were succeeded as wardens by the plaintiff and defendant. Gilbert, however, did not then pay the money to the plaintiff, but handed it over, together with the accounts, to the defendant, desiring him to retain it in his hands until the determination of the action of *Warrington v. Sewell*; and the defendant having accordingly refused to pay it over to the plaintiff, the present action was brought. The writ of summons was sued out while a rule nisi for increasing the damages in the cause of *Warrington v. Sewell* (which was tried at the Cheshire Spring Assizes, 1839) was pending.

On these facts it was objected, for the defendant, that the money was not received by the defendant to the use of the plaintiff, but to the use of Gilbert until the determination of the action of *Warrington v. Sewell*, and that the plaintiff ought to be non-suited. The learned Judge reserved the point, and a verdict was taken for the plaintiff, damages 22l. 18s. 4½d., leave being reserved to the defendant to move to enter a nonsuit.

Cresswell, in Michaelmas Term, obtained a rule accordingly; against which,

Alexander and Cowling now shewed cause. The plaintiff is entitled to retain the verdict. By the account stated in December, 1838, Sibson and Gilbert clearly admitted that [24] they had in their hands this precise sum of money, to be paid to the plaintiff, and which they had then appropriated to him. Gilbert could, after that, have had no defence to an action against him by the plaintiff for the amount, supposing the plaintiff to have got rid of the tender by a subsequent demand. Then, when the defendant received the money from Gilbert, he could stand in no better situation than him. The plaintiff, therefore, could equally maintain the action against the defendant, after a new demand. The defendant received the money, knowing it to be the plaintiff's; he thereby became his agent, and was bound to account to him, and cannot set up the *jus tertii*. Gilbert had no right to exercise any control over the subsequent disposition of the money, which he had admitted to be the plaintiff's, and had no authority to subject it, in the defendant's hands, to the condition of not paying it over to the plaintiff until a certain event. [Alderson, B. Whose agent was the defendant? He might become the plaintiff's agent to pay over the money after the determination of the action, but not till then. Lord Abinger, C. B. If I tender money to a creditor, who refuses to receive it, and I then pay it to a banker, telling him to keep it until a certain event, is the banker liable ever to my creditor?] But here the plaintiff received it with the knowledge that it belonged absolutely to the plaintiff. At all events, it was a question for the jury what was the meaning of the direction by Gilbert to the defendant; it might be merely by way of caution. [Gurney, B. It is a command, not a caution.] It could not properly be so, because Gilbert had no longer any control over the money, which he dismissed from his hands in consequence of his ceasing to be the warden, and the defendant's becoming so. The rule laid down by Willes, C. J., in *Scott v. Surman* (Willes, 404), is, "That if a man receive money which ought to be paid to another, or to apply to a particular purpose, to which he [25] does not apply it, this action will lie as for money had and received." *Barron v. Husband* (4 B. & Adol. 611; 1 Nev. & M. 728), and that class of cases, where there is no privity of contract whatever, are altogether different from the present: here, the defendant was as much the agent of the plaintiff as of Gilbert.

Cresswell and Crompton, contra, were stopped by the Court.

LORD ABINGER, C. B. This case is too clear to admit of any doubt. No doubt, where a party has an interest in a specific chattel, if it be handed over to a third person, he may follow it in an action of trover; but this is merely the case of a debt; there is no specific coin in the hands of either party belonging to the plaintiff. Then Gilbert pays over the money with a special charge, and the defendant receives and holds it subject to that condition; and until the event were determined, the plaintiff could have no right to receive it. The rule must therefore be absolute.

ALDERSON, B. If the plaintiff seeks to fix the defendant as his agent by the contract made by the defendant with Gilbert, he must take it with all its consequences. If, therefore, the plaintiff agreed to the defendant's receiving the money on the terms imposed by Gilbert, he must fail, because he has brought his action too soon; if Gilbert paid the money over without authority, the plaintiff equally cannot succeed, because he ought to have sued Gilbert, and not the defendant.

GURNEY, B., concurred.

Rule absolute.

[26] *CALLAND v. LOYD AND OTHERS*. Exch. of Pleas. 1840.—A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest:—Held, that the bankers were liable to A. for the amount, in an action for money had and received.

[S. C. 9 L. J. Ex. 56.]

Assumpsit for money had and received, and on an account stated. Plea, non assumpsit. At the trial before Maule, B., at the last Liverpool Assizes, the facts appeared to be as follows:—

The plaintiff was a warehouseman at Manchester, and had married, in June, 1836, the widow of one James Birch, by whom she had an only child, Robert Birch. In February, 1837, the father of the plaintiff's wife died, having made a will, under which the plaintiff became entitled to receive her share of his property, amounting to 731*l.*, and which was paid to the plaintiff in August, 1837. He deposited 300*l.* of the money in the bank of Messrs. Heywood & Co. at Manchester, and gave the rest to his wife to take care of. On the 28th of August, the wife, without the plaintiff's knowledge, took a 50*l.* Bank of England note, part of this 731*l.*, and on the same day paid that amount into the bank of the defendants, Messrs. Jones, Loyd, & Co., in the name of her son; and the defendants gave her an accountable receipt in his name, bearing interest, which she kept. Robert Birch, the son, was at that time about twelve years old. The plaintiff having discovered the deposit of the note with the defendants, demanded the money from them; and on their refusal to pay it, the present action was brought. It was contended for the defendants, that they having received the money upon a contract, whereby they were to be accountable for it to the infant, Robert Birch, the plaintiff could not recover it as money had and received to his use. The learned Judge overruled the objection, but gave the defendants leave to move to enter a nonsuit; and a verdict having been found for the plaintiff, Tomlinson, in Michaelmas Term, obtained a rule nisi, pursuant to the leave reserved; against which,

[27] Cresswell and Addison now shewed cause. The plaintiff is clearly entitled to recover in this action. The fact that this money was placed in the hands of the defendants by a person having no right to do so, and her taking the receipt in the name of another, cannot affect the plaintiff's title to sue for it. If this had been a specific chattel, and the wife, without the husband's authority, had delivered it to the defendants, and obtained from them an acknowledgment that it was held for a third party, would that be any answer to an action of trover at the suit of the plaintiff? The note deposited is admitted to be the plaintiff's property; he might have sued in trover, if he could identify it; if not, he has equally a right to sue for money had and received; and the promise of the defendants, to hold it for another person, cannot exonerate them from responsibility to the real owner. [Lord Abinger, C. B. Suppose a man had money in his hands to pay to a particular person, and he paid his own debt with it; could the owner bring money had and received?] Perhaps not; but this

is a different case: here the money is placed in the hands of parties having no title to it, they agreeing to hold it for the benefit of another party having no title; in such case the real owner may recover it. *Down v. Halling* (4 B. & Cr. 330; 6 D. & R. 455), (the authority of which is unimpeached upon the point for which it is now cited), is expressly in point. There the owner of a cheque, who had lost it by accident, was held to be entitled to recover the amount of it back, as money had and received, from a shopkeeper to whom, five days after the loss, it had been paid by a third party in payment for goods sold, the jury having found negligence in the defendant. [Lord Abinger, C. B. There the cheque remained the plaintiff's property when in the hands of the defendant, and might have been recovered in trover. Alderson, B. Is there any evidence here of the identity of the note? Is [28] there anything to shew that the wife might not have changed it and got money for it, and paid in the money?] Even assuming that she did, the defendants can have no right to retain it; she had no power to make any contract on behalf of her son; he could give her no authority to do so, and he alleges no title of his own to the money. The defendants not having any title in themselves, nor claiming to hold for another who has title, the law implies a contract to repay the money to the real owner. [Lord Abinger, C. B. If the wife had paid in the money in her own name, the husband clearly could recover: if she paid it in as the agent of A. B., he could not; then, if she pay it in, assuming to be the agent of A. B., but not being so in fact, the question is, can the husband recover, the defendants having made a contract?] The fallacy is in supposing that there is any binding contract; in order to establish that, the defendants must shew that the party depositing was competent to contract with them. The plaintiff, the real owner, has never authorized the defendants to receive the money to Birch's use. *Stephens v. Budcock* (3 B. & Adol. 355), which may be cited on the other side, is clearly distinguishable, on the ground that there the defendant received the money as the servant and agent of his master, to whom alone he could be accountable for it. But *Stead v. Thornton* (3 B. & Adol. 357, n.), there cited, is a distinct authority for the plaintiff. There it was held, that a party having money in his hands which he received on account of a bankrupt's estate, in the character of agent to a former assignee, who was insane when the money was received, must account for it as money had and received to the new assignee, since he could not derive any authority from a party who was incompetent in law to appoint any agent. Here the defendants could have no authority from the infant; they receive, therefore, merely as strangers. [29] *Sims v. Brittain* (4 B. & Adol. 375; 2 Nev. & M. 594) was a similar case in principle to *Stephens v. Budcock*, and was decided on the same ground. If the plaintiff here had assented to the defendants' entering into a contract to hold for Birch, that case would be applicable to the present. The plaintiff is not bound to shew that trover would lie, but if it would, he may waive the tort, and sue for money had and received; per Lord Tenterden, C. J., in *Buchanan v. Findlay* (9 B. & Cr. 747; 4 Man. & R. 593). In *Clarke v. Shee* (Cowp. 199), it was expressly held that an action for money had and received would lie by the true owner of money or notes, against a third person into whose hands they had come *malâ fide*, provided their identity could be traced and ascertained; in which case, therefore, trover would have lain also. The defendants, if called upon for payment by the infant, could have set up the plaintiff's title as a defence: *Solomons v. Bank of England* (13 East, 135). In *Hudson v. Robinson* (4 M. & Selw. 478), Lord Ellenborough says, "An action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another." That clearly includes the present case. They referred also to *Collins v. Martin* (1 Bos. & P. 648), and *Littlewood v. Williams* (6 Taunt. 277).

Tomlinson, *contrâ*. It is not necessary, on behalf of the defendants, to argue upon what would have been the case if this had been an action of trover. The plaintiff has elected to sue upon an implied contract for money had and received; if that implied contract have been superseded by an express contract with another person, he cannot recover. The cases of *Down v. Halling*, *Gill v. Cubitt* (3 B. & Cr. 466; 5 D. & R. 324), and others, relating to the recovery of lost or stolen securities, have been much narrowed by later decisions; and the rule now is, that such gross negligence must be shewn as is evidence of *mala fides* in the person receiving them: *Crook v. Jadis* (5 B. & Adol. 909; 3 Nev. & M. 257), *Backhouse v. Harrison* (5 B. & Adol. 1098); 3 Nev. & M. 188). Here, so far as the defendants are concerned, all fraud is excluded; the only fraud alleged is in the conduct of the wife. This must undoubtedly be taken to

have been the plaintiff's money when paid in by her, although it may be observed, that she was the meritorious cause of his becoming possessed of it, and would have been entitled to a settlement in equity. But then the defendants have entered into a contract with a third party, by which they are bound to pay the money over to him, and that express contract supersedes the implied contract on which the plaintiff relies. [Lord Abinger, C. B. That is the pinch of the case; can you satisfy us that there is a binding contract to pay it over to the infant?] They give an accountable receipt in his name. A contract made by another for the benefit of an infant is binding. Supposing him not to receive the money until he comes of age, if he then adopt the contract, the plaintiff may have a remedy against him; but would the defendants have any defence to an action by him? [Lord Abinger, C. B. This is not a contract made for the benefit of the infant, but a fraudulent gift made to him.] Whosever money it is in fact, if a banker *bonâ fide*, on the representation that it is the money of A. B., enter into a contract to pay it to A. B., he is bound by that contract. The true principles of law, as to the situation of a banker, are laid down in *Sims v. Brittain* and *Sims v. Bond* (5 B. & Adol. 389; 2 Nev. & M. 608). In the former case, Parke, J., in delivering the judgment of the Court, says—"Although the concurrence of one of the plaintiffs was necessary to enable the defendants to receive the money from the East India Com-[31]-pany, yet it was received by the defendants as the agents of G., and they by such receipt became accountable to him for it." In *Carr v. Carr* (cited, 1 Mer. 541), Sir W. Grant, M. R., held that money paid into a banker's was not a deposit, but became a debt to the payer, and would pass as such under his will. [Lord Abinger, C. B. It is rather a fallacy to put forward a defence for the defendants as bankers; they appear rather trustees for the infant: he cannot draw a cheque till of age.] But he may bring an action. It is the same as if A. intrusted his money to B., who opened an account with it in his own name at a banker's, the banker acting *bonâ fide*. *Clarke v. Shee* is distinguishable, because there the money was received *malâ fide*, the contract on which it was received being avoided by statute. [Alderson, B. That is, there was no contract: is there any here?] Yes, a contract made by the wife on behalf of the infant, to whom the defendants have attorned.

LORD ABINGER, C. B. This rule was granted on the supposition that some contract existed, by which the defendants, the bankers, were bound to pay over this money to another person than the plaintiff. There is no doubt, that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker; and for some time I doubted whether there was not in this case a lawful contract to bind the defendants. [His Lordship stated the facts of the case, and proceeded:] The question is, whether the bankers, when the plaintiff has given them notice that it is his money, have a right to set up the *jus tertii*. The answer is, that there is no *jus tertii*: it is admitted that the money is the plaintiff's, and the defendants are merely setting up an unlawful title in answer. If this were allowed, it [32] would be a recipe for every woman who gets possession of her husband's money, to go and make a provision out of it for her minor children. The case set up for the defendants is answered by this, that there is no contract to bind them. The wife was not the agent of her husband, nor had she any right to make a deposit for the infant, who could give her no authority. It is preposterous to suppose, that although the son can have no right to receive the money when he comes of age, nor can draw a cheque in the meantime, yet the bankers have a right to keep it from the true owner for nine years. I am of opinion, therefore, that there is no colour for making the rule absolute.

ALDERSON, B. I am of the same opinion. If the money had been received by the defendants under a contract, I am not prepared to say that the plaintiff could recover; but, in truth, there is no contract with the defendants on behalf of Bireh.

GURNEY, B., concurred.

Rule discharged.

WILLIAMS v. GRIFFITH. Exch. of Pleas. 1840.—After action brought upon an attorney's bill containing any taxable item, the Court will refer it to taxation, without requiring from the defendant an undertaking to pay the amount found on taxation to be due, or imposing any other terms upon him.

[S. C. 8 Dowl. P. C. 414; 9 L. J. Ex. 185; 4 Jur. 803.]

This was an action on an attorney's bill. After the declaration was delivered, and before plea pleaded, Crompton, for the defendant, obtained a rule to shew cause why the plaintiff's bill of costs should not be referred to the Master for taxation, and why the plaintiff should not give credit upon oath for all sums received by him from or to the use of the defendant, without the defendant's being required to enter into the usual undertaking. It appeared from the affidavits that part of the bill was of above six years' date. The bill contained several items for business done in actions in this Court.

[33] Jervis and Welsby shewed cause. The defendant is not entitled to this rule. The application is made on the authority of *Watson v. Postan* (2 C. & J. 370), in which this Court held, that after an action brought on an attorney's bill, the Court or a Judge may order it to be taxed, without requiring from the defendant an undertaking, pursuant to the statute 2 Geo. 2, c. 23, s. 23, to pay the amount taxed. That case is not very fully reported, and it does not appear whether the bill there contained any taxable item or not. The Court proceeded upon the ground that they had a jurisdiction at common law over the taxation of attorneys' bills, independently of the statute; and the same was laid down in *Wilson v. Gutteridge* (3 B. & C. 158; 4 D. & R. 736). But in *Dagley v. Kentish* (2 B. & Adol. 413; 1 Dowl. P. C. 381), (which was decided before, though not cited in, *Watson v. Postan*), the Court of King's Bench expressly refused, even after action brought on an attorney's bill, which contained no taxable item, to send it for taxation. The authority of that case appears to have been admitted in *Jones v. Bywater* (2 C. & J. 371). And it is now settled by many subsequent cases, that the Courts have no authority to refer a bill for taxation, at least before action brought, except under the provisions of the statute: *Clutterbuck v. Combes* (5 B. & Adol. 400; 2 Nev. & M. 209), *Ex parte Bowles* (1 Bing. N. C. 632; 1 Scott, 583), *Doe d. Palmer v. Roe* (4 Dowl. P. C. 95). And there can be no reason why the attorney should be in a worse condition, after the defendant has neglected to pay the bill within the month, and driven him to commence an action. If the Court, then, have no jurisdiction but under the statute, they must carry out all the terms of it, and require the undertaking mentioned in it. But at all events, the plaintiff ought to have the security which [34] existed before the statute, as stated by Mr. Tidd (1 Tidd's Prac. 325), viz. that the amount of the bill should be brought into Court. [Alderson, B. There are many cases in equity as to the power of the Courts over solicitors and their bills, but none of them are referred to in *Dagley v. Kentish*.] Mr. Tidd refers to an *Anonymous case*, 2 Ves. 451, in support of the position above stated.

Cresswell and Crompton, contra. The rule as to the authority of the Courts in such a case as this, was laid down long before the passing of the 2 Geo. 2, c. 23, in *Springett v. Springett* (1 Salk. 332), where it is said, that there shall be no rule to tax an attorney's bill, unless an action be depending thereon; and the reason is, that, after action brought, the Court have jurisdiction over the cause, and may do in it what appears to them reasonable and just. There is nothing to shew that as a condition of such taxation, the defendant is to be deprived of any defence he may have to the action. According to the present practice, the Courts do not permit the reasonableness of the bill to be inquired into at Nisi Prius. It would be most unjust, therefore, that the defendant should be deprived of the opportunity of such an inquiry before the Master, or should have it only on the condition of giving up some defence. The practice at Nisi Prius could never have been supported, unless the items of the bill could have been investigated before. *Dagley v. Kentish* is distinguishable, because there the bill contained no taxable item, and the defendant might have gone into the items at Nisi Prius. There is no case which impugns the authority of *Watson v. Postan*, and that case is directly in point for the defendant. [Alderson, B. The case of *Dagley v. Kentish* may perhaps stand, on the ground that there the bill contained no taxable item, and was therefore on the same footing as a

trades-[35]-man's bill: the officers of the Court would have no peculiar knowledge on the subject of it. It is important that there should be a settled practice on the subject, and we will therefore take time to consider the point, and confer with the other Courts.]

Cur. adv. vult.

On a subsequent day in the term,

ALDERSON, B., said—We have conferred with the other Courts upon this case, and on consideration have come to the conclusion, that the rule laid down in the case of *Dagley v. Kentish* should be adhered to in all cases where the bill contains no taxable item; but that where the bill contains taxable items, the Court have authority, after action brought, to refer it for taxation, without requiring any admission of liability on the bill, or calling upon the defendant to abandon any defence which he may have at *Nisi Prius*. If the question were *res integra*, we should have been much disposed to have decided otherwise even in the case of *Dagley v. Kentish*; but as it is, we adhere to that decision.

PARKE, B., who was not present during the whole of the argument, added—The constant practice, ever since I have been in the profession, has been in accordance with the rule now laid down: and it would be the utmost hardship on the defendant if it were otherwise, because he is precluded from disputing the items of the bill at *Nisi Prius*.

Rule absolute.

[36] *LEGG v. EVANS AND WHEELTON*. Exch. of Pleas. 1840.—Property held by a party in right of a lien cannot be taken in execution.—In trover, the declaration alleged that the plaintiff was lawfully possessed of the goods “as of his own property;” and the replication, in answer to a special plea in justification, set up a right to the possession of them in respect of a lien:—Held, that this was not a departure.

[S. C. 8 Dowl. P. C. 177; 9 L. J. Ex. 102; 4 Jur. 197.]

Trover against the defendants, as sheriff of Middlesex, to recover the value of certain pictures and picture-frames, of which the declaration stated that the plaintiff was “lawfully possessed as of his own property.”

Plea, that before the defendants converted and disposed of the said goods and chattels, one William Thompson had sued out of the Court of her Majesty the Queen, before the Barons of her Exchequer at Westminster, a writ of *fieri facias*, directed to the sheriff of Middlesex, commanding him of the goods and chattels of the plaintiff, to levy, &c.; and that by virtue of that writ they the defendants, being such sheriff as aforesaid, seized and took in execution the said goods and chattels, for the purpose of levying the monies so directed to be levied, which was the conversion in the declaration mentioned.

Replication, that before the said time when &c. in the declaration mentioned, to wit, on &c., one David Williams, being then lawfully possessed as of his own property of the said goods and chattels in the declaration mentioned, delivered the same to the plaintiff, for the purpose of the plaintiff, in the way of his trade of a carver and gilder, which he then carried on, performing certain work and labour upon the said goods and chattels, and supplying certain materials for the same; and the plaintiff then had and received the said goods and chattels for the purposes aforesaid, and in the way of his said trade or business then performed upon the said goods and chattels certain work and labour, and supplied certain materials for the same; in respect of which said work, labour, and materials, the said D. Williams then became and was, and from thence hitherto has been, and still is indebted to the plaintiff in a large sum, to wit, 311l. 13s. 5d.: and the plaintiff further says, that after the said goods and chattels were so delivered [37] to him as aforesaid, and whilst they remained in his possession, and before the said time when &c., to wit, on &c., it was agreed between the plaintiff and the said D. Williams, that, in consideration that the plaintiff, at the request of the said D. W., would draw and indorse for the use of the said D. W., certain bills of exchange, the plaintiff should have a right to hold the said goods and chattels for securing the payment by the said D. W. of such bills of exchange: and the plaintiff says, that afterwards, in pursuance of the said agreement, and before the

said time when &c., to wit, on the respective dates of the said bills in that plea after mentioned, he the plaintiff, at the request of the said D. W., and for his use, drew and indorsed certain bills of exchange, to wit, &c., (setting out three bills drawn by the plaintiff upon and accepted by the said D. W., for the several sums of £55, £50, and £40, and payable to the order of the plaintiff, one at two, and the other at three months after date respectively), which said several bills, from the time they were so drawn and indorsed as aforesaid continually until the said time when &c., remained and still remain wholly unpaid by the said D. W.: and the plaintiff further says, that from the time the said goods and chattels were delivered to the plaintiff as in that plea aforesaid, until the conversion thereof in the declaration mentioned, the said goods and chattels remained in the possession of the plaintiff, and that he the plaintiff, before and at the said time when &c., had, and but for the said conversion thereof would still have had, a lien upon the said goods and chattels for the aforesaid sum so due to the plaintiff for the said work, labour, and materials, and a right to hold the said goods and chattels for securing the payment by the said D. Williams of the said bill of exchange: and the plaintiff in fact further says, that by means of the premises in this plea mentioned, and of the said lien and right to hold the said goods and chattels, and in no other manner whatsoever, the plaintiff, at the time [38] of the said conversion of the said goods and chattels as in the declaration mentioned, was possessed of the said goods and chattels as in the declaration also mentioned; of all which premises in this plea aforesaid the defendants, before and at the time they seized and took in execution the said goods and chattels as in the said plea alleged, had full notice. Verification.

Special demurrer, assigning for cause, that the replication was a departure from the declaration; that it did not appear that the plaintiff had, by reason of the conversion, sustained any damage for which an action was maintainable, or that the sheriff, by seizing the goods, had deprived the plaintiff of his lien thereupon.

Kennedy, in support of the demurrer. The question is, whether the sheriff is justified in seizing in execution property in which a party has a lien. There is no precedent for seizing property of that description; but there are cases analogous in principle, and which shew that it is no objection that a party has only a limited interest, and not the sole property in the goods. Thus, it has been held that a sheriff is justified in seizing partnership property, on a judgment and execution against one of the partners: *Heydon v. Heydon* (1 Salk. 392): though the execution creditor takes only the interest of that partner in the property, which interest is his share of the surplus, subject to all the partnership accounts: *Dalton v. Morrison* (17 Ves. 193; 1 Rose, 213), *Taylor v. Fields* (14 Ves. 396). So, a sheriff may take goods which have been let to hire for a term: *Dean v. Whittaker* (1 C. & P. 347), *Duffell v. Spottiswoode* (3 C. & P. 435). And although the owner of the goods may maintain an action on the case against him if he sells the entire property of such goods, that is only in case the owner, as soon [39] as the goods are seized, apprizes the sheriff that the goods were lent for a term only, in order that he may know that the sheriff had only a right to sell the qualified property which the hirer had in them. And in *Duffell v. Spottiswoode*, it was held that the action is not maintainable if it appears that the sheriff has not sold, which was the case here. A person who hires goods has a qualified right to the possession of them for a limited time only; and the same right exists in the case of a lien, where the party entitled to the lien has a right to retain the chattel only until the debt is satisfied. The sheriff was therefore right in seizing the goods in question. But, secondly, the replication, is bad, as being a departure from the declaration. The declaration alleges that the plaintiff was possessed of the goods as of his own property; but the replication sets up a mere right to the possession on the ground of having a lien on them, which is a departure from the declaration.

Mellor, contra. It is a general principle of law that a sheriff can seize such chattels only as he can sell: Com. Dig. Execution (C. 4). Before the recent stat. 1 & 2 Vict. c. 110, a sheriff could not seize money or bank-notes, bills of exchange, &c., or other securities for money; but, by the 12th section of that act, he may now do so. The law of lien, however, remains as it was before the passing of that act. A lien is a right in a person to hold the possession of property until his demand be satisfied; but as soon as the holder parts with or relinquishes the possession of the property, the lien ceases to exist: *Montague on Lien*, 1. A person entitled to a lien cannot sell the subject-matter of it, except where the keeping of the property is attended with

expense, as in the case of a horse. Thus, in *The Hostler's case* (Yelv. 66), it is said by Popham, C. J., "That [40] if a man brings his horse to an inn, and leaves him there in the stable, without any special agreement what to pay, there the innholder is not bound to deliver the horse till the party and owner has defrayed his charge for the horse, but he may justify the detainer of the horse for his food and keeping; and after the horse has eat as much as he is worth, the innholder, upon a reasonable praise-ment, may sell him, and it is a good sale in law." . . . "So, if a tailor has my apparel to make, and he makes it accordingly, he is not obliged to deliver it until he is paid for the making of it; but although in that case he may detain till he is paid, yet for default of payment he cannot sell it, as in the other case he may sell the horse: the reason is, because the keeping of the horse is a charge, because he eats; but the keeping of the apparel is not any charge. And this the whole Court agreed to." There is a distinction between a pledge of goods by way of security, and the ordinary case of lien: in the former case, the pawnee may sell in default of payment. That was so held by Gibbs, C. J., in *Pothonier v. Dawson* (Holt's N. P. C. 383): but the distinction between that and the case of lien was distinctly recognised. The Chief Justice says—"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods; but when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge: the lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." In *Jacobs v. Latour* (5 Bing. 130; 2 M. & P. 20), it was held that a party who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off the premises. [Parke, B., referred to *Capper v. Dickinson* (1 Roll. Rep. 215), where it was held that a pawnee might sell goods pawned to him.] [41] In Com. Dig. tit. Execution (C. 4), it is said, "So, the sheriff cannot take goods in pledge." It is laid down distinctly in the books of practice, that a sheriff cannot seize what he cannot sell (see 2 Tidd's Prac. 1003; Chit. Archb. 426). A lien is a mere personal right, which cannot be made available to any other person; for as soon as the possession is parted with by the person having the lien, it is gone altogether: it is clear it is not assignable. Unless it can be shewn that a lien can be made available to a third person, it follows that it cannot be seized in execution. Then, as to the replication being a departure, surely a person having this right might declare in trover, alleging a general property, and yet, on a subsequent pleading, set up a special property, sufficient to maintain trover: it is not inconsistent with, but explanatory of, his interest. [Parke, B. It is not a departure. Any person having a right to the possession of goods may bring trover in respect of the conversion of them, and allege them to be his property.]

Kennedy, in reply. The dicta in the books which have been cited refer to property of such a nature as to be incapable of sale—as, for instance, bank-notes, money, &c.; but here the subject-matter of the lien might be sold. Even if the sheriff had no right to sell under the particular circumstances, he had power to seize and retain the goods, with a view to compel the payment of the debt.

PARKE, B. The general rule of law is, that the sheriff can seize only such things as he can sell. That rule of law still remains, except so far as it has been modified by the act of 1 & 2 Vict. c. 110; but that statute does not affect the present case. If we consider the nature of a lien, and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right, which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods. The case is quite different from those referred to, in which goods were let on hire for a certain period, because there the person hiring them has the absolute use of the goods for a particular term, and that interest may be disposed of. Here, the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant. Then, as the sheriff cannot sell, neither, by the general rule of law, can he seize: and there must, therefore, be judgment for the plaintiff.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

PETERS v. FLEMING. Exch. of Pleas. 1840.—To a declaration for goods sold, &c., the defendant pleaded his infancy, to which the plaintiff replied that the goods were necessaries suitable to the degree, estate, and condition of the defendant:—Held, that the term necessaries included such things as were useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.—It is a question for the jury, whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use.

[S. C. 9 L. J. 80. Approved, *Wharton v. Mackenzie*, 1844, 5 Q. B. 612; Dav. & M. 545; *Bryant v. Richardson*, 1866, 14 L. T. 24; 12 Jur. (N. S.) 300; 14 W. R. 401; *Ryder v. Wombwell*, 1868, L. R. 4 Ex. 32. Referred to, *Clements v. London and North Western Railway Company*, [1897] 2 Q. B. 482; *Hewlings v. Graham*, 1901, 70 L. J. Ch. 568; 84 L. T. 497.]

This was an action of debt for goods sold and delivered, work and labour done, and materials found and provided, and for money found to be due upon an account stated. The defendant pleaded, first, *nunquam indebitatus*; secondly, infancy. The plaintiff took issue on the first plea, and to the second replied, "That the goods, &c., at the time of the sale and delivery thereof, were necessaries [43] suitable to the then degree, estate, and condition of the defendant." The rejoinder traversed that allegation, and thereupon issue was joined.

The cause was tried before Vaughan, J., at the last Summer Assizes for the county of Cambridge, when it appeared that the action was brought to recover the amount of the following articles:—

| | |
|--------------------------------------|--------|
| A fine gold ring | £1 8 0 |
| A ring, engraved crest, &c. | 0 18 0 |
| A short gold watch-chain | 2 2 0 |
| A pair of pins | 0 18 0 |
| A ring | 1 6 0 |
| A ring | 1 5 0 |
| A ring repaired, new stone | 0 3 6 |
| | <hr/> |
| | £8 0 6 |

The defendant was the eldest son of a gentleman of fortune and a member of Parliament, and at the time when the goods were supplied, and the work was done, was an undergraduate of the University of Cambridge, and resided in the University. The learned Judge left it to the jury to say whether, in their opinion, the articles in question were necessaries or not, and they found that they were; upon which the learned Judge directed them to find a verdict for the plaintiff for the full amount claimed; but gave the defendant leave to move to enter a nonsuit. Biggs Andrews having, in last term, obtained a rule accordingly, or for a new trial,

Kelly and Byles now shewed cause. The case was properly left to the jury, and they have come to a correct conclusion in finding that the articles in question were necessaries for a person in the defendant's station in life. If things of such a nature are necessaries in any case, they certainly must be so for the son and heir of a gentleman [44] of fortune and a member of Parliament. The jury are the proper judges whether the quality or nature of the ornaments supplied are suitable to the defendant's rank in life. *Hands v. Slaney* (8 T. R. 578) is an authority to shew that the term "necessaries" is not limited to the bare necessaries of life, but extends to such things as are necessary according to the station and degree of the party; and it was there held, that a minor, a captain in the army, was liable for a livery ordered for his servant, because the defendant was placed in a situation of life which required such an attendant. Lord Kenyon there says, "The general rule is clear, that infants are liable for necessaries according to their degree and station in life." In the present case the defendant was a person receiving a University education, and for whose position in society a watch chain and a seal would be proper and useful articles; the one to enable him to pull out his watch, the other to seal his letters to his father or his friends. The other articles were also proper for a person in his station of life.

But it was a question for the jury whether these articles, or any of them, were proper and necessary for the defendant, and if any one of them was necessary, there cannot be a nonsuit; and the amount is too trifling for the Court to grant a new trial, on the ground of the verdict being against the weight of evidence.

Sir William Follett, Biggs Andrews, and Gunning, contra. In this case no question ought to have been left to the jury at all, as the defendant was not competent to enter into a contract for articles of this nature, which were mere ornamental articles of jewellery. An infant is incapable of contracting for that which is not requisite for him as a matter of necessity, such as "meat, drink, apparel, necessary physie, and such other necessities, and likewise for his necessary teaching." Co. Litt. 172 a. [45] In *Manby v. Scott* (2 Sid. 113), it is said: "Our law allows many persons to make contracts in cases of necessity who otherwise would be disabled from doing so; and although generally the contracts of infants are void, yet, in cases of necessity, their contract shall bind them." So, in *Brooke v. Gally* (2 Atk. 34), Lord Hardwicke says: "The law lays infants under a disability of contracting debts, except for bare necessities; and even this exemption is merely to prevent them from perishing." According to those cases, an infant cannot bind himself but for such things as are strictly necessary for him. [Parke, B. A watch may, in some cases, be a thing necessary. In *Burghart v. Hall* (4 M. & W. 727), it was decided that you must lay out of the question the allowance of a suitable maintenance to the infant. The only question is, whether the things themselves are necessities suitable to his station and degree, or not. It will be very difficult to maintain that the Judge can withdraw the question from the jury, whether such an article as a watch is not necessary; and if a watch be necessary, a chain must be so also, to draw it out of his pocket, for a boy of any age.] If articles of this description are to be considered as necessities, where is the line to be drawn? [Alderson, B. The term "necessaries," as applied to dress, may mean those things without which the party would lose caste in society. The quantity of the things furnished may be important; as, for instance, if twenty breast-pins had been supplied, they could scarcely be necessary.] What came within the term "necessaries" was, according to the old cases, a question for the Judges; and in *Mackerell v. Bachelor* (Goldsborough, 168; Cro. Eliz. 583), cited by Lord Ellenborough in *Maddox v. Miller* (1 M. & Sel. 731), the Judges decided that some of the articles were not necessities for the defendant, and that the action would not lie for them; although certainly in *Maddox v. Miller* it was held to be not so purely and exclusively [46] a question of law as that some question should not be left to the jury; but there the supply was of ordinary clothes. Here none of these articles are strictly necessities, and there could be no difficulty in laying down a rule that an infant cannot bind himself for such things as these. If an infant wants articles of such a nature, he should be made to pay for them at the time of the purchase. The rule to be collected from the books is, that an infant can bind himself only for such things as are "necessaries," which, according to the old law, were such things as a person could not do without. [Parke, B. No; it always had been the law from the first that an infant might bind himself for what was suitable to his state and degree. That was shewn in the argument in *Burghart v. Hall*. The law has always been the same in this respect.] But these articles were not even useful, they were mere ornaments, and could not be necessary, in the proper sense of the word, for any one.

PARKE, B. It seems to me that in this case the learned Judge could not have been properly called upon by the defendant to nonsuit the plaintiff, and that there was some evidence to go to the jury in support of the allegation in the replication, that the goods were, at the time of the sale and delivery thereof, "necessaries suitable to the then degree, estate, and condition of the defendant." The decision of this question does not depend in any degree upon any allowance the defendant may have had from his father, and which he may have misapplied; that must be considered as settled by the case of *Burghart v. Hall*; but the question is, whether the articles furnished are properly such articles as are necessary and suitable to the station, degree, and condition of the defendant. It is perfectly clear, that from the earliest time down to the present, the word necessities was not confined, in its strict sense, to such articles as were necessary to the support of life, but [47] extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word "necessaries" in its unqualified sense, but with

the qualification above pointed out. Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, viz. the breast-pin and the watch-chain. The former might be a matter either of necessity or of ornament: the usefulness of the other might depend on this, whether the watch was necessary; if it was, then the chain might become necessary itself. Now it is impossible for us to say that a Judge could withdraw it from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury: there was, therefore, evidence to go to the jury. The true rule I take to be this—that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be responsible. That must be a question for the jury, and it is for them to decide, upon due consideration, whether the articles were of such a description or not; and here the jury have found that they were. It is impossible to say there was not some evidence to go to the jury in the present case: that being so, it becomes unnecessary for us to inquire as to the other matters charged for.

ALDERSON, B. If it were laid down strictly that an in-[48]-fant can make no contract except for articles that would be necessary to keep him from famishing, that would be a rule which would press very hardly indeed in many cases. But that is not the rule; for a party may make contracts for necessary clothes, and for necessary education. It has been ruled that an infant may be liable for schooling, and if it become a question how much schooling is necessary, then you must inquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another. The real question would be, whether or not what he has contracted for be such as a person in his station and rank in life would require. The articles must be for real use, and such as would be necessary and suitable to the degree and station in life of the infant. The question in these cases is this—Were the articles bought for mere ornament? if so, they cannot be necessities for any one. If, however, they are bought for real use, then they may be necessities, provided they are suitable to the infant's age, state, and degree. The jury then must say, whether they are such as reasonable persons, of the age and station of the infant, would require for real use. If so, they will be necessities, for which an infant will be liable.

GURNEY, B. I think my Brother Parke has laid down the principle most correctly. If the articles are merely ornamental, the party cannot recover. What may be ornamental, and what necessary, is a question for the jury. In this case the jury have found that these articles were necessary; as to two of them, it appears to us the jury were right: and it is admitted that it is not worth while to discuss the precise amount.

ROLFE, B. The difficulty in this case arises from the vague and uncertain nature of the word necessary. I think [49] the explanation given by my Brother Alderson is the best that can be given, viz. that that is necessary which is bonâ fide purchased for use, and not merely for ornament, and which consorts with the condition and rank in life in which the party moves. One of these articles, at all events, and I think two, clearly might come under that description, and therefore the matter was properly left to the jury.

Rule discharged.

YOUNG v. HIGGON, ESQ. Exch. of Pleas. 1840.—In the computation of the calendar month's notice of action to a justice, required by the 24 Geo. 2, c. 44, s. 1, the day of giving the notice, and the day of suing out the writ, are both to be excluded.

[S. C. 8 Dowl. P. C. 212; 9 L. J. M. C. 29; 4 Jur. 125. Applied, *In re Railway Sleepers Supply Company*, 1885, 29 Ch. D. 204; *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161–2 Referred to, *Goldsmiths' Company v. West Metropolitan Railway*, [1904] 1 K. B. 5; *English v. Cliff*, [1914] 2 Ch. 384. And see *In re Knox's Trusts*, [1895] 1 Ch. 538.]

Trespass against the defendant, a magistrate of the county of Pembroke, for breaking and entering the plaintiff's dwelling-house, and seizing his goods. Plea, (by statute), not guilty.

At the trial before Gurney, B., at the last Pembrokeshire Assizes, it appeared that the plaintiff, having been convicted before the defendant of an offence under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, was afterwards also charged before him, under the stat. 3 Jac. 1, c. 10, with having refused to bear the charges of his conveyance to gaol under the former conviction, and the defendant thereupon issued his warrant to the constable of the parish wherein the plaintiff resided, to sell the plaintiff's goods for the purpose of satisfying such charges. The constable accordingly seized and sold certain of the plaintiff's goods for that purpose, which was the trespass complained of. It was objected for the defendant, (amongst other things), that no sufficient notice of action had been given to satisfy the stat. 24 Geo. 2, c. 44, s. 1. The notice was served on the 26th of March, 1838; the writ was sued out on the 26th of April. The learned Judge reserved the point, and a verdict was found for the plaintiff, damages 10l.; leave being reserved to the defendant to move to enter a non-[50]-suit, if the Court should think the action was brought too soon. Evans, in Michaelmas Term, obtained a rule accordingly; against which,

Chilton and J. Wilson new shewed cause. The notice was sufficient. The enactment of the 24 Geo. 2, c. 44, s. 1, is, that "no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any Justice of the peace for anything done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, &c., at least one calendar month before the suing out or serving the same." The true construction of the statute is, that the day of giving the notice and the day of suing out the writ are to be reckoned, the one inclusive, and the other exclusive: if so, the action was not brought too soon. The rule for computing the time in cases like the present, where it dates from an act done, is to include in the computation the day on which the act was done. There are many authorities to that effect: *Clayton's case* (5 Rep. 1), *Norris v. Hundred of Gawtry* (Hob. 189; 1 Brownl. 156), *Osbourn v. Rider* (Cro. Jac. 135), *Clark's case* (Sty. 382), *K. v. Adderley* (2 Dougl. 463), *Morley v. Vaughan* (4 Burr. 2525), *Bellasis v. Hester* (1 Lord Raym. 280; Lutw. 1591). [Parke, B. The cases which refer to bills payable at sight have been long overruled.] *Castle v. Burditt* (3 T. R. 623) is a direct authority to the same effect, decided upon a similar statute to the present. *Lester v. Garland* (15 Ves. 248) may be referred to as a decision qualifying the former cases; but that was the case of a will, in which a liberal construction ought to be allowed. Sir William Grant also, in his judgment, assigns some weight to the circumstance of the party interested being privy to the act done, [51] which does not apply to this case. It has always been laid down that the Court will apply a liberal rule in favour of the right of the subject to sue for a wrong to his liberty or property. In *Zouch v. Empsey* (4 B. & Ald. 522), the Court certainly held that the "fourteen days at least," mentioned in the Lords' Act, 32 Geo. 2, c. 28, meant fourteen clear days; but the point arose on a summary application, and was decided without argument. In *Reg. v. Justices of Shropshire* (8 Ad. & Ell. 173; 3 N. & P. 286), on the other hand, Littledale, J., says, "It appears to me that a day is a day, whether at least be added or left out." The rule of H. T., 2 Will. 4, c. 8, expressly directs that, in all matters of practice, the computation of time is to be made with one day inclusive and one exclusive. That appears to be a recognition of that mode of computation as the reasonable and legal one. [Parke, B. The whole question is, whether the case of *Castle v. Burditt* is to be considered sound law.] It has never been overruled. In *Ex parte Farquhar* (Mont. & McArthur. 7), Leach, V. C.,

held, that in the computation of the two calendar months mentioned in the Bankrupt Act, 6 Geo. 4, c. 16, s. 81, one of the days ought to be included; and his decision was affirmed on appeal by the Lord Chancellor. *Manners v. Bryan* (5 Sim. 147; 1 Myl. & K. 453) is another authority to the same effect. In *Blunt v. Heslop* (8 Ad. & E. 577; 3 N. & P. 553), where the Court of Queen's Bench held that the month required by the stat. 2 Geo. 2, c. 23, s. 23, for the delivery of an attorney's bill before he commence an action upon it, is to be computed exclusively of both the day on which the bill is delivered and the day on which the action is brought, the attention of the Court was not directed to the recent rule of Court above referred to. There, also, the statute requires that the bill shall be delivered "one month or more" before action brought.

[52] Evans and E. V. Williams, contra, were stopped by the Court.

PARKE, B. I am of opinion that this rule must be made absolute. The question is, was this action brought prematurely? The notice of action was given on the 26th of March, and the writ was sued out on the 26th of April in the same year. I think that was too soon. If the case of *Castle v. Burditt* is still to be considered law, then undoubtedly our judgment must be in favour of the plaintiff: but I think that, after the decisions which have since taken place, it cannot be so considered. According to the earlier authorities on this subject, whenever a period of time was to be computed from an act done, and not from a particular day, the day on which the act was done was reckoned inclusive: and on that principle the case of *Castle v. Burditt* was decided. There, in an action before the bringing of which, by the statute 23 Geo. 3, c. 70, "one calendar month's notice" was required to be given, the plaintiff gave his notice on the 28th of April, and issued his writ on the 28th of the following month; and the Court held the notice sufficient. But that case was decided without much argument, and altogether on the authority of the previous case of *Rex v. Adderley*, in which, upon the construction of the 20 Geo. 2, c. 37, s. 2, which exempts sheriffs from the obligation of returning any process unless required to do so within six months after the expiration of their term of office, the Court held that these months must be intended to mean lunar months, and that the day of the sheriff's going out of office must be reckoned inclusively in the computation of them. One of the principal grounds there assigned for the judgment of the Court was, that the statute being made for the ease and in favour of sheriffs, ought to receive a liberal construction in their favour. But since those decisions, the subject has been much considered in the case of *Lester v. Garland*, which [53] introduced a new view of the question. I do not say that that case is precisely in point with the present: but looking at the elaborate judgment of the Master of the Rolls, in which all the authorities are collected and commented upon, I should feel little difficulty in saying that the day in this case ought to be reckoned exclusively, on the authority of that case alone. But many others have since been decided, in which the principle of that case has been followed, viz. that when time from a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively. One of the first of these cases was that of *Pellew v. Inhabitants of East Hundred of Wotton* (9 B. & C. 134; 4 M. & R. 130), in which, under the 9 Geo. 1, c. 22, which requires that notice of an injury done to premises maliciously set on fire, for which an action is brought against the hundred, shall be given within two days from the time of its being committed, the Court held that these two days must be reckoned exclusively of the day on which the fire happened. It is true, that is a case where the party to be affected was not privy to the act done, and therefore is within the distinction suggested in *Lester v. Garland*. Then came the case of *Hardy v. Ryle* (9 B. & C. 603; 4 M. & R. 295), which was an action against a magistrate for false imprisonment, which, by the 24 Geo. 2, c. 41, s. 8, must be brought within six calendar months after the act committed. The plaintiff was discharged from prison on the 14th of December, and issued his writ on the 14th of June: and he was held to be within the six months. One of the reasons given for the decision in that case by Bayley, J., in delivering the judgment of the Court, certainly was, that the act was one to which the plaintiff could not be considered privy. There would be considerable difficulty, however, in supporting the judgment on that ground, for a man must surely be privy to the act of his own imprisonment: the case therefore [54] rests more legitimately on the general ground, that the first day is to be excluded from the computation. In *Webb v. Fairmaner* (3 M. & W. 473; 6 Dowl. P. C. 549), in which almost all the authorities are cited, this Court held, in conformity with the decisions

just referred to, that where a party bought goods to be paid for in two calendar months, the day of the sale should be reckoned exclusively in computing the time. That case has been followed up by the decisions of the Court of Queen's Bench in the two cases of *Reg. v. Justices of Shropshire*, and *Blunt v. Heslop*: so that the point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded: and such appears to me to be the reason and good sense of the matter. On the other hand, *Castle v. Burditt* rests altogether on the authority of *Rex v. Adderley*, which I cannot help considering as overruled. Apply the criterion which has been before suggested—reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted.

ALDERSON, B. I am of the same opinion, that the rule ought to be made absolute; on the simple principle, that where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time. Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given: but the act of Parliament allows him a month, as an intervening [55] period within which he may deliberate whether he will do a certain act, viz. tender amends: and unless you exclude both the first and the last day, you do not give him a whole month for that purpose.

GURNEY, B. I am of the same opinion. As to the argument that this act ought to be construed liberally, so as not to be in restriction of the general right of bringing actions, I think it is rather in the nature of a benefit to the party to whom the notice is required to be given, and ought to receive a liberal construction in his favour.

ROLFE, B., concurred.

Rule absolute.

BLAYMIRE v. HALEY. Exch. of Pleas. 1840.—An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person: although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service.

[S. C. 9 L. J. Ex. 147; 4 Jur. 107.]

Case. The declaration stated, that one S. B., the daughter of the plaintiff, being an infant under the age of twenty-one years, to wit, of the age of eighteen years or thereabouts and unmarried, had become and was, with the assent of her said father, a domestic servant of the defendant, at and for certain wages theretofore agreed upon and with the intention on the part of the plaintiff and his said daughter, that she should return to her said father whenever she quitted the service of the defendant, unless she should immediately proceed to the service of some other person than the defendant or the plaintiff. The declaration then averred that, at the time of the grievance thereafter mentioned, the said S. B. was able and accustomed, and but for the committing of such grievance would have continued, to do and perform domestic services, and by means thereof to support herself without [56] assistance from her said father while she was in the domestic service of another person, and to render great assistance to her said father while living with him. It then alleged the seduction of the said S. B. by the defendant, that she became pregnant, and returned to her father's house, and that by reason of such seduction she became unable to maintain herself, and thereby the plaintiff was charged with her support and medical expenses, and deprived of the benefit of her services &c.

General demurrer and joinder. The point stated in the margin was, that the declaration disclosed no cause of action, it not being alleged that the daughter of the plaintiff was, at the time of her seduction, in the service of the plaintiff.

Alexander, in support of the declaration, was called upon by the Court. Although it was formerly considered essential to the maintenance of an action of this nature, to shew acts of household service performed by the daughter for her parent, it is now

clearly settled that it is not necessary to prove any distinct or actual service, in order to sustain the action. [Parke, B. Still a constructive service must be proved in all cases. There is a distinct decision of Littledale, J. to that effect, *Maunders v. Venn* (M. & M. 323).] There is a sufficient allegation of constructive service in the present case; it is averred that the girl left her father's house with his consent, and with the intention on both their parts that she should return thither on quitting her service.

PARKE, B. That averment was evidently inserted for the purpose of shewing an animus revertendi in the daughter, and so assimilating this case to those in which actions [57] have been held to lie for the seduction of a girl while on a visit to a friend.^(a) But this case is very distinguishable from those: here the girl was in the actual service of another person, and her intention was not to return at any definite time to her father's house, but only on her dismissal from her service, and in the uncertain event of her not going into another service. That an action for seduction will not lie under such circumstances, has been expressly decided in *Dean v. Peel* (5 East, 45). In order to sustain this action, there must be *damnum et injuria*. The plaintiff not having shewn any right to the services of his daughter at the time of the seduction, there is here *damnum absque injuriâ*. A mere temporary absence undoubtedly would not be sufficient to defeat the action; but that is very different from a continued and regular service.

ALDERSON, B. I remember this very case arising on the Northern Circuit, at Newcastle, in a case in which I was concerned, about the year 1819—and the Court held that no action lay.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.

[58] *MORTIMER v. M'CALLAN*. Exch. of Pleas. 1840.—*Indebitatus assumpsit*, in £5000 for certain £3 per cent. stock alleged to be sold, and caused to be transferred, by the plaintiff to the defendant, and by the defendant duly accepted. Pleas—1st, non assumpsit; 2nd, that the defendant did not accept the stock from the plaintiff. At the trial it appeared that one T., a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of £5000 for the defendant. The plaintiff, not having any stock of his own, applied to W., who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed; though credit is sometimes given to the principal, and his cheque taken where the broker's credit is not thought sufficient:—Held, that under these circumstances the learned Judge was right in leaving it to the jury to consider, whether the plaintiff sold the stock on the credit of T. and T. only, or on the credit and responsibility of the principal, the defendant; and the jury having found the latter, that the verdict was right:—Held, also, that although the plaintiff was not in possession of the stock at the time of the sale or transfer, he could maintain *indebitatus assumpsit* for the price of it: and that the contract was not prohibited by the stat. 7 Geo. 2, c. 8, s. 8, as that only applies to fictitious sales of stock, and not to cases where the stock is actually transferred, although the seller was not possessed of it at the time of the contract.—A witness having been called to prove on the part of the plaintiff, that, immediately after the transfer had taken place, the plaintiff requested T. to give him the cheque of his principal:—Held, that this evidence was admissible, not as amounting to an admission, but as part of the *res gestæ*.—In order to prove the acceptance of the stock by the defendant, evidence was adduced that T., and a person unknown to the clerk in the Bank, came there with T. and made an entry of his acceptance of the stock, and a witness was then called who proved that he had inspected the Bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting:—Held, that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the

(a) *Booth v. Charlton*, and *Johnson v. M'Adam*, cited 5 East, 47. See *Harris v. Butler* 2 M. & W. 542.

Bank books themselves should be produced, they not being removable on the ground of public convenience.—On the part of the defendant, several letters, containing accounts between the defendant and T., were offered in evidence to prove the existence of a debt from T. to the defendant to the amount of the stock transferred. Other evidence had been given which shewed that fact on the part of the plaintiff, and the plaintiff's counsel admitted in his reply, that the existence of the debt from T. to the defendant had been sufficiently established. The defence turned on a point collateral to this question. This evidence having been rejected:—Held, that rejection of it did not form a sufficient ground for a new trial.—Held, also, that the allegation in the declaration, of the acceptance of stock from the plaintiff, was sufficiently shewn, although made through the medium of W.

[S. C. 9 L. J. Ex. 73; 4 Jur. 172.]

Assumpsit. The declaration alleged, that the defendant was indebted to the plaintiff in the sum of £5000, for certain to wit, £5000 interest or share in the joint stock of £3 per cent. annuities, transferable at the Bank of England, called the Consolidated £3 per Cent. annuities, then sold and caused to be transferred by the plaintiff to the defendant at his special instance and request, and by the said defendant, then, to wit, on, &c., duly accepted. There was a second count upon an account stated.

The defendant pleaded, first, non assumpsit; secondly, as to the first count of the declaration, that the said interest or share in the said joint stock, in the first count [59] mentioned, and therein alleged to have been caused to be transferred by the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff after the 1st of June, 1734, viz. on the 7th of October, 1839, for the transfer on the day and year last aforesaid by the plaintiff to the defendant, of the said sum of £5000 interest or share in the said joint stock in the first count mentioned, for and in consideration of the sum of 453l. 5s., to be therefore paid to the plaintiff for the same. And the defendant further says, that at the time of the making of such contract and agreement, the plaintiff was not actually possessed of, or entitled unto, in his own right, or in his own name, or in the name or names of trustee or trustees to his use, of the said interest or share in the said joint stock in the said first count mentioned, or any part thereof, by means whereof the said contract and agreement, and the said promise in the said declaration mentioned, so far as the same relates to the said first count, then became and was, and from thence hitherto hath been, null and void. Verification. The third plea alleged, that the defendant did not accept from the said plaintiff the interest or share in the said stock, as in the first count alleged.

The plaintiff took issue on the 1st and 3rd pleas, and demurred to the 2nd.

At the trial before Gurney, B., at the London Sittings after last Michaelmas Term, it appeared that on the 7th of December, 1839, a person of the name of Taylor, a stockbroker, applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of £5000 for the defendant. The plaintiff, not having any stock of his own, applied to a person named Ward, who agreed to transfer stock to the defendant to the amount required, and accordingly stock, standing in Ward's name, was transferred by him to the defendant. In order to prove the acceptance of the stock by the defendant, an examined copy of the Bank [60] books was produced, in which there appeared to be a transfer of that amount of stock by Ward; and for the purpose of proving the identity of the defendant with the person to whom the stock was transferred, a clerk in the Bank was called, who proved that on the day in question, a person whom he did not know came to the Bank with Taylor, and made an entry of his acceptance of the stock; and it was then proposed to shew the identity of the defendant with that person, by proving that the name in the Bank books, as acceptor of the stock, was in his handwriting. This evidence was objected to, on the ground that, in order to prove the defendant's handwriting, the Bank books themselves ought to be proved, and that if on the ground of public convenience they could not be produced, no secondary evidence of their contents could be given to prove the defendant's identity. The learned Judge however received the evidence. A stock receipt, signed by Ward, was also put in evidence, which stated that he, Ward, had received money from the defendant for the transfer of £5000 stock. It was proved also, that after the transfer was made, a conversation had taken place between the

plaintiff and Taylor, in which the plaintiff had requested Taylor to give him the cheque of his principal, when he gave his own cheque, requesting that it might not be presented till the next day. This evidence was objected to, on the ground of the conversation having taken place after the transfer was made, but the objection was overruled. The plaintiff subsequently pressed Taylor for the money, when he admitted that he had no funds at the bank on which his cheque was drawn; upon which the plaintiff summoned him as a defaulter before the committee of the Stock Exchange, when he admitted that he had for a long time owed the defendant £5000 worth of stock, which the defendant, who had employed him in several stock transactions, had allowed to remain in his hands, on receiving an undertaking that he would replace it within a certain time. It appeared that shortly before this trans-[61]-action, the defendant had repeatedly applied to Taylor to invest the money in Consols; and two letters were given in evidence from the defendant to Taylor, containing statements of accounts between them, and pressing for the investment. Four other letters between these parties, containing statements of accounts between them, were tendered on behalf of the defendant, but on being objected to by the plaintiff's counsel, were rejected. Taylor died a day or two after the transfer. Evidence was adduced of the course and practice of the Stock Exchange, from which it appeared that the general usage was to give credit to the broker, even although the name of the principal were disclosed, and that the reason for this was, because the principal was usually a person unknown to the seller, and one whose solvency he consequently could not know or judge of. The practice, therefore, in paying for stock was, to take in the first instance the broker's cheque for the amount, who then took that of his principal, both for the amount of the stock and for his commission. Sometimes, however, when the broker was not deemed sufficiently responsible, and the seller unwilling to give him credit, the usage was either to demand actual payment in money, or take the cheque of the principal, and to hold back the stock until the actual receipt of the one or the other, or till the broker shewed he had got them in his hands. There is also a printed rule of the Stock Exchange, declaring the broker to be the person responsible for the stock, notwithstanding any reference made by him to a third person. The learned Judge, in summing up, told the jury that, although by the regulations of the Stock Exchange the broker was the party considered liable, it did not follow that the principal might not be liable also; and he left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of Taylor, or ever consented to release the defendant as the principal. The jury having found their verdict for the plaintiff for the amount claimed,—

[62] Sir W. W. Follett now moved to enter a nonsuit, or for a new trial. First, the learned Judge misdirected the jury with reference to the question to whom credit was given. The evidence of the usage of the Stock Exchange shewed that credit was usually given to the broker, and not to the principal; and the question left to the jury ought to have been, Did the plaintiff, on the present occasion, contrary to the practice of the Stock Exchange, give credit to the principal instead of the broker? The general rule with respect to the responsibility of principal and agent is laid down in *Paterson v. Gandasequi* (15 East, 62),—that if the seller, knowing that the buyer, though dealing in his own name, is in truth the agent of another, elect to give credit to such agent, he cannot afterwards recover against the known principal; but if the principal be not known at the time of the purchase, the principal when discovered, or the agent, may be sued at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing. Now, according to the usage of the Stock Exchange, the credit here was confined to the broker, and the principal is not liable. [Alderson, B. Is not the question whether he bought as principal or as agent? If a party goes into the market and buys stock as principal, the person to whom the seller afterwards transfers it cannot be liable for what he so buys. But if he goes into the market and buys as an agent, is not the principal liable when discovered?] In the case of an ordinary agency it may be so, but there is a distinction in the case of a stock-broker, by the usage of the Stock Exchange. [Alderson, B. The rule as to credit being given to the broker, is a mere honorary regulation among the members of the Stock Exchange. No one can doubt but that the plaintiff took the responsibility of the principal. Lord Abinger, C. B. And the question as to whom credit was given was left to the jury.]

[63] The second objection is as to the admissibility of evidence of the handwriting

of the defendant in the Bank books, for the purpose of proving that he was present at the Bank and accepted the stock. Such evidence was not admissible. If it was important to prove that fact, the plaintiff should have produced the Bank books, and proved that the signature to the acceptance of the stock was in the defendant's handwriting. In order to prove the identity of the handwriting, the document itself should be produced. The rule that an examined copy of an entry in a book of this public nature is receivable, is confined to the proof of a fact directly in issue; but where a collateral fact connected with those books is sought to be established, that principle does not apply, and the original must be produced. In the case of a marriage, that may be proved by an examined copy of the register, and by shewing the identity of the parties; but the identity of the parties would not be established by mere proof of their handwriting to the original entry. In order to prove that, it is necessary to adduce witnesses who were present at the ceremony. [Alderson, B. If I want to shew that the defendant was the individual who wrote his name in the Bank books, surely I shew that by proving that it was his handwriting. Suppose, in a case of treason, it were necessary to prove that an individual was in a certain crowd at a particular place, would it not be competent to shew that at that place he wrote his name on a wall, by proving his handwriting upon it, or must the wall be produced? The case of handwriting in the Bank books is precisely analogous, because for the sake of public convenience they cannot be removed.] The objection is, that you cannot ask the question whether it was the handwriting of the party, for the purpose of establishing the collateral fact. With relation to parish registers,—suppose it were sought to prove a collateral fact, as that a certain party was in that parish [64] church on a certain day; that could not be done by proving his handwriting in the parish books; because it would be to prove a collateral fact, which might be established by independent evidence. It is submitted that if a document is required for a collateral purpose, the original document ought to be in Court, in order that the jury may, for the purpose of ascertaining its genuineness, have the opportunity of comparing it with other documents which may be produced, or for the purpose of cross-examining the witness who comes forward to prove it. The rule on this subject is thus laid down by Powis, C. J., in *Rex v. Smith* (1 Str. 126): "Where things are evidence of themselves as corporation books, we make no rule to produce them, but only that a party may have copies, which copies are evidence; but this examination (before a Justice of the peace) is not evidence of itself, without proving the hand of the party; and so it is of warrants and affidavits; and, therefore, a copy of them is no evidence, and we must have the original, for nothing else concludes the party."

Thirdly, the learned Judge ought not to have received evidence of the conversation between Taylor and the plaintiff, behind the back of the defendant, after the stock had been transferred, and the transaction was at an end. That was a mere statement made by an agent, after his power to bind his principal was determined, and therefore could not affect the latter. [Lord Abinger, C. B. Was it not part of the *res gestæ*?] It occurred after the transaction was at an end, and therefore was not admissible. It is immaterial whether it was on the same day or six months afterwards, provided the transaction was completed. Fourthly, the four letters from the defendant to Taylor, containing the accounts between them, were improperly rejected. They were material evidence in the cause, as shewing the origin of the debt [65] due from Taylor to the defendant, and therefore were admissible in evidence. The question was not, whether in the opinion of the learned Judge the fact to be established by them had been proved already, for the jury might not consider the proof already given as sufficient. The Judge cannot take into consideration the effect or the weight of the evidence, but merely its admissibility: *Crease v. Barrett* (1 C. M. & R. 919). Fifthly, the plaintiff not having any stock of his own at the time of the sale, the contract was altogether void, by the provisions of the statute 7 Geo. 2, c. 8, s. 8, by which it is enacted, that "all contracts and agreements whatsoever, for the buying, selling, assigning, or transferring of any stock, or of any part, share, or interest therein, whereof the party contracting or agreeing, &c., to sell, assign, or transfer the same, shall not at the time of the making such contract or agreement be actually possessed or entitled unto in his own right, or in his own name, or in the name of a trustee or trustees to his use, shall be null and void to all intents and purposes whatsoever." This action is in form an action of *indebitatus assumpsit* for stock sold by the plaintiff, but such an action is not maintainable, the contract for the sale of it being void: if

there be any remedy at all, the plaintiff ought to have proceeded on the special contract, and have alleged as the consideration that he had procured a third party to transfer the stock. Lastly, the allegation in the declaration, of the acceptance of this stock, was disproved by the evidence, for the stock was standing in the name of Ward, and must be considered as transferred by him, and not by the plaintiff.

LORD ABINGER, C. B. I am of opinion that there is no sufficient ground to accede to any part of the motion in this case.

[66] The first objection turns upon an alleged improper direction by the learned Judge, upon the question whether the credit was given to Taylor or to the defendant by the plaintiff. Now that question, undoubtedly, is one of a very important character, as it involves the practice of the Stock Exchange generally. I have no doubt myself, from the long experience I have had in matters of this description, that there is an understanding between the parties on the Stock Exchange, that inter se they hold the broker liable. I do not say that understanding would not have a very great influence on the question in individual cases; but it is admitted in this case that there was evidence which shewed that it was doubtful whether the party meant to hold the broker only responsible, or to have also the security of the principal. I do not apprehend the rules of the Stock Exchange would make any difference as to the right of a party who sells stock, to choose to what person credit shall be given if he thinks proper, and the evidence shews that it was the case sometimes to look to the principal. That, then, brings it to a question in this particular case,—whether or not the plaintiff meant to take the credit of Taylor only, and give up that of the defendant, or whether he insisted on the credit of the defendant? Now that was a question for the jury. I think there was evidence to go to them upon that question, and the learned Judge seems to me to have left it very fairly to them, and in words quite sufficient for the jury to understand that the question was, whether or not the plaintiff had sold the stock on the credit of Taylor only, and had given up his claim on M'Callan. If he chose to take Taylor and give up M'Callan, undoubtedly he must abide by the consequences. The whole question upon this part of the case is, whether he did so or not, and there was at least evidence to raise a question of doubt, which the jury alone could determine, and that question was left by the learned Judge correctly. I think, therefore, we cannot disturb the verdict upon that ground.

[67] The next objection is, that the evidence of the defendant's handwriting, in the books of the Bank of England, was not admissible. Now it has been established by a series of decisions, the first of them I think by Lord Mansfield,^(a) that the books of the Bank of England being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient, that copies of them might be received in evidence. It was founded upon the principle, that the public inconvenience, from the removal of documents of that sort, would justify the introduction of secondary evidence. That principle has been adopted in a variety of cases, and has never been questioned since. I know there have been attempts to apply it in cases where it was not applicable: the first was the case of *Rex v. Lord George Gordon*,^(b) where copies of the journals of the House of Commons were offered to be given in evidence, and supported on the ground of the above decision by Lord Mansfield as to the books of the Bank of England; but they were rejected by him on the trial, on the ground that no such inconvenience would attend the removal of the journals of the House of Commons, as any wishing to remove them could get the sanction of the Speaker to do so. Another attempt was made to give copies of the journals in evidence, on the trial of Lord Melville on his impeachment.^(c) There the case of *Lord George Gordon* was cited, and the ruling was said to have been in favour of receiving the secondary evidence; but Lord Erskine, who presided in the House of Lords, referred to that case, and shewed that the decision had [68] been to the contrary; and the evidence

(a) See Dougl. 593, n.; *Marsh v. Collnett*, 2 Esp. 665; *Lynch v. Clerke*, 3 Salk. 154; *Mann v. Carey*, id. 155.

(b) Dougl. 590. There the copies of the journals are stated to have been received and read as evidence without objection; and see the note at p. 593. See also 21 St. Tr. 543.

(c) See 29 St. Tr. 685. It would appear from that report, that the objection of the Lord Chancellor was not to the reception of examined copies, but of the printed journals.

was rejected, on the ground that there was no such inconvenience attending the removal of the journals as of the books of the Bank. The next case that arose was with respect to the books of the Customs and Exeise (see *Rex v. King*, 2 T. R. 234; *Fuller v. Fetch*, Carth. 346). It was formerly the practice to produce them, but after some consideration it was thought that the public inconvenience was so great, that it has become every day's practice, in this and the other Courts, to allow copies of those books to be received in evidence. That goes upon the general principle of not removing books of general concernment. Then does not that principle apply in all such cases? The public inconvenience in this case is as great as in the case of any other books. I think a case has been aptly put by my Brother Alderson, that if a writing were on a wall, might you not give evidence of the character of the handwriting, as probable evidence of who wrote it, without producing the wall in Court? Suppose a man, instead of printing a libel in the usual way, were to write it on the dead walls of the metropolis, is it to be said that he cannot be punished, because you cannot produce the wall in Court? May you not, in such a case, prove his handwriting? Nor is this case altogether imaginary—I would mention a case which occurred very early in my professional life, where a man was convicted of writing a libel on the wall of the Liverpool gaol. In that case the handwriting of the party was proved, and he was convicted. Formerly the actual production of an answer in Chancery was required, but the Lord Chancellor's officers had been in the habit of carrying out these documents without the consent of the Lord Chancellor, and as that was found to be inconvenient, they were forbidden to do it, and the consequence is, that an office copy is now given in evidence, in cases where the original would be evidence. I also remember a case where two persons were convicted in [69] Ireland of a misdemeanour against the revenue laws, and who could only be identified by proving the entries they had made in the Custom-house books, which were not removable upon the general principle of inconvenience to the public; and some one was called, not to prove that he saw them there, but to prove their handwriting; a bill of exceptions was tendered upon that very point, and the House of Lords determined that it was admissible evidence. That is exactly this case, except that it is stronger. Therefore I think it was competent evidence, for the purpose of proving the identity of the party who accepted this stock, to shew that an entry in the books of the Bank of England was the handwriting of that party. The principle of law is, that where you cannot get the best possible evidence, you must take the next best; and where the law has laid down that you cannot remove the document in which the writing is made, you are to be entitled to the next best evidence of it, by proving whose writing it was. I therefore think there is no ground for the rule upon this point.

The third point is, as to the admission of the evidence of what occurred between Taylor and the plaintiff, immediately after the transaction. As a general principle it is undoubtedly true, that conversations with an agent after the transaction are not evidence against his principal; but the question is, whether this be not a part of the *res gestæ*? It is part of the evidence to shew that the plaintiff did not trust Taylor, and I do not know how it could have been shewn otherwise. It is before the transaction is concluded, that is, before payment is made; and I think it is receivable: it is not a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him, and a part of the *res gestæ*.

Then, the fourth objection is, that letters were rejected which, it is said, tended to shew more satisfactorily the debt which the defendant claimed to be due from [70] Taylor. If the question was, whether Taylor owed M'Callan a sum of money, these accounts would not prove it. How could accounts between Taylor and the defendant tend to establish the existence of a debt, in an action between the defendant and a third party? I think they certainly were not evidence at all. The letters directing the money to be invested were evidence, because they were directions given to the agent; they were evidence of the fact; but it is quite new to me for a party to say, I will establish a debt due to myself, by letters of my agent, who is not a party in the cause. I think, therefore, these letters were properly rejected.

The next point is, that the stock was not the stock of the plaintiff, but was Ward's stock; and it is said that the plaintiff could not enforce his contract for the sale of this stock, because he had none at the time of the contract. That general proposition certainly is not true; how many merchants are there who make contracts to sell

things which they are not in possession of? Can it be doubted, that a man who has made a contract to sell that which he is not then possessed of, if he obtain means to perform that contract, and to deliver the thing sold, by his own hands or by the agency of another, is entitled to recover the price of it? But it is said, that by reason of the prohibition in the act of Parliament, he could not sell this stock. Now that act was made for the purpose of preventing what is declared to be an illegal trafficking in the funds, by selling fictitious stock merely by way of differences; but it never was intended to affect *bonâ fide* sales of stock, or to say, if a man undertakes to sell stock to another, and transfers the actual stock, and delivers it to him, and he accepts the stock, that that is not a lawful transaction. That is not a case within the statute at all. True, the plaintiff had not the stock at the time it was purchased, but he had it before it was invested in the name of the defendant; and whether he transferred it to the defendant himself, or procured another person to transfer it for him, makes no difference. [71] In point of fact, he procured stock; and through his instrumentality, the defendant became possessed of the stock; and therefore, whether he had it transferred into his own name first, and then re-transferred it, makes no difference. I therefore think there is nothing in that objection.

The next is, that the issue, that the defendant accepted the stock from the plaintiff, was not proved. Now let us see what that issue is. The declaration states, that the defendant was indebted to the plaintiff in the sum of £5000 for certain stock then sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. The meaning of that is, that it was sold and delivered to the defendant, and that he took to it; that he took the stock as his own, not that he accepted it from the plaintiff. Then the defendant, by his plea, endeavours to introduce that which is not part of the averment in the declaration. He says, I did not accept from the plaintiff, meaning to say he accepted from Ward; but that is no part of the issue in the sense in which it has been contended for; the words "from the plaintiff" there are immaterial—the question is, whether he did not accept the stock, and he did. But I cannot agree altogether that he did not accept it from the plaintiff, supposing that was material to the issue. The plaintiff is the person who causes Ward to transfer, and Ward having transferred, the defendant accepted this stock—that is, the stock which the plaintiff had undertaken to transfer to him; and thus he does accept it from the plaintiff. It appears to me, therefore, that there is no ground for a rule in this case in any of the points which have been suggested.

ALDERSON, B. I am of the same opinion. It appears to me that the question was properly left to the jury, it being in substance whether the plaintiff trusted Taylor, or trusted M'Callan, the principal. There was abundant evidence from which the jury might reasonably infer that he trusted [72] M'Callan, and they have found that he did, and the learned Judge and the Court are perfectly satisfied with that as a conclusion of fact. It was the proper point to be left to the jury, and it seems to me that it was the only verdict which could reasonably, under the circumstances, be found.

The second question is, whether or not the acceptance of the stock was proved, by the evidence which was offered of the handwriting of the defendant in the Bank books. Now it appears that the documents produced shew a transfer and acceptance in point of form, but these being only copies, they do not shew that the stock was transferred to and accepted by the defendant, unless some act of his, done at the time when he is at the Bank, in the Bank books, be also shewn. The Bank books are not capable of being produced without so much public inconvenience, that the Courts have directed them to remain in the Bank, and copies of them to be received in evidence for the purpose for which the books are receivable. Then, if they are not removable on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. Inscriptions upon tombstones or on a wall are proved every day in this way for that reason. The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule. Then how is it shewn that that of which a copy has been produced, has been executed by the defendant? That is proved by the person who saw Mr. Ward and him going towards the Stock Exchange; by the clerk at the Bank, who saw Mr. Taylor in an unknown person's presence at the time of the transfer and the acceptance of the stock, and by his pointing out to a third person the accept-

ance of the stock, which person knows that it is in the handwriting of the defendant. Putting all these things together, can any one doubt that this is reasonable evi-[73]-dence from which the jury might conclude who were the two persons who were seen engaged in the transfer and acceptance in the Bank books?—one of whom is proved to have been Taylor by the evidence of the Bank clerk, and one is proved to have been M'Callan by the testimony of the person who proves that the acceptance is in his handwriting. It appears to me that from that evidence, the only reasonable conclusion to be drawn, is that which the jury have drawn. The distinction in these cases is between the admission of evidence and the weight of evidence; I quite agree that if the document is not produced, less weight ought to be given to it; but that is a question for the jury. The only question for the Court is, is it admissible as evidence of identity? I have no doubt that it is.

Then, with respect to the admission of what occurred subsequently to the transfer, the question is, was that part of the transaction, and what was the conversation itself? It appears to me to be part of the transaction; but, independently of that, the conversation itself, though, being in words, it may be called an admission, is in truth an act, demonstrated by the words used. It is a demand of the cheque of the principal, by which the one party claimed payment, and which had been stopped by the other. Suppose it had been in writing,—such a demand afterwards of the principal's cheque would have been a fact which would have had a tendency to convince the jury that the principal was trusted, and not the person from whom the cheque was demanded; for if, at the time of the transaction, the plaintiff had demanded the cheque of Mr. Taylor, that would have been strong evidence to shew that Taylor was trusted; if, on the other hand, the cheque of the principal was demanded from Taylor, that would be very strong evidence to shew it was the principal who was trusted, and not the broker. Then this in truth is not an admission in words by the agent of a debt from the principal, but it is an act done by or through the agent, which is competent to be [74] given in evidence independently of its being a part of the original transaction. Therefore I think that was properly admitted.

With respect to the letters, I entirely concur in the view my lord has taken of them; but, independently of that, supposing the letters to have been receivable, and supposing them to have been rejected by the learned Judge, I apprehend we ought not, on this account, to grant a new trial, the object, and the sole object, of these letters being, if they were admissible, to prove a fact admitted in the course of the cause. In the case of *Edwards v. Evans* (3 East, 451), this point arose. That was an action for bribery, and the question was, whether or not certain conversations had taken place, between the party accused and the party who was supposed to have bribed him—a gentleman of the name of Kinnaird. The plaintiff called a witness who proved the conversation with Kinnaird, and then called another witness to prove the same conversation. Then a very nice question arose, whether that witness was incapacitated from being examined on the ground of his having an interest in the transaction. The learned Judge, Mr. Justice Lawrence, who tried the cause, was of opinion that he ought to be rejected on the ground of interest, and the question was raised before the Court whether the Judge had been right in so ruling, and all the Court concurred that it was a very considerable question for the consideration of the Court, and upon that ground a rule ought to be granted; but inasmuch as it appeared from the Judge's report that the question at the trial did not turn on the words used in the conversation, which alone the witness was called to prove, that conversation having been proved by another person, and the whole defence turning, not on the denial of the words, but upon the question whether those words were spoken seriously or were used merely in jest, the Court, upon the ground that the examination of [75] the second witness could not have at all tended to alter the verdict as found, inasmuch as it was conceded that what that witness was to have proved had been proved before, refused the rule for a new trial, though they were of opinion that the witness had been improperly rejected, or at least that the question as to his improper rejection was a question well deserving the consideration of the Court. Lord Ellenborough there says: "Here the issue, which went to the jury, was quite collateral and immaterial to what the witness was called to prove. For the evidence of Mr. Kinnaird, which Bradley was called to corroborate, was admitted to be true, and the defence made was quite collateral to it, upon which the verdict was given." Sir W. Follett has stated that we cannot tell what operates on the minds of the jury—so it might have been said in *Edwards v. Evans*, "the jury have not told us whether

they did not disbelieve Kinnaid, or whether they might not have believed him in case he had been confirmed by Bradley:" but as the whole defence was collateral to that, it was presumed that the jury, as men of understanding, did not disbelieve the witness who was called, as the fact he deposed to was not disputed at the time. Now these letters were tendered in evidence to shew the existence of a debt between M'Callan and Taylor; and when Mr. Cresswell comes to reply, he admits that to be the fact; and that being a fact admitted, and that fact being the only object for which the letters were tendered, it would be a new thing to grant a new trial upon the ground that letters were rejected, which only had a tendency to prove a fact which, being before admitted, was not left to the jury at all. I entirely concur in all the doctrine laid down in *Crease v. Barrett*. This is a case excepted out of the principle of *Crease v. Barrett*, exactly in the same way that *Edwards v. Evans* was conceded, in the judgment in *Crease v. Barrett*, to be law, and was quoted for that purpose. Therefore, upon that ground I think there is no ground for a new trial.

With respect to the point as to the form of the plead-[76]-ings, it appears to me, that, after the decision of this Court in *Hibblewhite v. M'Morine* (5 M. & W. 462), in which the doctrine of Lord Tenterden, in *Bryan v. Lewis* (Ry. & M. 386)—that a party could not maintain an action for the price of goods which he had not in his possession at the time of the contract—was held not to be maintainable in point of law, inasmuch as it would put an end to half the commercial contracts in London; the circumstance of the plaintiff not having stock at the time of the contract is immaterial, if he had stock to deliver at the time the transfer was to be made. Here he had stock at the time the transfer was to be made, for he procured Mr. Ward to transfer the actual quantity of stock, and the defendant accepted it; and it is immaterial to him whether he received the actual quantity of stock from the plaintiff or from Mr. Ward, provided he received under the contract with the plaintiff that which he received from Mr. Ward. I think the case is not within the act of the 7 Geo. 2: that act was intended to prevent gambling transactions where the stock is not delivered in any part of the transaction, and where all that is sought to be recovered is a compensation for a fictitious sale, which was a mere imagination between the parties,—in truth, nothing more or less than a gambling transaction, and a bet between them as to the price of stock. That was the kind of dealing intended to be prohibited; but here the stock is actually delivered, the defendant has received it, and I think he may therefore well have an action brought against him, in which the declaration states it as a contract for stock sold and delivered.

Then comes the last question—is there any proof that it was accepted by him? I quite agree with what my Lord has stated, that it is not necessary for the purpose of this declaration, or to support the plaintiff's claim, that there should have been an acceptance proved in the very terms in which it is put by the defendant; but if it were, I think [77] it has been proved. In truth, the stock has been accepted under the contract; for it has been transferred to the defendant, and has been accepted by him; although transferred by Ward, it has been accepted by the defendant under his original contract with the plaintiff. Upon these grounds, I am of opinion that there should be no new trial.

GURNEY, B., concurred.

Rule refused.

YATES AND ANOTHER v. THE DUBLIN STEAM PACKET COMPANY. Exch. of Pleas.

1840.—In an action by the owners of goods which were on board a vessel, and were lost by a collision with the defendants' vessel, the jury having found a verdict for the defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record. The Court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated on affidavit that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other: the Judge being satisfied with the verdict.

[S. C. 8 Dowl. P. C. 402; 9 L. J. Ex. 146; 4 Jur. 437.]

This was an action against the defendants, as the owners of a steam packet called the "Duchess of Kent," for running down a vessel called the "Byron," whereby certain

goods of the plaintiffs, then on board the latter vessel, were lost. Plea, not guilty. The cause was tried before Gurney, B., at the London Sittings after Michaelmas Term, when a verdict was found for the defendants. Another action against the same defendants, by the owners of the "Byron," for the loss of her by the same injury, was entered in the cause list for trial; but, on the verdict being returned for the defendants in this action, the record in the other was withdrawn.

Sir F. Pollock, for the plaintiffs, now moved for a rule to shew cause why the judgment and execution in this action should not be stayed until after the trial of the other action. The application was made on an affidavit stating that a witness, who was absent at the trial of this cause, having been detained at sea by contrary winds, [78] would be able to give material evidence in favour of the plaintiffs' case, on the trial of the second cause, at the next sittings. He referred to a case of *Cobbold v. Grinnell* (E. T. 1832; not reported), in which the Court of King's Bench, under similar circumstances, granted a stay of proceedings until after the trial of a second action arising out of the same injury; and urged that such an arrangement would best effectuate the real justice of the case. [Alderson, B. It is the plaintiffs' own fault if they went to trial on insufficient evidence. If this affidavit had been produced at the trial, the learned Judge would probably have postponed it. Gurney, B., expressed his opinion that, upon the balance of the evidence, the verdict for the defendants was right.]

ALDERSON, B. I think we ought not to accede to this application. I fear that if the Court were to grant this rule, it might be drawn into a dangerous precedent. This is a case in which the verdict is satisfactory to the learned Judge who tried the cause, and it is not suggested that there has been any misdirection: but it is said that there is another case involving precisely the same question, which stood next after this for trial, and was withdrawn in consequence of the verdict in this action, and it is suggested that the parties will be enabled to try the second cause with additional testimony, and so make that more clear in favour of the plaintiffs, which before was in doubt in the opinion of the jury. The only authority which has been referred to is the precedent made by the Court of King's Bench in the case of *Cobbold v. Grinnell*. But in that case the Court intimated some dissatisfaction with the verdict—at least they thought there was good ground for further inquiry to be made with respect to it. They did not, however, grant a new trial, where there was another cause depending [79] which would decide the same point, and which might be decided so satisfactorily as to render it unnecessary to grant a new trial; but thinking the matter somewhat doubtful, the Court granted the rule to which Sir F. Pollock has referred. I am not prepared to dissent from the principle of that decision; and if it appeared that there had been any injustice done to the plaintiffs in the present case, we should be disposed to grant them the indulgence which is asked. But it is to be observed that the case of *Cobbold v. Grinnell* was very different from the present, as to the party applying for redress; there the application was made by the defendant, here it is by the plaintiffs. The defendant has no command over the record, and can only ask to postpone the trial on affidavits, on the ground of the absence of a material witness whom he has subpoenaed; and if there have been any neglect on his part, the Court will not assist him, and the plaintiff recovers against him. The plaintiff, on the other hand, may, at the beginning, and even at the end of his case, stop the trial, at the expense of paying the costs of the day, and so prevent a decision from passing finally against him. He may withdraw the record in the first instance, if he has not sufficient evidence; and even after he has fully heard the defendant's case, and the summing up of the Judge, he has to the last moment allowed him, if he choose, to be nonsuited, and withdraw from proceeding further. The plaintiffs in this case chose not to do that, but took their chance of obtaining a verdict, and that when they knew all the facts, and the opinion of the Judge, and the manner in which he was submitting the case to the jury. Under these circumstances, it appears to me that the authority of *Cobbold v. Grinnell*, which was decided on the particular circumstances of that case, does not apply to the present, where the plaintiffs, having all these advantages, were content to stand upon the evidence; and that we should [80] be establishing a very dangerous precedent if we were to accede to this motion. The rule must therefore be refused.

GURNEY, B. I think, upon the evidence, the verdict was right; but if it had been the other way, I should not have thought it a case in which to grant a new trial.

ROLFE, B., concurred.
Rule refused.

PRINGLE v. MOLLETT. Exch. of Pleas. 1840.—The charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost, after the completion of the loading.

[S. C. 9 L. J. Ex. 148.]

This was an action of assumpsit on a memorandum of charter-party, brought to recover £60 for demurrage for ten days, at the stipulated rate of £6 per day, and damages for the detention of the plaintiff's ship "Diadem" by the defendant for thirty-three days. The defendant pleaded, by his first plea, as to so much of the causes of action in the declaration (consisting of one count) as relates to the keeping and detaining the said ship over and above the fifty days and ten days on demurrage in the memorandum of charter-party mentioned, except as to fourteen days, that he did not keep or detain the said ship; and in his second plea, as to the residue of the causes of action, the defendant pleaded a payment of £144 into Court, with an averment of no further damage in respect thereof. The plaintiff, in his replication, joined issue on the first plea, and took the money out of Court on the second.

The parties agreed to take the opinion of the Court on the following case.

The material part of the memorandum of charter-party is as follows:—"Memorandum of charter-party, London, 19th Jan., 1837. It is this day mutually agreed between [81] Harrop Pringle, Esq., owner of the good ship or vessel called the 'Diadem,' L. Leslie, master, of the measurement of 376 tons or thereabouts, now lying at Shields, and John Mollett, Esq., of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Odessa, (then follow stipulations as to the cargo and rates of freight): it is further agreed, that on the ship's arrival at Odessa, the freighter's agents shall have the option of employing her for one intermediate voyage to a safe port in the Mediterranean, on paying three-fifths of the above freight: fifty running days are to be allowed to the said merchant (if the ship is not sooner despatched) for loading and unloading upon each voyage, (if two), and ten days on demurrage over and above the said laying days, at £6 per day." After arriving at Odessa, the vessel proceeded, according to the terms of the memorandum of charter-party, on an intermediate voyage to the Mediterranean, upon which no question has arisen. On the 28th of November, 1837, the "Diadem" again arrived in the mole at Odessa, and was ready to be loaded on the 9th of December following, on which day her loading was commenced, with a general cargo, consisting of timber, pearl ashes, wool, tallow, seed, and grain; and on the 9th of February following the said loading was completed. On the 29th of December, 1837, and during the progress of the said loading, the mole was frozen in, and in consequence thereof the "Diadem" was fixed in the ice, and totally unable to sail homeward until the 28th of February, 1838, when the captain and crew were enabled, and not before that time, to cut through the ice, and to get the "Diadem" into clear water. The ship afterwards arrived in London, and employed eleven days there in unloading. The whole period at Odessa, between the 9th of December, 1837, and the 28th of February, 1838, was 82 days, which, with the [82] time of detention at London, amounted to 93 days, which, after deducting therefrom the 50 running days allowed by the memorandum of charter-party for loading and unloading, are reduced to 43 days, in respect of which the action is brought.

The payment of £144 into Court is computed by the defendant, and paid by him, in respect of 24 days, namely, the ten days on demurrage, three days of detention at Odessa, (the 7th, 8th, and 9th of February), and eleven days at London.

If the Court shall be of opinion that the defendant is liable for the detention of the vessel from the 9th of February until the 28th of February, or any part thereof, that is to say, from the time that the loading was completed until the vessel was free from ice, then a judgment shall be entered for the plaintiff for the sum of 120l., or such sum as the Court shall be of opinion the defendant is liable for, by confession: and if the Court shall be of opinion that the defendant is not so liable, then a judgment

of nolle prosequi shall be entered for the defendant. Either party to be at liberty to refer to the pleadings, or memorandum of charter-party, as part of the case.

The points marked for argument were as follows:—For the plaintiff—that the owner is entitled to recover for those days mentioned in the case. For the defendant—that he is not liable to pay for the detention of the vessel by the frost, from the time that the loading was complete until the vessel was freed from the ice.

Alexander, for the plaintiff. The payment into Court covers the space of 24 days, of which three were days of detention at Odessa; but the plaintiff claims to recover in respect of 19 additional days, during which the vessel was frozen in; and the question is, whether the owner of [83] the ship, or the charterer, is to bear the loss arising from that unavoidable detention. The general rule of law is, that detention is to be paid for by the charterer, and not by the owner: *Abbott on Shipping*, 269 (6th edition). *Barker v. Hodgson* (3 M. & Sel. 267), and *Barrett v. Dutton* (4 Campb. 333), are authorities to shew that the freighter of a vessel is not excused from the performance of his covenant by an unavoidable detention. [Parke, B. This is a very different case: in those cases the loading of the vessel was impeded; here the detention was not during the loading, but after it was completed the ice prevented her sailing. The defendant has paid for all demurrage during the time of loading. Lord Abinger, C. B. The meaning of “running days” is, that the freighter shall not waste time in loading and unloading.]

Per Curiam. This is a clear case, and the judgment must be for the defendant. The detention by the ice was not occasioned by any fault of the defendant. In order to render him liable, the detention must have been for the purpose of loading. Here the ship was detained only three days for that purpose, and those have been paid for.

Judgment for the defendant.

W. H. Watson was to have argued for the defendant.

[84] JONES AND ANOTHER v. JONES AND ANOTHER. Exch. of Pleas. 1840.—Plea, to an action of debt by the payee against the maker of a promissory note payable on demand, that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorized by him; and that there was not any consideration or value for the making or payment of the note, except as aforesaid:—Held bad on general demurrer.—The plaintiff replied, that after the making of the contract, the defendant paid part of the purchase-money, and was let into possession, and that the plaintiff had always been ready and willing to execute a conveyance:—Quære, whether this replication was bad for multifariousness.

[S. C. 9 L. J. Ex. 178.]

Debt by the payees against the makers of a promissory note for £35, dated 6th June, 1838, payable on demand: with a count on an account stated. Plea, as to the first count, that the promissory note in that count mentioned was made and given by the defendants to the plaintiffs for the payment of a certain sum, to wit, the said sum of £35 in the said note mentioned, as and for the purchase-money to be paid to the plaintiffs for the sale to the defendant Owen Jones of a certain cottage and land, by virtue of an agreement then, to wit, on the 6th June, 1838, made between the defendant Owen Jones and the plaintiffs for the sale of the said cottage and land; and that the said contract for the sale of the said tenement was not, nor was any memorandum or note thereof in writing signed by the said Owen Jones, being the party to be charged therewith, or any person or persons thereunto lawfully authorized by him: and the defendants further say, that there was not at any time any consideration or value for the defendants' making the said promissory note, or payment of the amount thereof, except as aforesaid; and the plaintiffs have held, and now hold, the same without value or consideration. Verification.

Replication, that at the time of the making of the said contract in the said first plea mentioned, the defendant Owen Jones paid to the plaintiffs a certain sum, to wit, the sum of 4l. 10s., in part satisfaction and discharge of the purchase-money for the said cottage and land in the said first plea mentioned, and was then, to wit, on the

said 6th day of June, 1838, put into the possession of the said cottage and land, and from thence hitherto hath been and still is in the possession and enjoyment thereof, under and in pursuance of the said contract; and the plaintiffs in fact further say, that from the time of the making of the [85] said contract, they, the plaintiffs, have always been and still are ready and willing to execute a conveyance of the said cottage and land to the defendant Owen Jones, according to the said contract.—Verification.

Special demurrer, on the grounds that the replication neither traversed nor confessed and avoided the plea; that it offers immaterial issues, and that it is multifarious. Joinder in demurrer.

Hayes, in support of the demurrer. The plaintiffs cannot recover under the circumstances disclosed on this record. First, the replication is multifarious: it alleges, by way of answer to the plea, first, the part-payment of the purchase-money; secondly, the letting of the defendant into possession; and, thirdly, the willingness of the plaintiffs to execute a conveyance. The letting into possession is a fact altogether beside the part-payment of the purchase-money; each may have an effect in equity, but they are distinct grounds of answer, and the defendants cannot take issue on both. If either be material, one is as much so as the other, and the defendants cannot tell which is relied on. [Parke, B. Is the plea good? The defendant chooses to give the note on being let into possession; then surely he must pay it: he has got all he bargained for.] Nothing appears upon the plea but that the note was given on a verbal contract for the sale of land, and that there was no other consideration for it. [Lord Abinger, C. B. The defendants say the contract was not in writing; does it therefore follow that the plaintiff will not execute it? The plea should have alleged that the plaintiffs had refused to transfer the estate to the defendant. Parke, B. The defendants are bound to pay the note, unless they shew that there was no consideration whatever for it. How do we know, from the plea, that the defendant has not had possession?] The plea is to be looked at as upon a general demurrer; and the allegation, that there was no other consi-[86]deration for the note except the parol agreement, excludes the notion that anything has passed besides the mere executory contract. Then there is no valid agreement to satisfy the Statute of Frauds. The action in effect is to enforce an agreement in breach of the statute. An agreement within the statute must, in order to give a cause of action, contain in the writing the consideration for the promise, as well as the promise itself: *Wain v. Warlters* (5 East, 10), confirmed by *Saunders v. Wakefield* (4 B. & Ald. 595). This is a contract altogether executory. Can it be said the agreement is not binding when it stands merely as a contract, but becomes binding by the giving of a promissory note? There is no distinction between that and any other promise to pay in futuro, except its negotiability, and that it *prima facie* imports consideration. [W. H. Watson, for the plaintiffs, referred to *Sowerby v. Butcher* (2 C. & M. 372).] That case did not arise on the Statute of Frauds. There, also, there clearly was a consideration, in the contract implied by the bill of exchange to give time to the third party. This is in truth an action to recover the purchase-money of an estate, and what the estate was is to be proved by parol. [Parke, B. We must assume, on these pleadings, that the note was given for the purchase-money, and that the plaintiffs are perfectly ready to execute a conveyance. The plea does not aver that they are not ready and willing to convey. Although, therefore, they may not be bound to perform the agreement, yet, if they are ready to do so, what right have the defendants to refuse to pay their note? They have all they bargained for. But further, is it not necessary in equity that there should be both part payment and a letting into possession, to give validity to the contract? If so, the replication is not double.] Part payment alone is sufficient under certain circumstances.(d) Then, on the face of the [87] plea, it is a mere executory contract for the sale of land, and the note is no more than a written agreement to pay in futuro the purchase money of an estate, which by the contract is left wholly uncertain, and cannot be supplied by parol.

Watson, contra. The plea is bad. The promissory note on the face of it imports consideration, and the plea must shew an absolute and total failure of consideration, in order to defeat the plaintiffs' right of action: it must disclose circumstances such as that, if money had been paid instead of a note being given the defendant would

(d) See Sudg. Vend. and P., 3rd edit., vol. 1, p. 202.

have been entitled to receive it back : *Stephens v. Wilkinson* (2 B. & Adol. 320). Could the defendants have done so, before the plaintiffs had refused to convey? Certainly not, because till then there would be no failure of consideration. The plea does not shew that the plaintiffs have refused or are unable to convey; nay, it is consistent with it that the land has in fact been conveyed since the note became due: the only allegation is, that there was no other consideration "for the making or payment of the note" but the parol contract. The total failure of consideration consists in the parol agreement, and the refusal to convey in pursuance of it. The Statute of Frauds has no application. It has been repeatedly decided, that a bill given for the debt of a third party is good, without any new consideration : *Popplewell v. Wilson* (1 Stra. 264), *Sowerby v. Butcher*. [Parke, B., referred to *Nelson v. Serle* (4 M. & W. 795).]

Secondly, the replication is not double. The whole taken together shews that it is a binding contract in equity. A Court of equity looks at all the circumstances. But it is also good as matter of law; it shews several things done under the contract, which binds the de-[88]fendants. He referred to Poph 186, *Gascoyne v. Smith* (McClell. & Y. 338), *Sterenson v. Underwood* (6 Dowl. P. C. 737). [Parke, B. The objection is, that you insist on several different matters, each of which is put forward as an answer to the plea. The putting the defendants in possession would itself be an answer; they say therefore that the replication is multifarious.]

Hayes, in reply. The consideration has totally failed here: the defendants bargained for the title to the estate, not for the mere possession, which they may be turned out from by the plaintiff at any time: the plea sufficiently negatives, at least on general demurrer, all other value or consideration except the mere executory contract. *Jackson v. Warren* (7 T. R. 121), is an authority for the defendants. But even if possession had been given, the objection still applies, that this is an action brought on a contract in violation of the Statute of Frauds. There are many cases in which a contract cannot be enforced, where the money paid under it could not be recovered back. The statute cannot be avoided merely by giving a note for the purchase-money of the land. Where a note is given which is payable after a certain date, it implies a forbearance for that time, which may be a sufficient consideration, whereas this is payable on demand. With respect to the replication, if it discloses several defences at law, it is multifarious; nor does it satisfy equity, for it does not state that the plaintiffs are able to convey.

LORD ABINGER, C. B. It is clear that this is a case where the parties have paid their money down,—or, what is equivalent, given a promissory note payable on demand,—for a future conveyance. Can anybody say they are not bound to pay it, unless they shew that the plaintiffs have [89] refused to execute that conveyance? I think the plea is clearly insufficient.

The rest of the Court concurred.

Leave to amend on payment of costs; otherwise

Judgment for the plaintiffs.

HUMPHREYS v. GRIFFITHS. Exch. of Pleas. 1840.—Service of distringas on lunatic.

[S. C. 9 L. J. Ex. 180.]

Welsby applied for leave to enter an appearance for the defendant pursuant to the statute. It appeared from the affidavits, that the defendant was confined in a lunatic asylum at Shrewsbury; that the party employed to serve the distringas went to the asylum on three several occasions, and saw the keeper, who refused to let him see the defendant for the purpose of serving him with a writ, and told him that such was the rule of the establishment, and that if he called twenty times he would not be permitted to see the defendant. On the last occasion the deponent left a copy of the distringas with the keeper. [Lord Abinger, C. B. Can you do this in the case of a lunatic? We cannot appoint a committee.] The plaintiff might have entered an appearance without leave of the Court, if the party had been personally served; he only comes to the Court to shew that all due diligence has been used to serve him. [Parke, B. A lunatic may appear by attorney: *Beverley's case* (4 Rep. 124).]

The Court directed that the appearance should be recorded, on production to the Master of an affidavit of notice to the keeper of the lunatic asylum of the plaintiff's

[90] intention to enter an appearance for the defendant, and that he should proceed thereon to judgment and execution.

Rule accordingly.

SCHERWINSKI v. PERONNET. Exch. of Pleas. 1840.—Where a defendant, on being held to bail under a Judge's order, deposits with the sheriff the amount indorsed on the writ, and 10l. for costs, under the 43 Geo. 3, c. 46, s. 2, and afterwards allows those sums, with an additional 10l., to be paid into Court, the plaintiff is not entitled to have the two former sums paid out to him.

[S. C. 8 Dowl. P. C. 229; 9 L. J. Ex. 101.]

In this case the defendant had been held to bail under an order of Rolfe, B., for 56l. 10s., and discharged on depositing with the sheriff that sum, with £10 for costs, pursuant to the statute 43 Geo. 3, c. 46, s. 2. In lieu of perfecting special bail, he allowed the above sums, together with an additional £10, to be paid into Court. The plaintiff having obtained a rule to shew cause why he should not be at liberty to take out of Court the sum of 56l. 10s. and £10, on an affidavit stating that the defendant had not put in and perfected special bail—

Jervis shewed cause. The plaintiff is not entitled, upon this affidavit, to take the money out of Court. The affidavit ought to have shewn, not only that the defendant had omitted to put in and perfect special bail, but also that he had omitted to do that which is equivalent to it, viz. to pay into Court an additional sum of £10, under the stat. 7 & 8 Geo. 4, c. 71, s. 2. The 4th section of the 1 & 2 Vict. c. 110, expressly directs, that all the subsequent proceedings, as to making deposit and payment of money into Court, shall be according to the previous practice.

Cowling, contra, contended, that the plaintiff was at liberty to proceed under the provisions of the 43 Geo. 3, c. 46, s. 2, and to have this money paid out to him. If the plaintiff paid in the additional £10 under the stat. 7 and 8 Geo. 4, c. 71, s. 2, he ought to have stated that by affidavit. But,

[91] Per Curiam. The rule must be discharged: the plaintiff has obtained all the security he is entitled to.

Rule discharged.

TAYLOR AND ANOTHER v. NICHOLLS. Exch. of Pleas. 1840.—A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose.—A defendant may apply to set aside a warrant of attorney and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he have become bankrupt since the execution of it.

[S. C. 8 Dowl. P. C. 242; 9 L. J. Ex. 78; 4 Jur. 271. See next case.]

Sir F. Pollock had obtained a rule to shew cause why the warrant of attorney given by the defendant in this cause, and the judgment and execution thereon, should not be set aside, with costs, on the ground that the warrant of attorney was not executed pursuant to the requisitions of the stat. 1 & 2 Vict. c. 110, s. 9. The following appeared, from the affidavits on both sides, to be the facts of the case.

The plaintiffs, who were the trustees of the defendant's marriage settlement, had allowed him to take into his hands some of the trust funds, which they subsequently required him either to replace or to give security for. An interview in consequence took place between the defendants and Messrs. Alexander, of Halifax, the attorney of the trustees, and the defendant, on the following day, the 19th of October, 1839, called at their office, and agreed to execute a warrant of attorney to the plaintiffs for the sum of £1200. One of the Messrs. Alexander accordingly prepared the warrant and read it over to the defendant, and told him that it was necessary that some attorney should be present on his behalf, to attest the execution of it by him, and inquired whom he would wish to have for that purpose. The defendant replied that he had no wish to have any particular attorney, but that his only anxiety was, that the transaction might not become known. Mr. Alexander thereupon mentioned

the name of a Mr. Crosseley, of Halifax. The defendant immediately assented, and went, accompanied by Messrs. Alexander's clerk, to [92] Mr. Crosseley's office. On their arrival there, the warrant of attorney was produced; Crosseley took it into his hands, and asked the defendant if he wished him to attest the execution of it on his behalf. The defendant replied that he did. Crosseley asked him if it had been read over to him, and if he understood it. The defendant replied that it had been read over to him by Mr. Alexander, and that he fully understood it. It was then executed by the defendant, and attested by Crosseley as his attorney, in the terms of the statute. Judgment was entered up on the warrant of attorney on the 21st of October, 1839, and execution sued out on the 22nd. The defendant in his affidavit stated, that when he executed the instrument he had no knowledge of Crosseley, and had never seen him before, and did not know whether in fact he was an attorney or not: and that he understood, at the time of signing the warrant of attorney, that it would not be enforced against him. On the 25th of October a fiat in bankruptcy issued against the defendant, founded on an act of bankruptcy committed on the 17th.

Cresswell shewed cause. It may be doubtful whether the defendant, having become bankrupt, can now make this application: he can no longer be affected by the warrant of attorney. [Parke, B. He has an interest to set aside the judgment, because he may be taken under it hereafter upon a ca. sa.] The application is rested on two grounds: first, that Crosseley, as it is alleged, was not expressly named by the defendant to act as his attorney; secondly, that the warrant of attorney was not explained by him to the defendant. With regard to the latter point, the statute does not require in terms that the warrant of attorney should be read over, or explained to the defendant, by the party who attests it. As to the other point, the execution was sufficient to satisfy the statute. The mere circumstance of the attorney's name having [93] been suggested by the plaintiff's attorney cannot vitiate the transaction, if the party named be afterwards really and substantially adopted by the defendant as his attorney. *Bligh v. Brewer* (1 C. M. & R. 651; 5 Tyr. 222; 3 Dowl. P. C. 266), which was decided on the construction of the rule of H. T., 2 Will. 4, r. 72, (of which the statute is only an extension, applying its provisions to defendants not in custody), is an express authority to that effect. If it were otherwise, what must be done where the defendant knew no attorney whatever in the place to which he came for the purpose of executing the instrument? *Mason v. Riddle* (5 M. & W. 573), which may be cited on the other side, only decided that the party attesting for the defendant must be an attorney other than the plaintiff's: and it appears from the recent decision in *Rising v. Dolphin* (Bail Court, H. T. 1840; 8 Dowl. P. C. 309), that that case is not to be considered as inconsistent with *Bligh v. Brewer*. [Parke, B. If the attorney's name must originate with the defendant, it would be equally fatal whether it were suggested by the plaintiff's attorney or by a third person. Alderson, B. The word "expressly" is not to be construed as meaning "originally."] *Bligh v. Brewer* went further than the present case, because there the defendant had an attorney whom he generally employed, only he was from home: here it does not appear that he had any. [Parke, B. The only question appears to be, whether that case has been broken in upon by any more recent decision.]

Sir F. Pollock and W. H. Watson, contra. The object of the statute was, that at the execution of any cognovit, or warrant of attorney, there should be an attorney present on the part of the person signing it, really and bona fide employed by him, in whom he is to repose confidence, and who is to give him the assistance contemplated [94] by the act, viz. to explain to him the nature and legal consequences of the execution of the instrument, and to see that he is not signing a document he ought not to sign. The very intent of the act of Parliament was to guard against the mischief likely to arise from the interference of the plaintiff's attorney. He ought to decline to name any person, and to tell the defendant to consult some friend on the subject. [Alderson, B. Does the phrase "expressly named," mean anything more than it is not to be collected impliedly from the facts of the case, that he is the defendant's attorney, but that he must be actually named by him?] If the defendant consults a friend, and at his suggestion names an attorney, that is a naming by the defendant: but if there is no nomination but by the plaintiff's attorney, that will be substantially naming an attorney for the plaintiff instead of the defendant, and is the very mischief to be avoided. It is not so much a question whether the party is

literally named by the defendant, as whether he is *bonâ fide* his attorney, to advise him fully as to the nature of the act he is doing. This was merely a cloke to give the transaction an apparent validity. But further, he is to be named "to inform the defendant of the nature and effect" of the instrument. Here it was explained to the defendant, not by Crosseley, who assumed to act as his attorney, but by the plaintiff's attorney only. He has received from Crosseley no explanation or advice whatever. They cited *Hutson v. Hutson* (7 T. R. 7), *Fisher v. Papenicholas* (2 C. & M. 215; 2 Dowl. P. C. 251), *White v. Cannon* (6 Dowl. P. C. 476), and *Rice v. Linsted* (6 Scott, 895; 7 Dowl. P. C. 153).

PARKE, B. I am of opinion that this rule ought to be discharged. The question turns entirely on the construction to be put upon the stat. 1 & 2 Vict. c. 110, s. 9; which [95] I apprehend must be construed according to the ordinary meaning of the words employed in it, unless such a construction leads to some practical absurdity, or contrariety. We are to construe the words as we find them,—adding nothing to them, detracting nothing from them. [His Lordship read the clause.] The attesting attorney, therefore, must be "expressly named" by the defendant. But we cannot therefore suppose that it was intended that the defendant must expressly pronounce at length the christian and surname of the attorney; but he must be expressly named by him, in contradistinction to his being impliedly named or adopted. There is not a word to lead to the conclusion that he must be originally or spontaneously named by the party, or to exclude the suggestion of a name by a third person. What then is there to exclude the suggestion of a name by the plaintiff's attorney? I cannot import such words into the act, when no such prohibition is expressed in it. It must not, undoubtedly, be the plaintiff's attorney himself who is named by the defendant, because it is impossible that the same person can be, for such a purpose, the attorney both of the plaintiff and the defendant, acting for two adverse interests at once; and to that extent, therefore, we must modify the words of the act of Parliament. But if the defendant *bonâ fide* agree to accept as his attorney a person named by the plaintiff's attorney, and use his services accordingly, that will be sufficient. That was the rule laid down in *Bligh v. Brewer*, in which all the previous cases on this subject were considered; and I am not aware that the authority of that decision has ever been called in question. Then, when the attorney has been really named by the defendant, he is there only for the purpose of informing him of the nature and effect of the instrument, if he requires it: he is not bound to read it over to him unless he desire him to do so; there is not a word in the act which makes such a duty imperative [96] at all events; and therefore his not having done so in the present case, is not a ground for setting aside the instrument; and it is perfectly clear that the defendant fully knew what was the legal effect of the warrant of attorney, although he did not expect it would be put in force against him immediately, but relied on the forbearance of the trustees. We are, then, to look at the facts of this particular case, to see whether Crosseley was expressly named by the defendant to act as his attorney. [His Lordship stated the facts, and continued]: It appears to me, that these facts shew an express naming within the statute, and an attendance at the request of the defendant, within its provisions: the statute has, therefore, been complied with. The only effect of the suggestion of the name by the plaintiff's attorney would be, that looking at it in conjunction with the other circumstances of the case, it might become a matter of evidence to shew that the naming by and consent of the defendant had been fraudulently and improperly obtained; in which case the instrument would be void, not for non-compliance with the act of Parliament, but on the ground of fraud. But there is no pretence for imputing any fraud in the present case; it is clear that the defendant knew perfectly the nature and legal effect of the instrument. We must adhere to the authority of *Bligh v. Brewer*, which is expressly in point on the present occasion; and following up the authority of that case, I think we must hold it a sufficient compliance with the statute, if the attesting attorney be expressly named by the defendant, although his name may have been originally suggested by the plaintiff's attorney.

ALDERSON, B. I am of the same opinion; it seems to me that the act has been complied with in substance. The attorney was named by the defendant, his name having been acceded to by him after it was suggested by the [97] plaintiff's attorney, and he having been expressly accepted by the defendant, when asked if he wished that he should act in his behalf. The act has been complied with, unless we incorporate

into it words which are not to be found in it, viz. that the attorney must be named by the defendant originally, and without the suggestion of any other person. The Court would, indeed, be ready to look at the fact of such a suggestion, as a circumstance tending to shew fraud; but here there was no fraud whatever, because it is clear that the party knew the purpose and effect of the instrument before, only he did not think it would be put in force against him so immediately; nor probably would it, if the trustees had not ascertained that he had committed an act of bankruptcy.

GURNEY, B. The effect of the suggestion of a name by the plaintiff's attorney is a good ground for watching the case more narrowly, but the act does not require that the name should originate with the defendant, if the attorney be expressly adopted by him. Here it appears that he was, and therefore the rule must be discharged.

ROLFE, B. I am of the same opinion. It is clear the act has been literally complied with, because the attorney was expressly named by the defendant: but it is said the spirit of the act has not been complied with, because the defendant was not informed by him of the nature and effect of the instrument: but the very same thing might occur when the attorney was expressly and originally named by the defendant.

Rule discharged, with costs.

[98] SANDERSON v. WESTLEY AND WATERS.(a) Exch. of Pleas. 1840.—Where, on the execution of a warrant of attorney, one attorney only was present, and attested it on behalf of the defendant, who had acted on previous occasions for the plaintiff, and who made out his bill for the obtaining and preparation of the warrant of attorney to the plaintiff, the Court held that he was not such an attorney “attending on behalf of the defendant,” as to satisfy the 1 & 2 Vict. c. 110, s. 9, and set aside the warrant of attorney.

[S. C. 8 Dowl. P. C. 412; 9 L. J. Ex. 204; 4 Jur. 942.]

Thesiger had obtained a rule on behalf of the defendant, Miss Elizabeth Waters, calling on the plaintiff to shew cause why the warrant of attorney for £450, given by her in this cause, and the judgment and execution thereon, should not be set aside, on the ground of a non-compliance with the requisites of the statute 1 & 2 Vict. c. 110, s. 9. It appeared from the affidavits, that the defendant Westley, being pressed for payment of a debt of £450 owing by him to the plaintiff, applied to and prevailed upon the other defendant, who was his sister-in-law, to sign the warrant of attorney in question. The plaintiff suggested that Messrs. Walters & Reeve, who were Miss Waters's family attorneys, should prepare the warrant of attorney, but the defendant Westley said that they knew her affairs, and would not allow her to execute it. It was then agreed that a Mr. Goddard, an attorney, who had on previous occasions done business for the plaintiff, should prepare it, and attest it on her behalf, which he accordingly did at his office, to which the parties went for that purpose. No other attorney was present on behalf of the defendants. Goddard made out his bill for obtaining and preparing the warrant of attorney, and for all the negotiations in the course of the business, in the plaintiff's name, and all the items were charged to him, but it was delivered to and paid by the defendant Westley. The plaintiff, in his affidavit, stated that the defendants, “or one of them,” desired to have the warrant of attorney prepared and attested by Goddard, but it did not expressly appear who first suggested his name.

Platt shewed cause. This case does not fall within the principle of *Mason v. Kiddle* (5 M. & W. 513), which will be relied on [99] for the defendant. Here it does not appear that Mr. Goddard was the attorney for the plaintiff, and he acted in the matter on the express employment of the defendants. *Haigh v. Frost* (7 Dowl. P. C. 743) was a case much resembling the present in its circumstances, and there the Court held the instrument to have been executed in conformity with the statute. [Parke, B. There the Court considered that the party was never, in the course of the transaction, anything but attorney for the defendant; and that might be, because a plaintiff may

(a) This case was decided in Easter Term, but is inserted here as referring to the same subject as the last.

take a warrant of attorney without having an attorney present on his part. The only question is, whether it sufficiently appears here that Goddard was not attorney for the plaintiff.]

Thesiger (Petersdorff with him), *contra*. It is sworn, and not denied, that Goddard had on previous occasions acted for the plaintiff; he makes out his bill in the plaintiff's name, and charges all the items to him; and he does not pretend to say he had previously had any communication whatever with the defendant Miss Waters. It is clear he was the attorney of the plaintiff to obtain these securities. Can it be said he was such an attorney as is contemplated by the act, in order to protect the interests of this defendant? He was then stopped by the Court.

PARKE, B. We are all of opinion that Goddard was the attorney of the plaintiff, prior to his being employed by the defendant, and was his attorney in this transaction. If so, the act is not complied with, since it requires that there should be a separate attorney employed by the defendant, to take care of his interests only. With respect to the case of *Haigh v. Frost*, that was no wrong decision in point of law; because there was no attorney for the plaintiff, and it is not necessary that he should have an attorney present on his behalf.

[100] ALDERSON, B. Wherever there is but one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney. In the case cited, I should probably have come to the same conclusion, upon the particular facts of that case.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

CHAPMAN AND OTHERS v. TOWNER. Exch. of Pleas. 1840.—By a memorandum of agreement, the plaintiff agreed to let to the defendant, and the defendant agreed to take, a house &c., from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years: that the lease to be granted by the plaintiff was to contain a covenant on her part for the defendant to purchase the fee simple for £600 at any time within the first seven years of the said term to be granted; and a covenant on the part of the defendant for payment of the rent of £35, payable quarterly, clear of all deductions for taxes whatsoever; and that the insurance on the sum of £500 was to be paid by the plaintiff, and to be repaid by the defendant as an increased rent: to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair; and all other usual covenants as in leases of houses in B.; and that the defendant should execute a counterpart of lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant:—Held, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing.

[S. C. 9 L. J. Ex. 54.]

Assumpsit. The declaration alleged, that the defendant, in consideration of his having become tenant to the plaintiffs of a certain dwelling-house, promised to pay them the yearly rent of £35 by quarterly payments, and it averred that 26l. 5s. had become due for rent for three quarters of a year, and assigned as a breach the non-payment of that sum.

Plea, as to 8l. 15s. parcel of the said sum of 26l. 5s., being one quarter's rent, payment into Court of that sum, and as to the residue, non assumpsit.

The plaintiffs replied by taking the sum of 8l. 15s. out of Court, and joined issue on the other plea.

At the trial before Lord Denman, C. J., at the last Summer Assizes for Sussex, it appeared that the plaintiff and defendant had entered into the following agreement:—

“Memorandum of an agreement made this 24th day of April, 1831, between Mary Chapman, of Took's Court, in [101] the parish of St. Andrew, Holborn, in the county of Middlesex, on behalf of herself and her two sisters, Catherine Chapman and Louisa Chapman, as administratrix of the estate of their late father, Mr. Richard Innoek

Chapman, of the one part, and William Towner, of Brighthelmston, in the county of Sussex, ironmonger, of the other part, as follows:—The said Mary Chapman, on behalf of herself and her two sisters, agrees to let to the said William Towner, and the said William Towner agrees to take, a house, No. 41, Western Road, Brighthelmston, aforesaid, with the appurtenances, from the 24th day of June now next ensuing, for the term of twenty-one years, determinable at seven and fourteen years. That the lease to be granted by the said Mary Chapman and her two sisters, is to contain a covenant on their part for the said William Towner to purchase the fee-simple for £600 at any time within the first seven years of the said term to be granted, and a covenant on the part of the said William Towner for payment of the rent of £35 payable quarterly, clear of all deductions for taxes whatsoever, and that the insurance on the sum of £500 is to be paid by the said Mary Chapman, and to be repaid by the said William Towner as an increased rent; to lay out within twelve months the sum of £100 on the said premises; to keep the premises in substantial repair, and all other usual covenants as in leases of houses in Brighton; and that the said William Towner shall execute a counterpart of lease when tendered to him by the solicitor of the said Mary Chapman, and that the expense of the lease and counterpart is to be borne and paid by the said William Towner.

“WILLIAM TOWNER.

“MARY CHAPMAN.

“Witness, Richard Thompson.”

It was proved at the trial that the defendant quitted the premises at the expiration of the first seven years, without giving any notice to quit. There was also evidence that, before the defendant quitted, he had made a proposition to [102] the landlord to purchase the fixtures which he, the defendant, had put up during his occupation of the premises, and the fixtures were accordingly valued, but the parties did not agree. The learned Judge was of opinion that no notice was necessary, and directed the jury to find a verdict for the defendant, giving the plaintiffs liberty to move to enter a verdict for 17l. 10s. if the Court should be of opinion that notice to quit ought to have been given.

Channell having, in Michaelmas Term last, obtained a rule accordingly,

Ball and Petersdorff now shewed cause. This instrument operated as a present demise. The essential clause in it is this—“The said Mary Chapman agrees to let to the said William Towner, and the said William Towner agrees to take, a house, &c. for the term of twenty-one years, determinable at seven and fourteen years.” Now that, it is submitted, clearly operates as a present demise; and there is no obligation on the part of the tenant to make any formal communication to the landlord that he shall elect to determine the tenancy at the end of the first seven years. No notice was therefore necessary. It is to be treated as a lease for seven years certain, and in such a case the tenancy would terminate by effluxion of time at the end of that period. But supposing the Court should be of opinion that some act should be done to determine the tenancy, there was evidence here to shew that the landlord had been aware of the defendant's intention to quit, as a proposition had been made to purchase the fixtures. This instrument clearly operated as a lease for seven years; and if so, no notice to quit was necessary: but even if some notice were necessary, there were here circumstances to shew that notice had been given, though not formally. Wherever an option of this kind is given, if the construction of it be doubtful, it ought to be in favour of the lessee, as it must [103] be taken most strongly against the grantor. In *Dunn v. Spurrier* (3 B. & P. 399), it was held that if a lease be granted for seven, fourteen, or twenty-one years, the lessee has the option at which of those periods the lease shall determine. That case came afterwards for consideration before the Court of King's Bench, in *Doe d. Webb v. Dixon* (9 East, 15), where it was completely upheld, on the principle that where the words of a grant are doubtful, they must be construed in favour of the grantee. Then is the option to be determined by notice? Nothing is there said about notice. The case of *Goodright v. Richardson* (3 T. R. 462) may be relied upon, but this point was not there decided, as in that case notice was given. [Gurney, B. The Court held that reasonable notice was necessary. Alderson, B. According to the principle laid down in that case, the moment the second period arrives, no notice being given in time, it becomes a lease for the second period; so here, the moment the seven years had expired without notice, it would become a lease for fourteen years.] Where the tenant remains

in possession even a day after the expiration of the first seven years, it is admitted that it would be so; because then he does an act which determines his option to remain; but here the fixtures were valued and the key taken by the landlord, which was an act done by which notice was waived.

Platt and Channell, *contra*, were stopped by the Court.

PARKE, B. We think this instrument amounts only to an agreement for a lease. No doubt, if there are words of present demise, if the instrument shews it to be the intention of the landlord that the premises shall be enjoyed by the tenant immediately, or at a future specified day, upon certain terms, a demise is thereby created, and a stipulation that a lease shall be afterwards prepared, does not prevent [104] its so operating. Here there are words which, in their ordinary sense, are those of agreement only, but may operate, unquestionably, as words of present demise—and frequently do so operate; but in this case the contract shews that they are used as words of agreement only: for the amount of rent, the periods of payment, and other terms of holding, are not mentioned, except as they are to be contained in a lease which is to be prepared. There is, therefore, no complete demise, independently of that lease. A lease is to be made absolutely and at all events, and not at the request of the party, and a counterpart is to be executed by the defendant. It is to be observed, also, that the instrument does not, as in many other cases, import that it shall be binding as a lease until a lease is actually executed; and, on the whole, it appears to us that it was intended to operate as an agreement only for a future lease. Therefore, when the defendant entered, he was only tenant at will until he paid rent, and he then became tenant from year to year; and that tenancy could only be determined by notice to quit given six months before the time of his entry, or by surrender in writing.

ALDERSON, B. One mode of ascertaining whether an instrument is to be treated as a lease or an agreement, is by looking to the inconvenience which would result from treating it as a lease. This lease is to contain “all other usual covenants as in leases of houses in Brighton.” Now we cannot tell what those usual covenants are. A difficulty arises from the omission to expand the terms of the holding upon the face of the instrument.

GURNEY, B., concurred.

Rule absolute.

[105] *PARMITER v. COUPLAND AND ANOTHER*. Exch. of Pleas. 1840.—In an action for libel, the Judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff. —A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case. *

[S. C. 9 L. J. Ex. 202; 4 Jur. 701. Discussed, *Capital and Counties Bank v. Henty*, 1882, 7 A. C. 762; *M'Inerney v. "Clareman" Printing and Publishing Company*, [1903] 2 Ir. R. 370, 399. Referred to, *Cox v. Lee*, 1869, L. R. 4 Ex. 290; *Harwood v. Harrison*, 1872, L. R. 7 C. P. 628; *O'Brien v. Marquis of Salisbury*, 1889, 6 T. L. R. 133; *Monson v. Tussaud*, [1894] 1 Q. B. 684.]

This was an action on the case for a series of libels published of the plaintiff, the late mayor of the borough of Winchester, in the “Hampshire Advertiser” newspaper, between the 17th of November, 1838, and the 2nd of March, 1839, imputing to him partial and corrupt conduct, and ignorance of his duties, as mayor and justice of the peace for the borough. The defendants pleaded not guilty. At the trial before Coleridge, J., at the last Winchester Assizes, the learned Judge, in the course of his summing up, stated to the jury that there was a difference with regard to censures on public and on private persons: that the character of persons acting in a public capacity was to a certain extent public property, and their conduct might be more freely commented on than that of other persons: and having told the jury what, in point of law, constituted a libel, he left it to them to say whether the publications in question were

calculated to be injurious to the character of the plaintiff. The jury having found a verdict for the defendants,

Erle, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds, (amongst others), 1st, that the learned Judge ought to have directed the jury that, in point of law, the publications complained of were libels on the plaintiff; and, secondly, that it was a misdirection to state to them any distinction as regarded publications relating to public and to private individuals. In this term,

Crowder appeared to shew cause, but the Court, after the report of the learned Judge had been read, called upon

Erle and Butt to support the rule. The learned Judge misdirected the jury, in not stating to them, as matter of [106] law, that these publications amounted to libels. When words spoken are complained of as defamatory, the only questions for the jury are, (supposing them to be proved as laid), whether they apply to the plaintiff, and whether the meaning ascribed to them in the innuendoes is made out by the evidence: and a different principle cannot be applied to oral and to written slander. The words here complained of were clearly actionable if spoken; and the Judge would in such case have been bound to tell the jury, that if they were meant in their ordinary sense, the plaintiff was entitled to recover. It has been often entertained as a question of law by a Court of Error, whether a particular writing amounts to a libel. In *Wright v. Clement* (3 B. & Ald. 503), a declaration stating that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, in substance as follows, was held bad in arrest of judgment, on the ground that the Court must judge whether the words set out constituted a ground of action or not. [Alderson, B. That is for the benefit of the defendant; the Court are to see whether, in any reasonable sense, the words may be innocent.] If the Court are so to judge for the defendant, whether it be a libel or not, so must they also for the plaintiff. [Alderson, B. That does not follow.] Holroyd, J., there says—"It is clear, that when it can be shewn distinctly what the instrument is upon which the whole charge depends, that instrument must be shewn to the Court, in order that they may form their judgment." [Alderson, B., referred to *Chalmers v. Payne* (3 T. R. 428, n.).] Where the libel is in a foreign language, if a translation of it only be set forth, the judgment will be arrested: *Zenobio v. Astel* (6 T. R. 162). If the defendant demurs to the declaration, then it clearly becomes a question of law. [Alderson, B. Then he admits a malicious publication. Parke, B. The practice used to be as you say before Mr. Fox's Act (32 Geo. 3, c. 60).] That [107] act is expressly confined to criminal cases. [Parke, B. It is true; but it has been the constant practice, in recent times, for the Judge to define what is a libel, and then to leave it to the jury, first, whether the writing complained of was published by the defendant; secondly, whether it fell within the definition of the offence.] Lord Mansfield distinctly laid it down, and in the case of *Rev v. Dean of St. Asaph* (2 C. M. & R. 156), as a general rule applicable to all cases where, by the form of the pleadings, the questions of law and fact can be severed, that the jury have no jurisdiction to decide upon the law. Where, indeed, the words may be controlled by the context, or are capable of more than one meaning, the question must be left to the jury; but here there is nothing whatever to throw any ambiguity upon the meaning of these paragraphs. [Parke, B. In criminal cases, the Judge is to define the crime, and the jury are to find whether the party has committed that offence. Mr. Fox's Act made it the same in cases of libel, the practice having been otherwise before.] In the next place, it was a misdirection to state to the jury that there was a distinction as to libels on a person in a public capacity. No man has a right to impute to another, whether filling a public capacity or not, injustice or corruption.

Crowder, contra, was not called on to argue the above points.

PARKE, B. The verdict is unquestionably wrong, and there ought to be a new trial, but on the ground of its being a wrong verdict only. I think there was no misdirection on the part of the learned Judge. One of the grounds upon which this rule was obtained, was, that the learned Judge ought to have told the jury that the terms of these papers were libellous, and not to have left that as a question of fact for them to determine. But it has been [108] the course for a long time for a Judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction, and that, whether the libel

is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The Judge, as a matter of advice to them in deciding that question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's Libel Bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases.

I also think that there was no misdirection in the other part of the learned Judge's summing up, to which an objection was raised. There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander: but any imputation of wicked or corrupt motives is unquestionably libellous; and such appears to be the nature of the publications here. I do not find that the learned Judge stated otherwise: we cannot therefore grant a new trial, as for a misdirection.

ALDERSON, B. I entirely concur. The first question is, whether the learned Judge ought to have laid it down positively, that if the publications were proved, and the words were used in their ordinary sense, the jury must [109] find that they were libels. I think it would not be correct so to do; but that he ought—having defined what is a libel—to refer to the jury the consideration of the particular publication, whether falling within that definition or not. I think that if he were to take it upon himself to say that it was a libel, he would be wrong in doing so.

As to the other point, there certainly is a material distinction between a publication relating to a public and a private person, whether they be libels. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. The same thing might be no libel on me, which might be a very grievous and injurious libel on another. There may be, and I think in this case there was, no real difference between the two cases, but that this was a libel on the plaintiff in whatever capacity. But I think the learned Judge right in the general observation, although I might differ with him in its application to the particular case. Probably, indeed, he applied it only to the question as to the amount of damages. It is however sufficient to say, that it does not appear to me to be a misdirection.

GURNEY, B., concurred.

Rule absolute, on payment of costs.

MARSHALL v. LYNN. Exch. of Pleas. 1840.—The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing.

[S. C. 9 L. J. Ex. 126. Referred to, *Martindale v. Smith*, 1841, 1 Q. B. 389; 1 G. & D. 1; *Tyers v. Rosedale and Ferryhill Iron Company*, 1873, L. R. 8 Ex. 316: reversed, L. R. 10 Ex. 195; *Sanderson v. Graves*, 1875, L. R. 10 Ex. 237. Discussed, *Noble v. Ward*, 1860, L. R. 1 Ex. 121; 1867, L. R. 2 Ex. 138; *Hickman v. Haynes*, 1875, L. R. 10 C. P. 604. Distinguished, *Ogle v. Earl Vane*, 1867, L. R. 2 Q. B. 281; 7 B. & S. 855: affirmed, L. R. 3 Q. B. 272; 9 B. & S. 182.]

Assumpsit. The first count of the declaration alleged, that the defendant theretofore, to wit, on the 15th of December, 1838, bargained for and bought of the plaintiff, and the plaintiff at the request of the defendant then sold to the defendant, a large quantity, to wit, as many potato[110]-toes as would load a certain brig or vessel of the plaintiff called the "Kitty," that is to say, from sixty to seventy lasts, to be shipped on board the said vessel on her next arrival at the port of Wisbech, in the county of Cambridge, the said potatoes to consist of what pink kidneys the said plaintiff then had, and the residue to consist of round, white, and blue potatoes, and to be paid for at the rate or price of 4s. 6d. per sack for each and every sack of the said pink kidneys,

and at the rate or price of 4s. 3d. per sack for each and every sack of the said round, white, and blue potatoes, of fifteen stones net merchants' ware, to be delivered by the plaintiff to the defendant free on board the said brig or vessel, and to be paid for by the said defendant on such delivery thereof as aforesaid. The declaration then, after alleging mutual promises for the performance of the terms of the contract, and averring the arrival of the "Kitty" at Wisbech on the 25th of December, 1838, the same being her next arrival after the making of the agreement, averred, that he the plaintiff has always on and after such arrival of the said brig or vessel as aforesaid, been ready and willing, and then tendered and offered to ship the said potatoes free on board the said brig or vessel, and to deliver the said potatoes to the defendant according to the terms of the bargain and sale; but that the defendant then wholly discharged the plaintiff from making such shipment and delivery, and then requested the plaintiff to delay such shipment and delivery until the said brig or vessel should have made a certain other voyage from the port of Wisbech, and should have again arrived at the said port of Wisbech on her return from such last-mentioned voyage, to which said last-mentioned proposal and request of the said defendant the plaintiff then consented and agreed; and thereupon, in consideration of the last-mentioned premises, and that the plaintiff at the like request of the defendant had then promised the defendant to ship and deliver the said potatoes to the defendant, according [111] to the said last-mentioned proposal and request of the said defendant, the said defendant then promised the plaintiff to accept the said potatoes of and from the plaintiff, and to pay him for the same, on the delivery thereof to the defendant as last aforesaid. And the plaintiff in fact says, that the said brig or vessel of the plaintiff did afterwards, and after the making of the last-mentioned promise, to wit, on the 1st of February, 1839, arrive at the said port of Wisbech on her return from the said last-mentioned voyage as aforesaid, of which the defendant afterwards, to wit, on the 8th of February, 1839, had notice; and although the plaintiff was afterwards, and within a reasonable time after the said 1st of February, to wit, on the 8th of February, 1839, ready and willing, and then tendered and offered to ship the said potatoes free on board the said brig or vessel, and to deliver the same to the defendant upon the terms aforesaid, of which said last-mentioned premises the defendant then had notice, and was then requested by the plaintiff to attend to such last-mentioned shipment, and to accept and pay for the said potatoes on the terms aforesaid: yet, that the defendant, not regarding his said last-mentioned promise, did not nor would, at the said time when he was so requested, or at any time before or afterwards, accept the said potatoes, or any part thereof, of or from the plaintiff, or pay him for the same at the rate aforesaid or otherwise, but then wholly refused so to do:—concluding with an averment of special damage in respect of the keeping and selling of the potatoes.

There were also counts for freight, demurrage, goods sold and delivered, and for money found to be due upon an account stated.

Pleas, 1st, non assumpsit; 2ndly, as to the first count, that the defendant was always, from the time of the arrival of the said brig or vessel at the said port of Wisbech, on her return from the said last-mentioned voyage in the said first count [112] mentioned, hitherto, ready and willing to accept the said potatoes of and from the plaintiff, and pay him for the same on the delivery thereof as aforesaid, and then would have attended to the shipment and delivery thereof, according to the said notice and request of the plaintiff in the said first count mentioned, and would have accepted and paid for the said potatoes upon the terms in the said first count mentioned, but that the plaintiff, immediately after the said second arrival of the said brig or vessel as aforesaid, and the giving such notice and the making such request as aforesaid, and before a reasonable time for the defendant's complying with the said notice and request had elapsed, and before the defendant could attend to such shipment and delivery as aforesaid, to wit, on the said 8th of February, 1839, aforesaid, without the consent or knowledge of the defendant, wrongfully shipped the said potatoes on board the said brig or vessel, and consigned, and carried and conveyed away the same to certain places to the defendant unknown, and wrongfully prevented the defendant from attending to the shipment and delivery of the said potatoes, and from accepting the same according to the said agreement in the said first count mentioned, and wholly discharged and hindered the defendant from the performance of the said agreement and promise so made by him as aforesaid.

Replication, de injuria.

At the trial before Vaughan J., at the last Summer Assizes for Cambridge, it appeared that on the 15th of December, 1838, the plaintiff and defendant entered into a written contract, of which the following is a copy:—

“Wisbech, 15th December, 1838.

“Bought of Mr. Thomas Marshall, as many potatoes as will load his brig the ‘Kitty,’ Captain William Scott, say from sixty to seventy lasts, to be shipped on board the above vessel on her arrival here the next time—say what pink kidneys he has at 4s. 6d. per sack, and the round, white, [113] and blue ones at 4s. 3d. per sack, of fifteen stones net merchants’ ware, free on board the said ship—payment, cash on delivery.

“(For WILLIAM LYNN),

“ROBERT LYNN.

“Witness, T. Marshall.”

On the 25th of December, the “Kitty” arrived at Wisbech, that being the next arrival after the making of the contract, and on the following day, the plaintiff’s son informed the defendant that the “Kitty” would be ready to take in the potatoes on the 28th, when the defendant requested that the plaintiff would let the vessel go to Lynn and load a cargo of potatoes which he had purchased there, and for which he could not obtain a vessel, and take them to London; and he then promised the plaintiff to take the plaintiff’s potatoes the next time the “Kitty” came to the port of Wisbech. This proposal was agreed to, on the understanding that the plaintiff’s potatoes should be taken the next time the “Kitty” came. In pursuance of this arrangement, the “Kitty” sailed to Lynn, and, after proceeding to London, and there discharging her cargo, she returned to Wisbech, and arrived there on the 7th of February. On the 8th of February the vessel was ready to receive the potatoes, of which the defendant had full notice, and was requested to take them; but the defendant said he could not take them then, nor did he know when he could; and he ultimately declined taking them. They were afterwards shipped to London, and there sold by the plaintiff, who brought this action to recover the loss sustained by the defendant’s non-performance of the contract. It was contended at the trial, on the part of the defendant, that the alteration in the time fixed by the terms of the original contract for shipping the potatoes was a variation of it in a material part, and ought to have been in writing. The learned Judge directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a [114] nonsuit. Storks, Serjt., in Michaelmas Term, obtained a rule accordingly, against which

Kelly and Gunning now shewed cause. A contract for the sale of goods to an amount exceeding £10 must be in writing, by the provisions of the Statute of Frauds; but that statute does not require either the time, or the particular mode, of the delivery of the goods to be in writing, and in this case there was a sufficient memorandum of the contract for the sale. This case falls strictly within that case of *Cuff v. Penn* (1 M. & Selw. 21), and is distinguishable from *Goss v. Lord Nugent* (5 B. & Adol. 58), which was decided upon the 4th section of the Statute of Frauds, and in which the distinction between that section and the 17th is recognised. The Court did not there decide whether *Cuff v. Penn* was good law or not, though undoubtedly Parke, J., in the course of the argument, appears to have doubted the correctness of that decision. No doubt, a written contract cannot be contradicted by parol, but it may be varied or discharged by parol, where there is no statutable provision to prevent it. The 17th section enacts, “that no contract for the sale of any goods, wares, and merchandizes for the price of £10 or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” That is, that no contract shall be binding for the sale of goods, unless it be in writing: it is not material that the time stipulated for their delivery should be in writing, as that is not a material part of the contract of sale. The object of the statute was to guard the public against evidence of a contract being given, when no contract has been entered into at all; but where there [115] is evidence of some written contract, that is sufficient, without setting out the whole of the contract. If it is held to be material that every particular of a contract is to be inserted, and that it cannot be varied from afterwards, the conse-

quences will be most serious. Suppose, in the case of a sale of wines, the seller enters into a written contract to deliver the wine at 28, Grosvenor Street, and it turns out, on inquiry, that the purchaser lives at No. 30, is he to be at liberty to repudiate the contract on that ground, after having subsequently requested that the wine should be delivered at No. 30? That would be a variation as to the place; then as to the time:—suppose a gentleman, living out of town, enters into a written contract, by which goods are to be sent by a particular coach, as, for instance, the ten o'clock coach, but he afterwards requests them to be sent by the eleven o'clock coach, because he is going by that coach, can it be said that that would avoid the contract? Such a circumstance as that last mentioned is of frequent occurrence, and is done for the convenience of the purchaser. To say that such a slight variation from the written contract, agreed to subsequently by parol, would render it nugatory, would lead to the greatest injustice. In *Cuff v. Penn*, Lord Ellenborough says, "The principal design of the Statute of Frauds was, that parties should not have imposed upon them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." . . . "But here, what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance; still the contract remains." Now that is precisely the present case: there, one day was substituted for another; here, one of the ship's voyages was substituted for another. The case of *Warren v. Stagg*, cited in *Littler v. Holland* (3 T. R. 591), shews that the time of delivery is not a material part of the contract, [116] and, if varied by subsequent agreement, it is to be considered only as a continuation of the first contract. And in *Hoadly v. McLaine* (10 Bing. 482; 4 M. & Scott, 340), it was held, that where an executory contract is entered into for the fabrication of goods, without any agreement as to the price, the memorandum of the contract, required by the Statute of Frauds, is sufficient without specification of price. That shews that the statute does not require every term of the contract to be in writing. [Parke, B. No doubt, every particular of the contract need not be mentioned; but if mentioned, it must be observed. I do not apprehend you can go into a distinction between the material and the immaterial parts of the contract. How can you tell what part of a contract is material, and what not? The recent case of *Stead v. Dawber* (2 P. & D. 447), appears to have entirely overturned the authority of *Cuff v. Penn*.] That case is distinguishable from the present, as there the goods were of a fluctuating value, the price was not mentioned, and therefore the time of delivery was of the essence of the contract. In this case, the price of the goods was fixed by the contract.

Storks, Serjt., contrâ, was stopped by the Court.

PARKE, B. I am of opinion that this rule ought to be made absolute. If it had not been for the decision in the case of *Stead v. Dawber*, I should have wished to hear the argument on the other side, and probably to have taken time to consider; but as the case of *Cuff v. Penn*, which has before been very much doubted, appears to have been overruled by *Stead v. Dawber*, we do not think it necessary to do so. Here there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, whether such an alteration, by parol, of the written contract, can be binding. It appears to me that it cannot; and that the same rule [117] must prevail as to the construction of the 17th section of the Statute of Frauds, which has already prevailed as to the construction of the 4th section. The decision in *Goss v. Lord Nugent*, the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that if the original written contract be varied, and a new contract, as to any of its terms, substituted in the place of it, that new contract cannot be enforced in law, unless it also be in writing. The question is, whether the same reasoning does not apply to a contract for the sale of goods, under the 17th section. [His Lordship read that section.] It appears to me that no distinction can be made: and I must also observe, that it seems to me to be unnecessary to inquire what are the essential parts of the contract, and what not; and that every part of the contract, in regard to which the parties are stipulating, must be taken to be material; and perhaps, therefore, the latter part of the judgment in *Stead v. Dawber* may be considered as laying down too limited a rule. Every thing for which the parties stipulate as forming part of the contract must be deemed to be material. Now, in this case, by the original contract, the defendant

was to accept the goods, provided they were sent by the first ship: the parties afterwards agreed by parol that the defendant would accept the goods if they were sent by the second ship, on a subsequent voyage: that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point: but the case of *Stad v. Dawber* is precisely in point with the present, and on looking at the judgment, it does not appear to proceed altogether upon the time being an essential part of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognises as a contract, cannot be varied by parol. It has been said that the adoption of this rule will produce a great deal of inconvenience; I am not, however, aware of much [118] practical inconvenience that can result from it, and none that furnishes any reason for altering the rule of law in respect of these mercantile contracts. They frequently vary in terms, and admit of some latitude of construction, but the expressions used in them generally indicate the intention of the parties sufficiently well; there is a sort of mercantile short-hand, made up of few and short expressions, which generally expresses the full meaning and intention of the parties. On the whole, it appears to me that no reasonable distinction can be made between this case and that of *Goss v. Lord Nugent*. This is a new contract, incorporating new terms, and I think it cannot be enforced by action, unless there is a note in writing, expressing those new terms distinctly, or in the mercantile phraseology which, as I have already said, admits of some latitude of interpretation. This action, therefore, cannot be maintained, and a nonsuit must be entered.

ALDERSON, B. I am of the same opinion, and entirely concur with what has fallen from my brother Parke. By the 4th section of the Statute of Frauds, it is provided that the contracts therein mentioned shall be in writing, otherwise no action shall be maintained on them. The 17th section requires that some note or memorandum in writing of the bargain before made, shall be signed by the party to be charged by such contract, or his agent lawfully authorized. There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section, it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him. Now here there is a stipulation which is to bind the defendant, and it is proposed to alter that by parol, which cannot be done. It is much better plainly to define what the law is, than to attempt to create fanciful distinctions. Here there is, as to one of the terms [119] by which the party is to be bound, entirely a new contract, and the law requires that such new contract should be in writing.

GURNEY, B. I am of the same opinion. This is a new contract, and the law which requires the one contract to be in writing, requires the other to be in writing also.

ROLFE, B. concurred.

Rule absolute.

BROWN v. TAPSCOTT. Exch. of Pleas. 1840.—The plaintiff and defendant, together with others, entered into and signed the following special contract:—"Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter, by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the 'Brockelbank,' or any other suitable vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprize, according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid £10 per cent. on the amount of our subscriptions, and we hereby bind ourselves, and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively:—"Held, that this agreement constituted a partnership between the parties who signed it; and that the plain-

tiff, who had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid, against the defendant who had not paid up his subscription, but that the proper form of action was a special action of assumpsit for the non-performance of the undertaking to pay the plaintiff the instalments from time to time.

[S. C. 9 L. J. Ex. 139.]

Indebitatus assumpsit in the sum of 22l. 10s. for money paid by the plaintiff for the use of the defendant; with a count upon an account stated. Plea, non assumpsit.

At the trial before Lord Denman, C. J., at the Summer Assizes for the county of Kent, it appeared that the plaintiff, who was a shareholder in certain steam navigation companies, having been applied to by several tradesmen residing at Herne Bay, to charter a steam-boat to run from London to that place and Margate, the following agreement was in consequence drawn up:—

“Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter by means of a small steam-boat, we hereby authorize Mr. George Augustus Brown to charter the ‘Broekelbank,’ or any other suitable vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole, or such part, of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprize according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid £10 per cent. on the amount of our subscription, and we hereby bind ourselves, and agree to pay to Mr. Brown such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat be not sufficient to pay the expenses: it being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively.

“Herne Bay, 30th October, 1837.”

This instrument was signed by 22 persons, including Brown the plaintiff, and Tapscott the defendant, the former subscribing for £50, and the latter for £25.

The plaintiff, pursuant to the terms therein mentioned, first chartered the “Broekelbank,” but the subscribers being desirous of having a better boat, he afterwards chartered the “Dart,” and subsequently the “Red Rover,” which vessels ran in succession to Herne Bay until the 30th of April, 1838, the end of the winter season. The expenses incurred and paid by the plaintiff considerably exceeded the earnings of the boats, and it became necessary to call for further instalments, from time to time, during the progress of the enterprize. At the time of signing the instrument, the defendant paid the sum of 2l. 10s., being £10 per cent. on the amount of his subscription; and it was [121] proved by Mr. Rohrs, the secretary to the Herne Bay Steam Packet Company, that by the plaintiff’s direction he had called upon the defendant, and had produced a rough sketch of the accounts, shewing the losses sustained, and the defendant had promised to send the amount of his second instalment, but had failed to do so.

It was objected at the trial that the instrument was an agreement for a partnership between the plaintiff and the defendant for the object therein stated, and therefore that the action could not be sustained, as one partner could not maintain an action against his co-partner for work and labour performed or money expended on the partnership account, and *Holmes v. Higgins* (1 B. & Cr. 74; 2 D. & R. 196) was cited. The learned Judge directed the jury to find a verdict for the plaintiff for the amount claimed, but gave the defendant leave to move to enter a nonsuit.

Platt having, in Michaelmas Term, obtained a rule accordingly,

Wheateley and Wallinger shewed cause. This instrument did not constitute a partnership between the parties, but was a mere authority to the plaintiff to carry on the undertaking, and the plaintiff was entitled to recover, to the extent of the defendant’s subscription, the money he actually laid out for the defendant’s benefit in carrying on the undertaking: *Helme v. Smith* (7 Bing. 709; 5 M. & P. 744), *Coffee v. Brian* (3 Bing. 54; 10 Moore. 341). The case of *Holmes v. Higgins*, which was cited at the trial is inapplicable, as there the plaintiff was liable as a partner jointly with

the defendant for the claim in respect of which the action was brought. But assuming that the agreement had the effect of constituting a partnership between the parties, the question is, whether the defendant can avail himself of this defence under the plea of non assumpsit. The [122] first rule of Hilary Term, 4 Will. 4, says, that the plea of non assumpsit shall operate only as a denial in fact of the express promise alleged, or of the matters of fact from which the promise alleged may be implied by law. The third rule enacts, that all matters in confession and avoidance, which shew the transaction to be either void or avoidable in point of law, shall be specially pleaded. Now here there is an express promise, and the defendant seeks to get rid of it by saying, that it is either void or voidable on the ground of the existence of the relation of partnership between him and the plaintiff. There is an analogy between this case and that of infancy, which is one of the instances mentioned in the rule. [Parke, B. There can be no doubt about the form of the plea, and that if it was a partnership transaction, it might be given in evidence under non assumpsit; but the question is, whether it is not an agreement at all events, to pay certain sums of money from time to time as they become due.] That is the effect of the agreement. This is no debt due to the plaintiff and defendant jointly, nor would the damages recovered go to or form part of the partnership fund: *Worrall v. Grayson* (1 M. & W. 166), *Bedford v. Brutton* (1 Bing. N. C. 399; 1 Scott, 245). The case of *Fenning v. Leckie* (13 East, 7) shews that the necessity of looking into the accounts, in order to ascertain whether there had been profit or loss, is no objection to the maintenance of the action. The action is not brought to recover partnership profits, but monies laid out by the plaintiff, to enable the defendant to get such profits: *Gale v. Leckie* (2 Stark. 107).

Platt and Channell, *contra*. The effect of the agreement was to constitute a partnership between the parties, each party to be liable to a certain amount. *Holmes v. Higgins* (1 B. & C. 74) is directly in point. The money, if recovered, [123] would clearly belong to the partnership funds, and must be introduced into and form part of the partnership accounts.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This was an action for money paid, with a count on an account stated. It appeared on the trial that the plaintiff, together with the defendant and others, entered into a special agreement to this effect. [The learned Judge here read the agreement.] The effect of this agreement was to constitute a partnership between those who subscribed, in proportion to their subscription. The plaintiffs took an active part in the management of the concern, and the earnings of the boat not proving sufficient, he paid the amount of the debts due to the different creditors; and if nothing else had been done, the plaintiff could not have recovered as for money paid to the partnership use, as one partner cannot sue another in that form of action for contribution to a joint partnership liability. But on this agreement, the plaintiff might have sued the defendant in a special assumpsit, for not performing his undertaking to pay the plaintiff the instalments from time to time, in addition to the £10 per cent., to form a fund, as such an action would lie, founded on the consideration of the plaintiff on his part undertaking to charter and manage the vessel, as much as an action would lie on a covenant in co-partnership articles by one partner to pay another a certain sum, if the partnership assets should prove deficient. As such an action, therefore, would lie, the only objection is to the form of the declaration. The count for money paid could not be supported. But it appears from my Lord Denman's note, that the earnings were admitted to be insufficient to pay the expenses; that application was made to the defendant by the plaintiff for the second [124] instalment, and that he promised to pay it. This appears to be sufficient evidence to support the count on an account stated as to that sum, founded on the obligation to pay it arising out of the special contract; and therefore the rule to enter a nonsuit must be discharged.

Rule discharged.

JOHNSON v. REID. Exch. of Pleas. 1840.—The plaintiff was committed by the defendant, a magistrate, under the 4 Geo. 4, c. 34, s. 3, by a warrant of commitment which was in the following form:—"To the constable of M., Surrey, &c.

Whereas information and complaint hath been made unto me, one &c., upon the oaths of J. H. and S. M., both of M., in the said county of S., calico-printers, that W. J., of M. aforesaid, in the county aforesaid, calico-printer, did on Wednesday, the 8th of May inst., contract with the said S. M., to print certain pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M., under such contract; and that the said W. J. hath, in his said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards the said S. M. and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his license or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true." It then commanded the constable to convey the plaintiff to the house of correction, and deliver him to the keeper thereof, who was ordered to detain him in custody:—Held, that this was a commitment in execution, and that it was bad, because it did not shew either that the contract was entered into, or the work refused to be done, or the plaintiff found, within the jurisdiction of the magistrate.

[S. C. 9 L. J. Ex. 79.]

Trespass against the defendant, a justice of peace for the county of Surrey, for assault and false imprisonment.

Pleas—1st, not guilty (by statute); 2ndly, a tender of £30 by way of amends. Replication to the second plea, taking issue on the sufficiency of the amends.

At the trial before Lord Denman, C. J., at the last Surrey Assizes, the plaintiff called as a witness the governor of the house of correction at Brixton, who produced a warrant of commitment, signed by the defendant, in the following form:—

"To the constable of Mitcham, in the county of Surrey, and to the keeper of the house of correction at Brixton, in the said county of Surrey, &c. Whereas information and complaint hath been made unto me, one of her Majesty's justices of the peace in and for the said county, upon the oaths of Jonathan Haslam and Samuel Makepeace, both [125] of Mitcham, in the said county, calico-printers, that Wm. Johnson, of Mitcham aforesaid, in the county aforesaid calico-printer, did, on Wednesday, the 8th of May inst., contract with the said Samuel Makepeace to print certain pieces of wollen cotton goods; that the said Wm. Johnson had adopted such contract, and entered into the service of the said Samuel Makepeace under such contract; and that the said Wm. Johnson hath, in his said service, been guilty of divers misdemeanours, miscarriages, and ill behaviour towards the said Samuel Makepeace, and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said Samuel Makepeace, without his license and consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true. These are therefore to command you, the said constable, forthwith to convey the said William Johnson to the said house of correction at Brixton aforesaid, and to deliver him to the keeper thereof, with warrant; and I do hereby command you the said keeper to receive the said William Johnson into your custody, in the said house of correction, there to remain, and be corrected and held to hard labour for the space of six weeks from the date hereof, and for so doing this shall be your sufficient warrant. Given," &c.

It was proved that the plaintiff was confined in the house of correction, under this warrant, for ten days, when he was discharged by habeas corpus. Other witnesses were also called to prove the damage sustained by the plaintiff; and it was elicited from some of them, that he was a journeyman calico-printer, and that such persons worked upon the premises of their employers, who supplied them there with blocks and materials necessary for performing their work; but it also appeared, that they [126] were paid according to the quantity of work done, and not by the day or week.

The defendant's counsel, on these facts being proved, submitted that the plaintiff ought to be nonsuited, as the commitment was a valid commitment under 4 Geo. 4, c. 34, s. 3, which gave the magistrate jurisdiction in the case. The plaintiff's counsel contended that this case was not within the act, and relied upon *Hardy v. Ryle* (9 B. & C. 603). The Chief Justice left it to the jury to say whether the sum of £30 was a sufficient compensation, which they negatived by finding a verdict for the plaintiff for the sum of £45. The learned Judge thereupon gave leave to move to enter a nonsuit, or a verdict for the defendant on the first issue. Thesiger having, in Michaelmas Term, obtained a rule accordingly,

Andrews, Serjt., (Montagu Chambers with him), now shewed cause. This is a commitment in execution, under the stat. 4 Geo. 4, c. 34, s. 3, and must be construed with the same strictness as a conviction. By that section it is enacted, "That if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service, according to his or her contract, (such contract being in writing, and signed by the contracting parties), or, having entered such service, shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, or otherwise, respecting the same, then, and in every such case, it shall and may be lawful for any justice of the peace of the [127] county or place where such servant in husbandry, artificer, calico-printer, handicraftsman, &c. &c., shall have so contracted, or be employed, or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, &c. &c., shall have so contracted, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending such servant in husbandry, &c. &c., and to examine into the nature of the complaint; and if it shall appear to such justice that such servant in husbandry, &c. &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanour as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction for a reasonable time, not exceeding three months." This conviction does not state such an offence as gave the magistrate jurisdiction within this act. The contract is not alleged to have been in writing, nor is it stated in what manner the entering into the service took place. Besides, the warrant is bad for omitting to shew that the offence was committed within the county in which the magistrate had jurisdiction. *Rex v. Hazell* (13 East, 139), *Rex v. Jeffries* (1 T. R. 241), *Rex v. Smith* (8 T. R. 588). It does not at all appear here where the offence was committed. Again, it does not allege that the party was present and was convicted. There ought to have been an adjudication that the plaintiff was convicted. A commitment in execution by a magistrate must state that the party has been convicted; and setting forth that he was charged on oath with the offence is insufficient. *Rex v. Cooper* (6 East, 509), *Rex v. Rhodes* (4 East, 220). He was then stopped by the Court, who called upon

Channell, contra [Parke, B. How do you answer the [128] objection as to the venue?] It is not necessary that the offence should be committed within the county within which the magistrate had jurisdiction. It is sufficient if the party is found within the jurisdiction. [Gurney, B. The commitment does not state that he was found within the jurisdiction.] Besides, this is only a commitment, and not a conviction, and it may be questionable whether it was enough for the plaintiff to produce the commitment, without shewing that there was a conviction which contained the same defects.

PARKE, B. It does not appear here that there was any conviction, and that is not required by the statute. This is a commitment which was intended by the act to operate as a conviction; and it is defective, in not stating that the contract was entered into, the work not done, or the plaintiff found, within the jurisdiction of the magistrate. The warrant is the only authority to the gaoler to keep the plaintiff in custody, and in this warrant there is no authority shewn, and nothing stated which justifies the plaintiff's arrest on this charge. But taking it merely as a matter of evidence, it does not appear that the magistrate had authority; that the contract was

entered into, the work refused to be done, or the man found, within his jurisdiction. This magistrate therefore had no defence.

ALDERSON, B. I am of the same opinion; and I may add, that it is consistent with this warrant that the plaintiff never appeared before the magistrate at all.

GURNEY, B., concurred.

Rule discharged.

[129] SECCOMBE v. BABB. Exch. of Pleas. 1840.—All matters in difference on the record in a cause were referred to arbitration, the costs of the action and of the reference and the award to be in the discretion of the arbitrator. The arbitrator awarded that the action should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff £50 towards the costs of the cause and reference; that the plaintiff should pay his own and the defendant's costs of the cause and reference, the said costs to be taxed as between attorney and client; and that the plaintiff should pay the arbitrator £25 for his fees &c.:—Held, that this award was not uncertain or inconsistent; but that the arbitrator had exceeded his authority in awarding costs as between attorney and client; and that the order as to costs was so connected with the rest of the award, that it could not be rejected as surplusage.

[S. C. 8 Dowl. P. C. 167; 9 L. J. Ex. 65; 4 Jur. 90.]

In this case the parties had agreed to refer all matters in difference on the record in the cause (except so far as related to a sum of £10) to two arbitrators, "the costs of the said action (except as aforesaid) and also of the reference and award incident thereto, to be in the discretion of the arbitrators." The arbitrators proceeded with the reference, and awarded that the action should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff the sum of £50 towards the costs incurred in the cause and the reference; that the plaintiff should pay his own costs of the cause and of the reference, and should also pay to the defendant the costs of the defendant in the cause and reference; and that the said costs should be in the meantime taxed as between attorney and client; that the plaintiff should pay to the arbitrators for their use the sum of £25 for their fees and disbursements as arbitrators in the reference, and for the costs and expenses of the award. Warren having obtained a rule to shew cause why the award should not be set aside, on the ground that it was uncertain whether the £50 was to go towards the costs of the plaintiff or of the defendant, or both; and that if the former, then it was inconsistent; and also on the ground that the arbitrators had exceeded their authority in directing the costs to be taxed as between attorney and client,

Butt shewed cause. The award is not uncertain; the £50 is to be paid to the plaintiff towards all the costs incurred in the cause and the reference on both sides, which he is ultimately to pay. And there is no inconsistency in it, in that view of the case, the arbitrators having full [130] power to award the costs as they should think fit. Secondly, the words respecting the taxation "as between attorney and client" may be rejected as surplusage, and the award construed as directing the costs to be taxed in the usual manner, as between party and party. But if that be not so, that part of the award may be waived, as was done in *Whitehead v. Pirth* (12 East, 165), where an arbitrator, having no authority to order costs, awarded them to be taxed as between attorney and client, but the plaintiff having waived his costs, and demanded only the principal sum awarded, was allowed to issue an attachment for the latter.

Warren, contra. The first part of the award is, substantially, the ordering of a *stet processus*. Then comes the award as to the costs, which is quite inconsistent and unintelligible; the plaintiff is ordered to pay the costs of the cause and the reference on both sides, and yet he is to receive £50 for costs. Secondly, it is clear that the arbitrators had no authority to award costs as between attorney and client: Watson on Awards, 133, 134. [Alderson, B. *Murder v. Cox* (Cowper, 127) is an authority to shew that that portion of the award may be rejected.] That case is distinguishable, as there the part relating to the mode of taxation was easily separable from the rest; but here the award of the costs as between attorney and client forms the very basis

of the award, and is so intermingled with the other parts of the award that it cannot be separated. He cited *Jackson v. Clarke* (M'Clell. & Y. 200).

PARKE, B. There is no difficulty as to the first objection. The inconsistency which at first sight appears is explained by the context, and it is clear that the arbitrators intended that the plaintiff should pay all the costs, both of the cause and the reference, together with the £25 [131] to the arbitrators; but as a partial indemnity for that, the defendant should pay him £50. But the other objection, I think, must prevail. The award of the costs as between attorney and client is so connected with the other parts of the award, that non constat that the payment of the £50 by the defendant was not part at least of the consideration for which the award as to the other matters was made. It appears to me to be so connected with the benefit which the defendant is to receive under the award, that it cannot be rejected. The rule, therefore, for setting aside the award must be made absolute.

ALDERSON B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

DOWLING v. HARMAN. Exch. of Pleas. 1840.—An application to compel the plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the Court, may be made after an order has been obtained for time to plead on the usual terms.—But the Court will not grant such an application, where the plaintiff, though a foreigner and usually resident abroad, is at the time actually in this country.—Semble, that the affidavit to ground such an application is sufficient, if it states that the deponent believes the plaintiff resides abroad.

[S. C. 8 Dowl. P. C. 165; 9 L. J. Ex. 53; 4 Jur. 43. Followed, *Tambisco v. Pacifico*, 1852, 7 Ex. 818. Not applied, *Westenberg v. Mortimore*, 1875, L. R. 10 C. P. 441. Referred to, *Redondo v. Chayter*, 1879, 4 Q. B. D. 455.]

This was a rule calling upon the plaintiff to give security for costs, and was obtained upon an affidavit, stating that the deponent believed that the plaintiff was a Frenchman, and resided at Brussels. The affidavits in answer to the rule stated, that although the plaintiff was in the habit of frequently going abroad, and was abroad at the time of the commencement of the action, he was in this country at the time of the application, and intended to remain until after the trial. It appeared also that the defendant had obtained a Judge's order for time to plead on the usual terms.

Ball shewed cause. The affidavit should have stated positively that the residence of the plaintiff is out of England; [132] the statement of the mere belief of the deponent is insufficient. *Sandys v. Hobler* (6 Dowl. P. C. 274). [Alderson, B. How can a man swear that positively, when he is himself here?] Secondly, the application was too late, after the defendant had obtained time to plead. The rule of H. T., 2 Will. 4, s. 89, which says that "an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined," does not apply to the present case, where the defendant was under terms of taking short notice of trial. This is an extraordinary case, and the rule only applies to ordinary cases. The defendant cannot move for security for costs after he has obtained time, unless he shews that he did not know of the plaintiff's residence abroad at the time he so obtained it. Thirdly, the plaintiff being actually in England, security for costs cannot be required from him, although his usual residence may be in a foreign country: *Anonymous* (8 Taunt. 737; 3 Moore, 78); *Ciragno v. Hossan* (6 Taunt. 20). It is not enough to say he is about to leave this country; he must be actually abroad.

Hoggins, in support of the rule. The application was regular, being made before issue joined, according to the rule of H. T. 2 Will. 4. As to the other point, in the cases cited it did not appear that the plaintiff was a foreigner: here it is sworn that he is a foreigner, and that he resides at Brussels. Though the plaintiff be here at the time, security for costs may be ordered, provided the plaintiff is a foreigner, and is usually resident abroad.

PARKE, B. We must, for the sake of regularity, abide by the rule of Court, which is, "that an application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined." The present [133] case is an ordinary one; the circumstance of the defendant's being under terms to take short notice of trial, does not take it out of that rule. The rule was made to correct a diversity in

the practice of the Courts on this subject, and with a view to introduce a uniformity in it. With respect to the other point, we must abide by the decision of the Court of Common Pleas in the anonymous case cited, which strongly resembles the present. It appears from the report of that case in Moore, that the plaintiff was a foreigner, usually resident at Dantzic, although he was at that time staying in this country. In the absence of any decision to the contrary, we must, for the sake of uniformity, adhere to the rule there laid down.

ALDERSON, B. The case of *Gurney v. Key* (3 Dowl. P. C. 559) is an authority in point to shew that the application is not too late.

Rule discharged—the costs to be costs in the cause.

WILLIAMS v. HIGGS. Exch. of Pleas. 1840.—An affidavit to bring back the venue, made by the plaintiff's wife, is insufficient, unless it appear that the husband was too ill to attend before a commissioner to make one, and that the wife is fully acquainted with the nature and particulars of the action. The proper person to make the affidavit, under such circumstances, is the plaintiff's attorney.

[S. C. 8 Dowl. P. C. 165 ; 9 L. J. Ex. 59 ; 4 Jur. 73.]

In this case Halcomb moved to bring back the venue from Cardiganshire to Merionethshire.

The affidavit on which he moved was made by the plaintiff's wife, he being himself unable from illness to attend to business.

PARKE, B. We must adhere to the ordinary rule, which is that the affidavit should be made by some person acquainted with the nature and circumstances of the action. Unless there is an affidavit that the plaintiff is [134] so ill that he cannot attend before a commissioner to make the necessary affidavit, and an affidavit of the wife, stating that she knows the nature and particulars of the cause of action, that rule cannot be dispensed with. The proper person, under the circumstances, to make the affidavit, was the plaintiff's attorney.

Motion refused.

KENNEY v. HUTCHINSON. Exch. of Pleas. 1840.—A party obtaining a Judge's order ought to serve it "forthwith," i.e. before the opposite party can take the next step. And where a party, at five o'clock on the day before the time for joining in demurrer expired, obtained an order for three days' time to join in demurrer, which was not served until two o'clock on the following day, and the plaintiff had signed judgment at the opening of the office at 11 o'clock on the same morning:—Held, that the order had been served too late.

[S. C. 8 Dowl. P. C. 171 ; 9 L. J. Ex. 60 ; 4 Jur. 106.]

In this case, the plaintiff having demurred to the defendant's plea, the defendant, on the day before that on which he ought to have joined in demurrer, took out a summons for time to join in demurrer, which was attended by both parties, and an order was made by Gurney, B., allowing three days' time. The order was obtained from the Judge's clerk about five o'clock on the afternoon of Wednesday, the 22nd of January, but was not served until two o'clock on the following day. The plaintiff, however, on the opening of the office at eleven o'clock on that day, signed judgment.

Cowling now moved to set that judgment aside for irregularity. The question is, whether the defendant was bound to serve the order before nine o'clock the same evening on which it was obtained, or before eleven o'clock on the following morning. Both parties attended the Judge, and therefore the plaintiff's attorney knew of the order having been made. [Parke, B. He cannot tell whether the defendant intends to draw up the order, until the defendant serves him.] There is no rule which requires the order to be served on the day it is made ; and can the defendant's attorney be supposed to have waived [135] the order, by not serving it before eleven o'clock the following morning, when the plaintiff signed judgment? In *Charge v. Farhall* (4 B. & C. 485), it is said that a Judge's order must be drawn up and served "forthwith ;" but what does that mean? Does it mean within twenty-four hours, or at what time? The expression there seems to have been used in contradistinction to a

delay of several days. [Alderson, B. You knew when the opposite party could take the next step, and you ought to get it served before he could do so.]

Barstow, who appeared to shew cause in the first instance, was stopped by the Court.

PARKE, B. Although the attorney for the opposite party was present when the order was made, yet he could not know whether the party applying for it would draw it up or not. Then what is a reasonable time in which to make his election? When the parties live within a short distance of each other, there is ample time between five in the afternoon and nine at night, to serve an order of this description. But at all events, it ought to have been served before the opening of the office on the following morning, or rather before the plaintiff's clerk would have to leave his office, in order to reach the judgment office at its opening.

ALDERSON, B. It is requisite that there should be some rigid rule in these matters. The inconvenience would be very great, if the parties were allowed time to consider whether they would avail themselves of a Judge's order and then, perhaps, ultimately abandon it.

Rule refused.

[136] MIDDLETON v. WOODS. Exch. of Pleas. 1840.—Semble, that where a party adds the *similiter*, forming part of his own pleadings, it is a pleading within R. H. T., 4 Will. 4, s. 1, and must bear a date, or it may be set aside for irregularity. Such irregularity is not waived by the party to whom the issue so made up is delivered, omitting to take that objection, on attending a summons to shew cause why the action should not be tried before the sheriff.

[S. C. 9 L. J. Ex. 59.]

This was action of debt to recover a sum of money under £20. The defendant pleaded *nunquam indebitatus*, to which the plaintiff added a *similiter*, but without a date, and on the 13th of January delivered the issue so made up. On the following day, the 14th, the plaintiff's attorney took out a summons, calling on the defendant to shew cause why the action should not be tried before the sheriff, which summons the defendant's attorney attended, but took no objection to the issue on the ground of there being no date to the *similiter*. However, on the 15th, he took out a summons to shew cause before a Judge at chambers why the replication should not be set aside, on the ground of its being without a date: and it was afterwards set aside accordingly by an order of Rolfe, B.

Dowdeswell now moved for a rule to shew cause why that order should not be rescinded. First, the *similiter* is not a pleading within the meaning of the rule of H. T., 4 Will. 4, s. 1, which requires "every pleading, as well as the declaration, to be entitled of the day of the month and year when the same is pleaded." The *similiter* is only a form which serves to mark the acceptance of the issue when well tendered, and the mode of trial proposed; Stephen on Pleading, 2nd edit. 280: and in early times it was added in making up the record, and formed no part of the pleadings. It was decided in *Shackel v. Ranger* (3 M. & W. 409), that the rule did not apply to a *similiter* added by one party for the other. Here the plaintiff added his own *similiter*. [Parke, B. That is the distinction. When a party adds his own *similiter*, it is a pleading, and ought to have a date; but where it is added by the opposite party, [137] it need not. That distinction was taken by this Court in *Shackel v. Ranger*.] Secondly, the objection was waived, by the omission of the defendant to take it on attending the summons at the time the writ of trial was applied for. In *Mammatt v. Mathew* (4 M. & Scott, 356), a request by the defendant that the plaintiff would accept certain persons as bail without opposition, was held to amount to a waiver of all irregularities in the affidavit of debt. The defendant's attorney, by attending the summons for the writ of trial, must be taken to have admitted that issue was regularly joined.

PARKE, B. The only question before the Judge, on the summons for the writ of trial, was whether any difficult question of law was likely to arise, which might render the trial before the sheriff improper. The defendant could not set aside the issue for any irregularity, on attending before the Judge to shew cause why the action should not be tried before the sheriff. The proper course was to obtain a summons to set it

aside, which he did, and he was in time on the 15th. On a motion to compute principal and interest on a bill of exchange, you cannot shew for cause the irregularity of the judgment. So also, you cannot attack the regularity of the issue, on a summons like the present. The omission to do so, therefore, could not amount to a waiver. You may, if you think fit, take a rule on the first point.

Dowdeswell, finding the inclination of the Court against him, declined to take the rule.

[138] ARTHUR AND ANOTHER v. BARTON. Exch. of Pleas. 1840.—The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury.

[S. C. 9 L. J. Ex. 187. Approved, *Gunn v. Roberts*, 1874, L. R. 9 C. P. 331.]

Debt for money lent, and on an account stated. Plea, nunquam indebitatus. At the trial before Patteson, J., at the last Merionethshire Assizes, the facts appeared to be as follows. The defendant, a gentleman residing near Portmadoc, in Merionethshire, was the owner of a coasting vessel called the "Progress," which was generally employed in the conveyance of slates from Portmadoc to different places on the coast, and in bringing back return cargoes of any goods that might be required in that neighbourhood. In January, 1837, the vessel had taken out a cargo of slates, and on her return home was stranded in Bude Bay, in Cornwall. The defendant had an agent at Bude, from whom the master obtained a sum of £15, which was expended in victualling the vessel, and other necessary expenses. She proceeded on her voyage homeward, and put into Swansea harbour, where the master borrowed from the plaintiffs, (who were merchants at Swansea and Neath and had contracted to ship on board the vessel a cargo of culm, consigned to a Mr. Williams, residing near Portmadoc), a sum of £5, which was applied as follows; 4l. 7s. for loading the vessel and getting out the ballast; £1 for a pilot; 13s. 6d. for a new chart and for the repair of the compass—the chart having been lost and the compass damaged when the vessel was stranded,—and the rest for provisions, and in payments to the broker for clearing out the vessel. These payments exhausted the whole of the £5, with the exception of 2s. 6d., which the master paid over to the defendant on his arrival at Portmadoc. It appeared that the defendant had no agent at Neath or Swansea. Those places are about forty miles from Portmadoc, and a letter written there, and sent by post to the defendant, might have been answered in about four days. The master sailed for Port-[139]madoc, with a fair wind, on the day after the advance of the £5.

For the defendant, it was contended that the action was not maintainable, for that the master of a coasting vessel, in an English port, had no authority by law to borrow money on the credit of the owner. The learned Judge reserved this point. The defendant then adduced evidence to shew that in fact the credit was expressly given by the plaintiffs to Mr. Williams, the consignee of the cargo. The learned Judge left it to the jury to say, first, whether the supply of money by the plaintiffs was obtained by the master for the necessary use of the vessel; and secondly, whether it was advanced on the credit of the defendant or of Williams: and the jury found for the plaintiff, damages 4l. 17s. 6d., leave being reserved for the defendant to move to enter a nonsuit, if the Court should be of opinion that the action was not maintainable.

In Michaelmas Term, Jervis obtained a rule nisi accordingly, against which, in this term,

Cresswell Welsby, and Townsend shewed cause. The jury having found that this money was borrowed by the master, and applied for the necessary use of the vessel, in a port where the defendant had no agent, the plaintiffs are entitled by law to charge the owner with it. The rule of law on this subject is not limited to cases where the materials are supplied or money advanced to the master in a foreign port; it is founded upon the general control of the master over the vessel, which is necessarily vested in him for the safe and due prosecution of the voyage, and the preservation of the ship and crew. Here there was no deviation from the due and proper course of the voyage, and the master obtained the money for the purpose of carrying it into effect. [Parke, B. The law is more strict as to the borrowing of money than as to

repairs of the vessel.] The principle is the same, although in the former [140] case a more pressing necessity may be necessary to be shewn, but that is a question for the determination of the jury. *Webster v. Seekamp* (4 B. & Ald. 452) is a distinct authority that the owner is liable for necessary repairs done to the ship in an English port, on the order of the master; and the Court assign a large meaning to the term "necessary repairs," viz. such as are reasonably fit and proper for the voyage, and such as a prudent owner himself would order if present. There, Abbott, C. J., says, "The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship." And Bayley, J., "It is within the scope of his authority to order such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered." It may be said, that in the case of the advance of money, there is greater danger of its subsequent misapplication by the master; but that argument would as strongly apply to the case of an advance abroad. The master is not bound to hypothecate the ship or cargo. [Parke, B. Is the application of the money to the purposes of the vessel anything more than strong evidence of the necessity? So, the subsequent misapplication would only be evidence that the master had not really borrowed the money for the purposes of the vessel.] It was formerly considered that a party supplying necessities to a ship, even without any hypothecation, had not only the personal security of the owners, but also the security of the specific ship: *Rich v. Coe* (Cowp. 636), *Farmer v. Davis* (7 T. R. 312): and although that doctrine is now exploded, yet the rule as to the personal liability of the owner remains unaltered, and must equally apply to an advance in an English and a foreign port. It is laid down in Abbott on Shipping (6th edit. p. 116), (without anything to restrict the application of the rule to foreign ports), that "the business of fitting out, victualling, and [141] manning the ship, is left wholly to the management of the master in places where the owners do not reside, and have no established agent;" and that "his character and situation furnish presumptive evidence of authority from the owners to act for them in these cases." *Robinson v. Lyall* (7 Price, 592) appears to be a direct authority in favour of the plaintiff. That was an action against a shipowner in London, to recover a sum of money furnished to the master at Portsmouth, on the return of the vessel from a foreign voyage, in order to pay seamen's wages, and other debts contracted by the master at that place for necessities for the use of the ship, some of which were contracted on the outward voyage. Holroyd, J., at the trial, nonsuited the plaintiff, on the ground that the master could not bind the owner, even for necessities, in England; but the Court set aside the nonsuit, holding the owner liable for all such money as had been advanced necessarily; and directed the verdict to be entered for the plaintiff for such sum as should be awarded to be due for seamen's wages, in respect of which alone a supply of money was necessary for the then present use of the vessel. Here, also, some of the payments made by the master must necessarily be made in ready money—for instance, the charge for a pilot, and the payments for clearing out the vessel. And it was more for the benefit of the owner that he should be the debtor of the plaintiffs for one single sum, than of many persons for different small amounts, for articles obtained on credit. They cited also *Rocher v. Busher* (2 Stark. Rep. 27), and *Palmer v. Goode* (2 Stark. Rep. 428).

Jervis and Cowling, in support of the rule. The master had no authority by law to pledge the credit of his owner for this money. The advance of money is very different from the supply of goods, or the doing of repairs to the ship. The master does not represent the owner to the [142] full extent of his authority, but only so far as is necessary for the prosecution of the voyage; and for that purpose, in an English port, it is not necessary that he should have authority to borrow money. Abroad, he can only borrow money where he can pledge the security of the ship. The owner cannot know that the money, when obtained, will be properly applied; in the case of repairs, the party who does them sees that they are necessary to be done. *Robinson v. Lyall*, which is the only case cited of an advance of money in an English port, is very shortly reported, and there is no statement of the judgment of the Court; but admitting its authority, it is distinguishable from the present case, because there the money, in respect of which only the verdict was ultimately entered, was advanced to pay seamen's wages, without the payment of which the ship could not leave the port, inasmuch as the crew would have a lien upon her for their wages. Suppose the owner of a vessel in England had an agent within two days' post of New York, could

the master, even there, pledge the credit of the owner in England for money borrowed? [Alderson, B. The master has no authority even to get credit for repairs, if the owner is at hand; but if money be indispensable for the prosecution of the voyage, where is the difference in principle between the two cases?] If the necessity be proved, the defendant is no doubt liable; but the argument is, that in an English port, where the master and the owner may readily communicate together, there can be no necessity for the borrowing of money, in order to proceed on the voyage; whereas abroad, from the nature of the case, that necessity does exist.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

LORD ABINGER, C. B. In this case we are of opinion that the rule must be discharged. The point reserved by [143] the learned Judge was, whether the master of a coasting vessel could, by a contract made in England, bind his owner, who also resided in this kingdom, the contract being for a loan of money for the necessary use of the ship. Here the owner resided in North Wales; the contract was made in the county of Glamorgan.

We think this was a question of fact, and was properly left to the jury by the learned Judge.

Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary.

But if the vessel be in a foreign port, where the owner has no agent—or if in an English port, but at a distance from the owner's residence, and provisions or other things required to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner.

But then the further question arises, for what things he may pledge that credit? This also is limited, either to such things as are necessary, or (as Lord Tenterden, in his book on Shipping, page 116, and Mr. Justice Story, in his valuable book on Agency, section 122, very clearly lay it down) to such things as are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case.

But if repairs are needed, it is admitted he may pledge [144] the owner's credit for them. But repairs are only instances of the above rule. If therefore money be necessary, it may be raised upon credit. In the case cited, of *Robinson v. Lyall*, this was done. There, without money the wages of the seamen could not be paid, and unless they were paid, the seamen might have refused to assist in the further navigation of the ship. The Court therefore held, that the master could pledge the owner's credit for money to that extent. So also, it may in some cases be necessary to pay harbour-dues, or pilotage, or the like, and to pay them in ready money; and if that be the case, and the prosecution of the voyage cannot take place till they are discharged, then also a necessity for having money in specie may arise; and if so, the master would be authorized, under this general power of doing all things necessary for the due prosecution of the voyage, to procure money by loan, and to bind the owner by a contract for that purpose. It is not doubted that in a foreign port, where the owner has no agent, this may be done: *Evans v. Williams* (7 T. R. 481, n.); Abbott on Shipping, page 117; and we think that all these questions are referable to one general principle, although, when it is applied to a case like the present, it will require stronger circumstances to establish the fact of the necessity, upon which the liability of the owner must depend.

In the present case, the learned Judge left the question to the jury, and they have found for the plaintiff. There was clearly evidence on which they might reasonably act; and as the verdict is under £20, we should not, even if we doubted as to the propriety of their conclusion, interfere to grant a new trial. The rule, therefore, must be discharged.

Rule discharged.

[145] *MORSE v. APPERLEY*. Exch. of Pleas. 1840.—In trespass *qu. cl. fr.*, the defendant pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed; 3rdly, that defendant was seised in fee; 4thly, that A. B. was seised in fee, and that the defendant, by his command, committed the trespass complained of, &c. A summons having been taken out to strike out the 3rd and 4th pleas, the Judge refused to make any order, whereupon an application for that purpose was made to this Court:—Held that the 3rd and 4th pleas might be pleaded together with the 2nd, as they were not necessarily founded on the same ground of answer or defence, within R. G. H. T., 4 Will. 4, s. 6.—*Quære*, whether such an appeal lies to the Court, where the Judge at chambers has refused to make any order.

[S. C. 9 L. J. Ex. 61; 4 Jur. 702.]

This was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded, 1st, not guilty; 2ndly, that the plaintiff was not possessed of the close in the declaration mentioned; 3rdly, that the defendant was seised in fee of the close in which, &c.; 4thly, that A. B. was seised in the fee of the close in which, &c., and that the defendant as his servant, and by his command, committed the trespass complained of. The plaintiff had obtained a summons, calling on the defendant to shew cause before a Judge at chambers, why the third and fourth pleas should not be struck out, as being in contravention of the "General Rules and Regulations" of H. T., 4 Will. 4, s. 6. Gurney, B., before whom the summons was attended, refused to make any order, whereupon Gray applied to this Court for a rule to shew cause why the second plea, or the third and fourth pleas, should not be struck out, as being founded on "the same ground of answer or defence," within the meaning of the above rule.

W. H. Watson shewed cause. The Court has no jurisdiction over the subject-matter of this application. If more than one plea is used, in violation of the rule of Court, the party is at liberty to apply to a Judge at chambers, but if he refuses to interfere, the rule gives no appeal to the Court. [Alderson, B. My Brother Gurney having refused to make any order, I do not see how this Court can interfere. When a Judge makes an erroneous order, then you may appeal to the Court; but here he makes no order. The Court has not the same power in this respect as the Judge has; for example, if parties come before me at chambers upon an application like the present, and in answer to my inquiry whether the defendant intends to make two separate [146] defences under the proposed pleas, he satisfies me that he does so intend, I make an indorsement upon the summons accordingly. The Court, however, has no power to make such indorsement, which shews that there cannot be an original application to the Court. In a case like the present, where the point could not be raised except an order be made, the party might apply to another Judge; but if each Judge individually refuses to make an order, an appeal to them collectively in this Court can surely be of no avail.] But these pleas are no infringement of the rule. It was never intended by the new rules, that a party should not be at liberty to deny the fact of possession, and also to set up title in himself. The second plea is a mere denial of possession, which constitutes a sufficient title to maintain the action, as against a wrong-doer. By the third and fourth pleas, the defendant shews title in himself and A. B., under whom he justifies. Those pleas admit the plaintiff's possession, but deny his right and title to the close. The plaintiff might reply to the third plea, that he was tenant to the defendant from year to year; to which the defendant might rejoin, that the tenancy was determined by notice to quit. The new rules were never intended to preclude a party from bringing the question to a precise issue, but the contrary. (He was then stopped by the Court.)

Gray, *contrà*. First, as to the question of jurisdiction. There are two classes of cases to which the rule of Court extends. The first is, where it cannot be seen on the face of the pleadings themselves whether the contract or matter alleged in the two counts or pleas is the same; as, for instance, where a declaration contains two counts, each stating a contract to build a house, a Judge cannot tell from the declaration itself, whether there were in point of fact separate contracts as to different houses; he must, therefore, inquire of the plaintiff whether he means to give evidence [147] of separate contracts under each count. The second class is, where it appears on the face of the pleadings themselves that the matter alleged in one pleading may be given

in evidence under another,—as in *Neale v. M'Kenzie* (1 C. M. & R. 61), where a justification for entering the house as landlord, to distrain for rent, was not allowed with the general issue, because, by statute, that matter might be given in evidence under the general issue: in such cases a Judge requires no information beyond what appears on the face of the pleadings, to enable him to come to a decision. In the former case an indorsement on the summons becomes necessary, upon the assertion of the party that he intends to give separate matters in evidence, and perhaps that may be a reason why, in such case, no appeal would lie to the Court; but in the latter case every thing depends upon what appears on the pleadings themselves, and no indorsement on the summons can become necessary; because there is no assertion of the party, the truth or falsehood of which is to be afterwards ascertained and acted on by the Judge at the trial, as there is in the other case. The present case is within the second class, and therefore there can be no objection, on general principles, to an appeal to the Court. Then, secondly, these pleas are in contravention of the rule. A declaration in trespass quare clausum fregit alleges two traversable facts: first, that the defendant broke and entered a certain close; 2ndly, that the close was the plaintiff's. Now, the latter allegation is an allegation of title, *Purnell v. Young* (3 M. & W. 288), and not of bare possession; and although, where it is traversed, the plaintiff will prove the issue by shewing mere possession, if the defendant be a wrong-doer, that is because possession is *prima facie* evidence of title, and a wrong-doer is, from rules of convenience, precluded from raising the question whether the plaintiff or a stranger has title. The [148] reasons why he is so precluded are forcibly stated in the judgments of Lord Ellenborough, Le Blanc, J., and Bayley, J. in *Chambers v. Donaldson* (11 East, 66). If then, in point of pleading, that be an allegation of title, the form of the traverse can make no difference; the plea concludes to the country, and must be taken to be a denial of the plaintiff's title. The first and second pleas in this case put in issue what the general issue did before the new rules, that is, both the facts before alluded to; and under the general issue, before the new rules, the defendant could give in evidence either *liberum tenementum* in himself or in another, and that he acted by command of the other: *Argent v. Durrant* (8 T. R. 403). In the latter case Lord Kenyon says: "It is now too late to discuss this question, which appears to be settled in Lord Coke's time. In a case in 1 Lev. 301, in trespass, the defendant pleaded not guilty; and if he could give in evidence, that at the time of the trespass the freehold was in such a one, and he as his servant, and by his command, entered, was the question; and it is said by Coke 'that the same might be so well enough; and so it was adjudged in *Trevilian's case*, for if he by whose command he entereth hath right at the same instant that the defendant entered, the right is in the other, by reason whereof he is not guilty as to the plaintiff; and judgment was given accordingly.' Conformably to this doctrine, I have always understood that it has been the practice to permit the defendant to give *liberum tenementum* in evidence under the general issue." In *Carr v. Fletcher* (2 Stark. 71), the same doctrine was acted upon. [Lord Abinger, C. B. That was no decision of the Court, but an admission on the part of the counsel that this defence might be given in evidence under the general issue. Alderson, B. It is laid down in *Chambers v. Donaldson*, that if the defendant plead soil and freehold in another, by whose command he justifies, such command may [149] be traversed by the plaintiff. The general issue would put in issue not only the soil and freehold being in a stranger, but that by his command the defendant entered.] The reason why it may be given in evidence is stated in Gilbert on Evidence, 230, because it falsifies the declaration. He says, "The defendant may prevail in this issue, first, by making title to the land, for then he falsifies the declaration, for he proves that he did not enter into the plaintiff's close, but his own, and, consequently, that is a very just disproving of the plaintiff's declaration." If, then, the second plea amounts in substance to a traverse of the close being the plaintiff's, the facts alleged in the third and fourth pleas will, if true, prove it, and may be given in evidence under it; and therefore, either that plea, or the third and fourth, ought to be struck out as being prohibited by the new rules.

Per Curiam. We think these pleas are not necessarily in contravention of the rule. The plea of *liberum tenementum* admits the plaintiff to have the actual possession, but alleges that the right of possession is in the defendant as owner of the fee. It is consistent with that plea that the plaintiff may be in possession under a lease from the owner of the fee. It is possible that these pleas may apply to a state of facts

constituting one and the same subject-matter of defence, but it is also possible that they may apply to a totally different state of facts, constituting a different defence; and if that be so, they do not come within the rule which has been cited.

Rule discharged with costs.

[150] *ALDERTON v. ST. AUBYN*. Exch. of Pleas. 1840.—Where a writ of sequestration was returned to this Court before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the Bishop, in order that he might take the return off the writ and certify to the Court what he had done under it. The rule for that purpose is absolute in the first instance.

[S. C. 8 Dowl. P. C. 223; 9 L. J. Ex. 60; 4 Jur. 53.]

In this case a writ of sequestration, at the suit of the plaintiff, having been issued, directed to the Bishop of Exeter, was indorsed and returned by him into this Court before the execution was fully satisfied.

Humfrey now moved for a rule to shew cause why the writ should not be taken off the file of the Court and sent back to the Bishop, on the ground that this, being a continuing writ, ought not to have been returned until the execution was satisfied, otherwise parties who had lodged writs of sequestration subsequently, would deprive the plaintiff of the fruits of his prior execution. In *Disney v. Eyre* (1 Alc. & Nap. 34), the Court, under similar circumstances, directed the writ to be taken off the file and returned to the Bishop, in order that he might certify what he had done under it. He prayed that the rule might be absolute in the first instance.

PARKE, B. I think this rule ought to be granted, and that it ought to be absolute in the first instance. If we were to grant a rule nisi only, there might be a difficulty as to the parties upon whom the plaintiff was bound to serve it; the only parties who could properly lay any claim to service would be those who had issued subsequent writs, and who may be termed mesne incumbrancers. The Bishop was wrong in returning the writ when he did, but for that the plaintiff ought not to suffer. The Bishop may take the return of the writ, and certify to the Court what he has done under the writ.

The rest of the Court concurred.

Rule absolute.

[151] *BLAKE v. WARREN*. Exch. of Pleas. 1840.—A notice to attend taxation at Westminster, during term, is good.

[S. C. 8 Dowl. P. C. 173; 9 L. J. Ex. 136.]

In this case, notice of taxation had been given by the plaintiff's attorney for Saturday, the 23rd of November. The taxation not being completed on that day, notice of continuance was served for twelve o'clock on the following Monday, at Westminster. Before eleven o'clock on that morning, the defendant's attorney sent a notice that he objected to the taxation being proceeded with at Westminster. He accordingly did not appear at the time appointed, and the Master proceeded with the taxation ex parte, and execution subsequently issued.

Erle now moved for a rule to shew cause why the execution and all subsequent proceedings should not be set aside, and why the Master should not review his taxation. He contended that the taxation was irregular, because all taxations ought regularly to take place in the Master's office; and although, by consent of the parties, the taxation might be made at Westminster, the defendant's attorney was not bound to attend there, and having objected to do so, the taxation ought not to have been proceeded with.

LORD ABINGER, C. B. Whilst the Court is sitting, the Masters are properly here, and the practice is to attend them here.

ALDERSON, B. The objection might be a good one for the Master to make; but I cannot say how it can be an objection by the attorney. It is only for the convenience of suitors that the Masters attend at the office at all in term time.

Rule refused.

[152] *SEMPLE v. TURNER*. Exch. of Pleas. 1840.—A writ of error coram vobis is not a supersedeas in itself, but it prevents the party who has obtained judgment from taking out execution, except by leave of the Court or a Judge.

[S. C. 8 Dowl. P. C. 246 ; 9 L. J. Ex. 101 ; 4 Jur. 27.]

A writ of error coram vobis had been sued out in this case by the defendant, of which notice had been served upon the plaintiff. The latter, however, having obtained a Judge's order for leave to issue execution, sued out a ca. sa., under which the defendant was taken in execution.

Mellor now moved for a rule to shew cause why the writ of ca. sa. should not be set aside, and all subsequent proceedings stayed. He relied upon *Lery v. Price* (2 M. & W. 533), as an authority that a writ of error coram vobis is a supersedeas of execution from the time of notice given that it has been sued out, and not from the time of the allowance of it only.

PARKE, B. The present case differs from *Lery v. Price* in this respect ; that there the plaintiff, after notice of the writ of error, sued out execution without the leave of the Court, which was accordingly held to be irregular. In this case leave had been obtained for that purpose. A writ of this kind is a stay of proceedings or not, as the Court shall direct.

ALDERSON, B. A writ of error coram vobis is not a supersedeas at all ; and the Court has only engrafted upon it the necessity for obtaining leave to issue execution, because it would be unseemly to allow the plaintiff to have power of himself to issue execution after such a writ had been sued out, and consequently while a question is depending, by the decision of which his right of action may be destroyed altogether. That is stated by Lord Ellenborough, in *Birch v. Triste* (8 East, 415), as the principle on which the practice pro-[153]-ceeds ; and the case of *Walker v. Stokoe* (Carthew, 367), which he there cites, is an authority that a writ of error coram vobis is not a supersedeas in itself.

Rule refused.

DAVIES v. EVAN HUMPHREYS. Exch. of Pleas. 1840.—By a promissory note, E. H., W. D., & J. H., jointly and severally promised to pay to J. E. £300, with interest. W. D. having afterwards paid J. E. £280 on account of the note, J. E. made the following indorsement upon it :—"Received of W. D. the sum of £280, on account of the within note, the £300 having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against J. H., to recover contribution from him "as a co-surety :"—Held, that the indorsement was admissible in evidence, to prove not only the payment of the £280, but also that the money was originally advanced to E. H. as principal.—The amount of principal and interest was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid by him within that period. The Statute of Limitations having been pleaded :—Held, that the plaintiff was entitled to recover only to the extent of £30 which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.—Held, also, in an action on the same note against E. H., the principal, that the Statute of Limitations was a bar to all except £30, as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use.

[S. C. 9 L. J. Ex. 265 ; 4 Jur 250. Followed, *In re Snowden*, 1881, 17 Ch D. 44.

Considered, *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.]

Indebitatus assumpsit for money paid, and on an account stated. Pleas, 1st, non assumpsit ; 2nd, the Statute of Limitations.

At the trial before Coleridge, J., at the Carmarthenshire Spring Assizes, 1839, the following appeared to be the circumstances upon which the action was founded :—Shortly before the making of the promissory note hereinafter mentioned, that is to say, about the month of November, 1827, the daughter of the plaintiff married the defendant, who was the son of one John Humphreys, the defendant in the action next

mentioned, and which John Humphreys was then the tenant and lessee of a farm called Coed, in the same county. The plaintiff gave his daughter on her marriage £100 and some household furniture, and John Humphreys, on the same occasion, gave up to the defendant, his son, the lease of Coed, together with the stock and implements, (which were valued at £1150), on the understanding that the defendant should pay him for [154] the same the sum of £800, (being £350 less than the actual value), in the following manner: viz., by paying down the sum of £400, and giving his undertaking for the other £400. The defendant handed over to his father the £100 which he received with his wife, and they both (Evan and John Humphreys) applied to the plaintiff to make up the other £300, which were to be paid down as above mentioned. This the plaintiff declined doing; but agreed, that on the lease of Coed being deposited with him as a security, and on their procuring the money from a relative of theirs, one John Evans of Altyeadno, he would join with them as their surety in a promissory note for the amount. On the 27th of December next after the marriage, the plaintiff, the defendant, and John Humphreys met, when one Thomas Jones, an attorney, being sent for, he drew up a promissory note, which was signed by them, and witnessed by him; but he died before the trial. The following is a copy of the note and indorsements:—

“£300.”

“On demand we do hereby jointly and severally promise to pay to Mr. John Evans, of Altyeadno, or order, the sum of three hundred pounds, with lawful interest for the same. Value received. As witness our hands this 27th day of December, 1827.”

(Signed)

“EVAN HUMPHREYS, of Coed,
Llandifilog.

“Witness, Thomas Jones,

“Attorney, Caermarthen.

“W. DAVIES, Marnage.

“JOHN HUMPHREYS.”

Indorsed.

“The principal money or sum of three hundred pounds is not to be called in, or recovered, or paid up, unless six months' previous notice is given of the intention of so doing in writing.

“Received one year's interest, paid to the 27th of December, 1829.”

[155] “1831, December 31.—Received of Mr. William Davies the sum of two hundred and eighty pounds, on account of the within note, the £300 having been originally advanced to Mr. Evan Humphreys.

“JOHN EVANS.

“Witness, Thomas Jones.”

“June 5, 1832.—Received on account of this note £20.

“JOHN EVANS.”

“Received 11th of July, 1832, of Mr. William Davies, 8l. 10s. on account of note and interest, which I hold of him.

“JOHN EVANS.”

“Received also, this 29th of August, 1832, 10l. 10s.

“Altyeadno.

“JOHN EVANS.”

“January 12th, 1833.—Received this day of Mr. William Davies, the sum of £11, which, with the sum of £ before paid by him to me, is the balance of principal and interest on this note.

“JOHN EVANS.

“Witness, Lewis Morris, Attorney, Caermarthen.”

No evidence was given of the payee's applying to the defendant or to John Humphreys for payment, but it was proved that he applied to the plaintiff, and that the plaintiff made the payments, the receipts for which were indorsed on the note, on the respective days stated in those receipts. It also appeared that those receipts respectively were signed by the payee, and that he died before the trial.

The amount of principal and interest due on the note was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was made within that period.

Two grounds of defence were relied upon at the trial:—1st, that the respective

payments were made by the plaintiff as a gift to his son-in-law, and not as a loan; and, [156] 2ndly, that the Statute of Limitations was a bar to all except the £30. The learned Judge left it to the jury to say whether the transaction was a gift or a loan; and told them that, in his opinion, the statute barred all but the sum paid within the six years; but should they be of opinion that it was a loan, he would reserve leave to the plaintiff to move to increase the damages from £30 to £300, in case this Court should be of opinion that he was wrong in point of law. The jury found for the plaintiff, damages £30. In Easter Term, 1839, Chilton obtained a rule pursuant to the leave reserved.

In the action by the same plaintiff against John Humphreys, which was also an action of indebitatus assumpsit for money paid, and on an account stated, the pleas were the same as in the other action, viz. non assumpsit, and the Statute of Limitations. In this action, however, the plaintiff, by his particulars of demand, stated that he brought his action to recover £165, being the half of £300, which he was obliged to pay as principal and interest due on a promissory note for £330, dated the 27th of December, 1827, and made by the plaintiff and defendant and one Evan Humphreys, but signed by the plaintiff and the defendant as sureties for the said Evan Humphreys; and towards the payment of which said sum of £330, so paid by the plaintiff, the defendant, as such co-surety, was liable to contribute one moiety.

On the trial of this cause, at the same assizes, the facts of the case appeared to be the same as those detailed in the preceding case against Evan Humphreys, except that Evan Humphreys was himself called as a witness for the now defendant, and stated that the money was borrowed of Evans, of Alt-y-Cadno, at the plaintiff's request, for his daughter, and to enable the witness (her husband) to pay his father for the stock of the farm left at Coed. It was objected, on the part of the defendant, that there was no evidence to shew that the plaintiff signed the note as co-[157]-surety with the defendant, as stated in the particulars of demand, except the indorsement on the note that the money was originally advanced to Evan Humphreys, and that that indorsement was inadmissible for that purpose. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit, should the Court above be of a different opinion. The questions left by him to the jury were: 1st, Were the plaintiff and defendant co-sureties with Evan Humphreys, or was the plaintiff a principal? and, secondly, Was the money advanced by the plaintiff as a gift, or advanced on his credit by way of loan? and he told them that he thought the Statute of Limitations precluded the plaintiff from recovering more than £15, a moiety of the sum paid by him within the six years next before the commencement of the action. In answer to the first question, the jury said that they thought the plaintiff and defendant were co-sureties; and to the second, that the money was advanced as a loan only; and their verdict was accordingly taken for the plaintiff, damages £15; the learned Judge giving the plaintiff leave to increase the verdict, either to £30 or £150, if the Court above should be of opinion that he was entitled to recover either of those sums.

In Easter Term last, E. V. Williams, and Chilton, obtained cross rules, the former for a nonsuit, and the latter to increase the damages to £30 or £150.

In Trinity term, cause was shewn against the rule for a nonsuit by

Chilton and Evans, for the plaintiff. There was evidence to go to the jury that the plaintiff and the defendant John Humphreys were co-sureties. The indorsement, which was put in and was not objected to, was evidence of the fact therein stated, that is to say, of "the £300 having been originally advanced to Mr. Evan Humphreys." It will be said on the other side, that [158] although that indorsement was evidence of the payment of the £280, yet it was not evidence to shew to whom the £300 was originally advanced: but the cases shew that where an entry of this sort is admissible at all, it is admissible for all purposes, to prove the facts stated in such entry: 1 Phillips on Evidence, last edit., 349. By this indorsement, the party acknowledges payment of the sum of £280, and says "it is Evan Humphreys to whom I lent the money;" that is a fact peculiarly within his knowledge, made by a person having no interest to misrepresent, and being a declaration against his interest, is therefore admissible in evidence after his death. If he had given time to Evan Humphreys after that, he would have lost his remedy against the two others. In *Gleadow v. Atkin* (1 Cr. & M. 410), it was held that an indorsement upon a bond in the handwriting of the obligee, which appeared to have been made at or about the time when the bond

was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for a third person, was admissible in evidence to connect the payments of interest with the bond, the bond being upwards of twenty years old, but the payments having been made within twenty years by the obligor to the third person. So, in *Higham v. Ridgway* (10 East, 120), it was held that an entry made by an accoucheur in his book, of his having delivered a woman of a child on a certain day, the charge for which was marked "paid," was admissible evidence of the birth of the child on that day, on the trial of an issue as to his age, at the time of his afterwards suffering a recovery. These decisions are on the principle, that the entry being against the interest of the writer in one respect, it stamps the whole with validity. If this were not so, the entry in the case of *Higham v. Ridgway* would have been merely proof of the money hav-[159]-ing been paid; but it was held admissible to prove the age of the child. It was there a perfect matter of indifference to the accoucheur on what day the child was born. The mere fact of payment was not the object of the inquiry. [Alderson, B. It appears once to have been doubted, whether the entry must not have been made by a person who, if alive, could have been examined as a witness at the trial.] That does not appear to have been necessary, from what is said by Bayley, B., in *Gleadow v. Atkin*, as to the note he had made of *Roe v. Rawlings* (7 East, 279), and *Higham v. Ridgway*. He says—"My entry of the case of *Roe v. Rawlings*, in my own note-book, was, that the declaration of a person who has peculiarly the means of knowing a fact, and has no interest in mistaking it, is admissible after his death to prove that fact, and a fortiori it would be admissible if the fact were against his interest." And after stating his entry of the case of *Higham v. Ridgway*, he adds, "There is not one single syllable in that entry as to the qualification that he could be examined in his lifetime." It appears, indeed, to have been doubted whether the ingredient of the entry being against the interest of the party making it, was necessary in order to render it admissible. In *Phill. on Evidence*, 8th edit., 308, it is said, "in some cases the Courts appear to have considered declarations to be admissible, without proof that the party making them had any actually existing interest which could be lessened or endangered;" and *Barker v. Ray* (2 Russ. 67, n.) is referred to, where the cases are collected. In *Doe v. Robson* (15 East, 32), entries of charges made by an attorney in his books, shewing the time when a lease prepared for a client of his was executed, which charges were shewn to have been paid, were held to be evidence, after the attorney's death, that the lease was prepared subsequently to the time it bore date. Lord Ellenborough puts it upon the [160] ground of there being "a total absence of interest in the party making the entries to pervert the fact, and, at the same time, a competency to know it."

E. V. Williams, and *Nicholl*, contra. Although the indorsement on the note was good evidence of the payment of the £280, it was not evidence to shew for whom the money was originally advanced. Where an entry naturally states that which is necessary and germane to the purpose for which the entry is made, by a party charging himself with the receipt of money, the whole may be admissible in evidence; but this is not so. It is the statement of an entirely independent matter, not at all connected with the other fact before stated, namely, the payment of the £280. This, in several respects, does not come within the rules as to the admissibility of entries of this nature. The lender has not necessarily any peculiar means of knowledge for whom the money was advanced, though the borrower has. Neither was it necessarily against his interest, as he might have thought Evan Humphreys was a more substantial and responsible person. [Maule, B. He had a right to treat them all as principals, but he chooses to say, I have that right against one only.] At all events, it is not clear that it was against his interest, and, if so, it is not admissible: *Chambers v. Bernasconi* (1 Cr. & J. 451). In that case a sheriff's officer sent a written memorandum to the sheriff's office, stating that he had arrested A. B. at a certain place, which return was filed at the sheriff's office, and, the officer being dead, was received in evidence to prove the place of the arrest, in an action between A. B. and a third party; but this Court granted a new trial, intimating a strong opinion that such return was not evidence of the place of the arrest. Bayley, J., there says, "The principle acted upon in the cases of *Doe v. Robson*, [161] *Higham v. Ridgway*, and *Middleton v. Melton* (10 B. & C. 317), was, that it was against the interest of the party to make the statement at the time of making it." The cause was afterwards tried again, when Lord Lyndhurst refused to receive the evidence, and a writ of error

having been brought on a bill of exceptions, it was decided by the Court of Exchequer Chamber (1 C. M. & R. 347), that the memorandum was not admissible to prove the place of arrest, on the ground that, "whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." In the case of *Rudl v. Wright* (1 Phill. on Evidence, 8th edit. 328), it was said by Lord Lyndhurst (id. 368), "That it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received." That applies to the present case; for the statement of the party as to whom the £300 was originally advanced, is totally collateral and independent of the former part of the entry, and has no connexion with the statement of the payment of the £280, and is in no respect a necessary part of such entry. It therefore was not evidence of the fact so stated.

Cur. adv. vult.

In the Vacation Sittings after Trinity Term, cause was shewn against the rule to increase the damages in both actions, by

E. V. Williams and Nicholl, for the defendant. The [162] plaintiff is not entitled to recover any money which has not been advanced by him within six years previous to the commencement of the action. First, as to the action against the co-surety. As soon as a co-surety is compelled to pay any part of the debt, an action on an implied assumpsit arises to him, to recover from his co-surety contribution to the amount of one-half of the money he has so been compelled to pay; and if that right be not enforced within six years, it will be barred by the Statute of Limitations. The case of *Craythorne v. Swinburne* (14 Ves. 164) is a leading authority on the subject of contribution. There Lord Eldon says, "It has been long settled, that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution; and I think that right is properly enough stated, as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons; and it must be upon such a ground of implied assumpsit, that in modern times Courts of law have assumed a jurisdiction upon this subject, a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous, especially since it has been held, that separate actions may be brought against the different sureties for their respective quotas and proportions:" referring to *Cowell v. Edwards* (2 Bos. & Pull. 268), where it was so held by the Court of Common Pleas, of which Lord Eldon was at the time Chief Justice. The same point had also been determined in *Deering v. The Earl of Winchelsea* (id. 270), which was cited in *Cowell v. Edwards*. [163] Perhaps *Slade's case* (4 Rep. 94 b.) may be cited, to shew that an action of debt cannot be maintained on a contract to pay money by instalments on different days, before the last day has expired—which was confirmed by *Rudler v. Price* (2 Saund. 337); but that only applies to an action of debt, and the case of *Cooke v. Whorwood* (1 H. Bl. 547) shews that that doctrine does not extend to an action of assumpsit. As soon as the co-surety pays any part of the debt, an implied assumpsit arises, and the co-surety may bring his action to recover a moiety of the sum so paid. [Parke, B. Do you say that a co-surety could sue before he has paid more than his own moiety?] Yes; the proposition of Lord Eldon in *Craythorne v. Swinburne* is, that if the creditor calls upon either of them to pay the principal debt, or any part of it, the surety has a right to call upon his co-surety for contribution. He enters into a contract to pay his moiety of any sum that the other shall be called upon to pay, and if he does not do so he breaks his contract. The principle is not that the surety is to wait until he has paid the whole, or at least more than his own moiety, but that he may sue as soon as he pays anything. Suppose a co-surety to pay all but a small fraction, and become bankrupt, or die insolvent; could not his assignees or executors bring an action for the recovery of a contribution in respect of what he had paid before his bankruptcy or death? Secondly, with respect to the action against the principal, it is perfectly clear that as soon as the surety pays any part of the debt, a right of action upon an implied assumpsit arises to him, to recover the amount he has been so called upon to pay. As

soon as the plaintiff paid any money on account of the principal, a cause of action arose. Then, if so, the Statute of Limitations is a bar to all that was paid beyond the six years. *Rothery v. Munnings* (1 B. & Ad. 15) was also cited to shew that the payments within the six years did not take the rest out of the statute.

[164] *Chilton and Evans, contra*. The observations of Lord Eldon, which have been cited, are only a dictum, not applicable to any difficulty in the case then before him; nor, in using the expression "any part of the debt," did he contemplate the case where less than one half had been paid by the co-surety. The plaintiff had no right to bring an action until the whole amount was paid, and at all events he was not bound to do so. The right of action in respect of each payment is kept alive as long as the instrument or security, in respect of which it is paid, is kept alive. As long as the note itself is kept alive, the various liabilities that arise upon it are kept alive also. It is admitted on the other side that an action of debt could not be maintained until the whole sum were paid, and there is no reason why a different rule should prevail in assumpsit. A Court of law must look at the true meaning and intention of the contract, and it can never be assumed, that the surety intended to make himself liable to an action on the payment of every £5 towards satisfaction of the debt. The plaintiff was not bound to bring his action until he had paid the whole amount, and was enabled to produce the security given for it. The payment by the surety must be taken to have been by compulsion of law, and he was not by law compellable to pay less than the whole amount, as no action could be maintained on the note for less than the full amount. The Statute of Limitations was therefore no bar, and the plaintiff was entitled to recover to the full amount in the one action, and a moiety in the other. With respect to the £30, which was paid within the six years, the whole of that was clearly paid for the co-surety, as the plaintiff had paid much more than his share before.

In Michaelmas Term the judgment of the Court was delivered by—

PARKE, B. In these cases actions were brought by the plaintiff, one of the makers of a joint and several promis-[165]-sory note, dated the 27th of December, 1827, for the sum of £300, with interest, to recover from the two other makers, Evan Humphreys and John Humphreys, a part of the money paid by him to the payee, he having paid the whole. In the action against Evan Humphreys, the plaintiff claimed the whole, alleging that the defendant was the principal debtor. Against the defendant John Humphreys, he claimed a moiety of what he had paid, alleging that the defendant was a co-surety. There were two pleas,—non assumpsit, and the Statute of Limitations; and on the trial at the Spring Assizes, before my Brother Coleridge, it appeared that the plaintiff had paid the whole of the debt and interest, of which the sum of £30 only was paid within six years before the commencement of the suit, the residue having been discharged before. For this sum the plaintiff recovered against Evan Humphreys, leave being reserved by the learned Judge to move to increase the amount to the whole sum paid; against John Humphreys, the plaintiff recovered a moiety of £30, and permission was also given to move to increase that verdict.

In the latter action, an objection was taken on the trial, that the plaintiff was confined by the particulars of his demand, to a claim against the defendant as co-surety, and that on the evidence there was no proof of his being a co-surety. To obviate this objection the plaintiff relied on a receipt, indorsed on the back of the note by the payee (since deceased), acknowledging the payment by the plaintiff of £280, on account of the £300, "the £300 having originally been advanced to Evan Humphreys."

It was objected, that this receipt was inadmissible for the purpose of shewing that the money was so advanced; but the learned Judge received it, reserving liberty to move to enter a nonsuit. Rules were granted on both sides. These several points were discussed at the sittings after last term, before my Brothers Alderson, Gurney, Maule, and myself, and time was taken by the Court to consider them. It will be most convenient first to dispose [166] of the last question. That the receipt was evidence of the fact of the payment which it admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to shew that the £300 was advanced to Evan Humphreys: and certainly if this point were now, for the first time, to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which

it had been made, and that it would have the same effect only that proof by parol of like payment would have had. In the case of steward's books, the receipts of money, as rent, would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit, and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it; as in the case of *Higham v. Ridgway* (10 East, 109), where the memorandum of the payment of the midwife's charge for attending a birth was held to be evidence of the date of the birth; and *Doe v. Robson* (15 East, 32), where the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn, which the proof by an eye-witness of the same payment, on account of such charges, would not have been; and there are other cases to the same effect. Without overruling these cases, (and we do not feel ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that £280 was paid by the plaintiff to the payee, as for a debt due from Evan Humphreys as principal, but also of the fact that the debt was due from Evan [167] Humphreys to him. The effect of the evidence was for the jury, to whom the question was properly left on this and parol testimony in the cause, whether he was the principal debtor or not; and no fault is found with their verdict. The rule, therefore, for a nonsuit must be discharged. On the other hand, the rule for increasing the amount of the verdict against Evan Humphreys, the principal, must also be discharged; for it is clear that each sum the plaintiff, the surety, paid, was paid in case of the principal, and ought to have been paid in the first instance by him, and that the plaintiff had a right of action against him the instant he paid it, for so much money paid to his use. However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement. The consequence is, that the plaintiff's right of action against the principal must be limited to the full amount of all the payments within six years, and this being the amount for which the verdict was taken, the rule to enter a verdict for a larger sum must be discharged. Against the co-surety the case is different—the Court will give it further consideration.

And now, in this term, the judgment of the Court, on the remaining point in the action against John Humphreys, the surety, was delivered by

PARKE, B. This was an action by the plaintiff against the defendant, his co-surety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the Sittings after Trinity term. In the course of the last term, [168] the Court disposed of the rule in the latter action, and one of the questions in this; having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Concell v. Edwards* (2 B. & P. 269), and *Craythorne v. Swinburne* (14 Ves. 161); though Lord Eldon has, and not without reason, intimated some regret that the Courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favour of the second of these propositions. Lord Eldon, in the case of *Ex parte Gifford* (6 Ves. 805), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay; and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to

us to be very reasonable: for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who [169] might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that Courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what [170] the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

Rules accordingly.

WILLIAMS AND ANOTHER, Assignees of William Bevan, a Bankrupt v. WILLIAMS.

Exch. of Pleas. 1840.—In an action brought by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt, who has not obtained his certificate, (but has released his assignees), is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy.

[S. C. 8 Dowl. P. C. 220; 9 L. J. Ex. 96; 4 Jur. 223.]

Assumpsit for money had and received by the defendant to the use of the plaintiffs, as assignees, since the bankruptcy. Plea, non assumpsit.

The cause was tried before the under-sheriff of Brecon, when it appeared that the action was brought to recover a sum of money which had been paid by the bankrupt to the defendant subsequently to the bankruptcy, for certain malt supplied to him before the bankruptcy. In order to prove the payment of the money to the defendant, the plaintiff called the bankrupt's wife, (the bankrupt having released his assignees), but it was objected that, as the bankrupt himself had not obtained his certificate, she was an incompetent witness. The under-sheriff, however, received the evidence, and the plaintiffs obtained a verdict. E. V. Williams having obtained a rule to shew cause why there should not be a new trial, on the ground of the incompetency of the witness,

Chilton now shewed cause. It is not intended to impeach the general rule, that the bankrupt, before he has obtained his certificate, is not a competent witness to increase his estate: but where he stands indifferent between the parties, or the interest preponderates against him, he is competent. Here there was a release, and [171] therefore he had no interest in the fund sought to be recovered. [Parke, B. You say he has no interest in the fund because he has released it, but has he not an interest that his debts should be paid?] Certainly, if the assignees recover, his estate would be increased pro tanto; but at the same time the defendant would become

a creditor against the bankrupt's estate to the whole amount. Nay, he might elect to proceed personally against the bankrupt, who is not certificated; so that in fact the interest of the bankrupt is to support the payment in his own discharge, rather than to defeat it, which exposes him to an action at the suit of the defendant. In *Jourdaine v. Lefevre* (1 Esp. 67), which was trover for a promissory note, Lord Kenyon was of opinion that the wife of a bankrupt was a competent witness to prove that the note had been paid to the defendants in contemplation of bankruptcy, and it was put upon that ground, that the defendants would be creditors against the bankrupt's estate to the amount of the note. It certainly does not appear in that case whether there was a certificate or not; but probably there was none, as otherwise it would have been adverted to. Undoubtedly the soundness of that rule has been questioned in the books on Evidence (2 Phill. 7th ed. 355, 356; 2 Stark. 134), but that was not on the ground of there being no certificate: and the decision does not appear to have been appealed against by any motion for a new trial. The case of *Reed v. James* (1 Stark. N. P. C. 134) is quite analogous. That was an action by the assignees of a bankrupt against a judgment-creditor who had taken the goods of the bankrupt in execution; and it was held that the bankrupt was competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution. It appears that that case was afterwards moved in the Court above, and a rule nisi for a new trial granted, but not on the ground of the admission of the bankrupt's evidence, which [172] was not even questioned. It could only have been received on the ground that he stood indifferent. The evidence of the bankrupt's wife was, therefore, properly received.

E. V. Williams, in support of the rule. It is a well established rule that a bankrupt is not a competent witness, in an action by his assignees, to increase his estate, unless he has released to his assignees his share in the surplus and dividends, and also obtained his certificate. Here the general result of the action, if the plaintiffs succeeded, would be to increase his estate; for if they did not succeed, the estate would be so much less, not only by the loss of the amount sought to be recovered, but by the costs of the action, and the future effects of the bankrupt would, in consequence, be subject to a greater liability. In *Kennet v. Greenwollers* (Peake's N. P. C. 3), it was held by Lord Kenyon, that a bankrupt who had not paid 15s. in the pound under a second commission, could not be a witness for the assignees under that commission, although he had obtained his certificate and released his allowance and surplus. [Parke, B. It is not a necessary consequence that the assignees would be allowed the costs out of the estate by the commissioners. *Prima facie* they must pay them out of their own pockets.] Still, the immediate result, if the plaintiffs recovered, would be to increase his estate, and to discharge his future effects pro tanto. The nature of the proposed evidence cannot be gone into, as the objection arises on the *voir dire*, and as soon as it was found that the witness was the wife of the bankrupt, she ought to have been rejected as incompetent.

PARKE, B. On the whole I am of opinion that the witness was incompetent, and that this rule ought to be made absolute. In the first place, it is said that the witness is incompetent, inasmuch as, being the wife of the bankrupt, [173] she has a beneficial interest in the result of the suit, because, if the plaintiffs fail, the costs incurred in the action would be paid out of the estate, and so diminish the general fund, and become a charge on the estate. But that does not appear to me to constitute in law such an interest as to render the witness incompetent, because it is not a certain necessary legal consequence, in the event of the assignees failing in the action, that they should be able to obtain payment of the costs out of the estate. That will depend on the judgment of the commissioners, whose duty it is to settle the accounts between them and the creditors, and to say whether those costs ought or ought not to be allowed to the assignees as a fair expenditure-legitimately incurred by them. The main ground of objection, however, is, that the bankrupt (and consequently his wife), has an interest in the assignees recovering the amount claimed, and that there not being yet a definite surplus, it is not a releasible interest. As the bankrupt has not yet obtained his certificate, it is obvious that a recovery of the money claimed in this case would increase the fund for the payment of his debts, in which fund he consequently has an interest; so that, unless there be some countervailing interest the other way, this witness is incompetent. But then it is said there is such a countervailing interest, and so I thought at first; for, if the assignees recover the amount

claimed, the defendant, being a creditor of the bankrupt, could sue the bankrupt for it, who, not having his certificate, could not make his bankruptcy a defence to the action. But on consideration, that does not appear to be a result arising from the present action, for a verdict given here for the plaintiff could not be used in an action by the creditor against the bankrupt: it would be *res inter alios acta*, and not receivable in evidence at all. The liability of the witness is not the result of the present action, nor is it forwarded by the success of the plaintiffs in obtaining a verdict in it. If this money belonged to the assignees, no doubt the creditor might sue the bankrupt for the amount, and it would be no answer for the latter to say he had already paid him, for the reply would be, that the money which he so paid was the money of the assignees. The case differs from that of a suit to recover money paid by way of fraudulent preference, inasmuch as there, some act to disaffirm the transaction must be done by the assignees, until which the money would not belong to them. It is not, however, necessary to pronounce any opinion on that point. As this witness, therefore, does not stand indifferent between the parties, but has an interest in assisting the assignees to recover this money, the rule must be made absolute.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

DAND v. KINGSCOTE. Exch. of Pleas. 1840.—By a deed, dated in 1630, the grantor conveyed in fee farm, land in the manor of A., in the county of Northumberland, “excepting and reserved out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits:” with a covenant by the grantees that they, their heirs and assigns, “should give such accustomed recompense for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases.”—By another deed of the same date, the same parties conveyed in fee farm, to other persons, lands in the manor of H. (adjoining A.) with a like exception, reservation, and covenant.—Quære, whether under this reservation of a “sufficient wayleave,” the coal-owner had now a right to make a railway, for the purpose of carrying the coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the owner of the soil.—Held, however, that the right was not confined to such ways as were in use at the time of the grant.—Held, also, that under the reservation of liberty of sinking pits, the right of erecting a steam-engine, and other machinery necessary for draining them, with all proper accessaries, passed as incident thereto.—Held, also, that under the reservation in the former deed, the coal-owner could not carry over A. coals got in H., although from part of the same mineral field.—To an action of trespass for breaking the plaintiff’s close, and laying a railroad thereon, the defendant justified under the reservation in the above deeds. The plaintiff new assigned to the plea, that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default:—Held, that, on these pleadings, the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner authorized by the reservation.

[S. C. 2 Railw. Cas. 27; 9 L. J. Ex. 279. Distinguished, *Bidder v. North Staffordshire Railway*, 1878, 4 Q. B. D. 412. Discussed, *Newcomen v. Coulson*, 1877, 5 Ch. D. 138: affirmed, 5 Ch. D. 145; *Finch v. Great Western Railway*, 1879, 5 Ex. D. 262; *Earl of Antrim v. Dobbs*, 1891, 30 L. R. Ir. 424. Explained, *Ingham v. Maskey*, [1898] 1 Ir. R. 272. Referred to, *Hamilton v. Graham*, 1871, L. R. 2 H. L. Sc. 173.]

This was an action of trespass. The declaration contained two counts. The first count charged the defendant [175] with breaking and entering a close called Cuddy’s Close, in the township of Amble, in the county of Northumberland, and four other closes, called Kirton’s Moor, Frontfield, Clark’s North Moor, and Creswell’s Moor,

in the township of Hauxley, in that county, and with making and continuing excavations and embankments, and laying a railroad thereon, and with committing other the trespasses, on foot and with horses, carts, and carriages, therein enumerated. The second count charged the defendant with breaking and entering a close called Clark's South Moor, in the township of Hauxley, in that county, and with committing similar trespasses as are enumerated in the first count, and also with making in the last-mentioned close pits and ponds, and with erecting houses, cottages, and engines, &c.

The defendant pleaded, to the trespasses in the first count, with cattle other than with horses, mares, and geldings; and as to the second count, except as to one pit, one shaft, one engine-house, and one edifice, not guilty; to which the plaintiff entered a *nolle prosequi*.

Thirdly,^(a) the defendant pleaded to the trespasses in Cuddy's Close in Amble, that Sir W. Hewytt and Thomas Hewytt, being seised of Cuddy's Close, and other lands in Amble, and of all the veins and seams of coal under all the lands in the township of Amble, on the 23rd of November, 1630, by bargain and sale enrolled, granted to Henry Lawson and Henry Horsley, Cuddy's Close and other lands in Amble, in fee, excepting and always reserved thereout all mines of coal within the said close, and also other the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, together with liberty of sinking and digging of pit and pits, for the winning of coal in Amble afore[176]-said. The defendant then deduced a title to the coals, with the reserved liberty, from Sir William Hewytt and Thomas Hewytt to the Dowager Countess of Newburgh, and then, as her servant, justified the trespasses in Cuddy's Close, for the purpose of carrying away coals got in Amble. The plaintiff, by his replication, after admitting the seisin, deeds of bargain and sale, and title as deduced, replied *de injuriâ absque residuo causæ*, upon which issue was joined.

Fourthly, the defendant pleaded to all the trespasses in all the closes in Hauxley, that is to say, all the closes in the declaration except Cuddy's Close, that Sir William Hewytt and Thomas Hewytt, being seised in fee of those closes, and other closes and lands in Hauxley, and of all the coals under all the lands in the township of Hauxley, by indenture of bargain and sale enrolled, dated 23rd of November, 1630, conveyed to Richard Brown and Thomas Palfrey in fee, those closes and other lands in Hauxley, excepting always and reserved thereout all mines of coal within the same closes, and all other the lands and territories of Hauxley aforesaid, with sufficient wayleave and stayleave to and from the said mines; together with liberty of sinking and digging pit and pits for the winning of coal in Hauxley aforesaid. The defendant then deduced the same title from Sir William Hewytt and Thomas Hewytt to the Countess of Newburgh, and justified sinking a pit and getting coals in Clark's South Moor, and making railroads, &c., for the conveyance of these coals got in Hauxley. The plaintiff did not traverse this plea, but new assigned, as to the trespasses in the 2nd, 3rd, and 4th pleas, that the defendant committed these trespasses on other and different occasions, and for other and different purposes than those mentioned, and to a greater extent than was necessary, and in other parts of the closes. The defendant pleaded to the new assignment, that the closes in the declaration were in and parcel of the manor of Amble, [177] and that the late Earl of Newburgh was seised in fee of the manor, and veins and seams of coal, with liberty for himself and his heirs, seised of the manor, and the veins and seams of coal, of getting coals, and making pits in the lands of other persons, and making convenient and sufficient roads for carrying them away. The plea then stated a devise thereof to the Countess of Newburgh for life, and the defendant then justified, as her servant, in getting the coals and in carrying them away, under that liberty. The plaintiff, by his replication to this plea, traversed the seisin of the manor, and coals, and liberty, as alleged, whereupon issue was joined; and also new assigned that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which last new assignment the defendant allowed judgment to pass by default. A copy of the pleadings accompanies this case, and to which each party is at liberty to refer on the argument, and also to the several deeds and other documents of title set forth in the pleadings. The cause came on for trial at the Northumberland

(a) The second plea, which set up a custom of the manor of Amble, became immaterial.

Summer Assizes, 1838, before Mr. Baron Alderson, when the 2nd plea to the declaration, and the plea to the first new assignment were abandoned by the defendant, and a verdict was taken by consent for the plaintiff, the damages to be assessed by an arbitrator according to the judgment of the Court, subject to the opinion of the Court on the following case:—

The plaintiff, before and at the time of the trespass, was and is seised in fee, amongst other lands, of the closes mentioned in the declaration. The closes called Kirton's Moor, Frontfield, Clark's North Moor, Creswell's Moor, and Clark's South Moor, are in the township of Hauxley, and the other close, called Cuddy's Close, is in the township of Amble, in the county of Northumberland.

Whilst the plaintiff was in the occupation of the afore-[178]-said closes, about the month of January, 1837, the defendant sunk a pit in the close called Clark's South Moor, to get coals thereout, and erected upon the same close a building of stone, containing a steam-engine of fifty-horse power, for the purpose of drawing off the water, and raising the coal to the surface. The defendant also made a large pond, five feet in depth and 158 feet in circumference, for supplying the engine with water, and erected sheds and other works upon the same close. The shaft, engine, pond, and sheds, occupy altogether about two acres and a half of the land of Clark's South Moor. In the summer of 1839, the defendant caused a railway to be made from the pit in Clark's South Moor, for the transit of coal from that pit, which railway passed over that close, then across a public highway, then across Clark's North Moor, then across Kirton's Moor, then across Frontfield, all in the township of Hauxley; then across Cuddy's Close, in the township of Amble, and then for about half a mile over the lands of other persons in the same township, to a piece of land belonging to the Countess of Newburgh, adjoining the Coquet, and likewise in the township of Amble. The defendant has constructed a staith for the purpose of loading the coals brought along the railway from the pit, on board of vessels in the river Coquet, which is there a navigable river, at the distance of about 500 yards from the mouth, where it empties itself into the German Ocean. The pit in Hauxley is a quarter of a mile from the nearest boundary of Amble. The coal-seams lying in the latter township can be conveniently won by outstroke from the Hauxley pit, and be raised to the surface by means of the shaft in Hauxley, the shaft being sunk so as to win from it the coals from both townships. There is an extensive field of coal within these townships, of which the seams dip to the east, and reach to the sea and the river Coquet.

The railway was completed about the month of October, [179] 1837; it is made of iron, fastened upon stone pillars or sleepers, which are sunk into the soil; it is of the breadth of eight feet, and severed from the remainder of the close by wooden rails on both sides of it. These wooden rails are necessary for the protection of the railway, and to prevent cattle from straying upon it. The entire space of ground between the wooden rails averages in breadth thirty-five feet. In making the railway, the defendant has cut the soil, and made embankments and dug ditches on each side of the railway, and broken down hedges separating the several closes from each other; and the defendant, by the wooden rails to fence the railroad, and by the cuttings and embankments, has severed one part of each field from the other. The defendant also made embankments and cuttings in Clark's South Moor, and in Creswell's Moor, for another railway to the south-west of the pit opened in Clark's South Moor, which railway was afterwards abandoned.

The engine erected by the defendant is necessary for winning and working the lower seams, which are the principal seams in his coal field: and in erecting the steam-engine, and in other works of the colliery, he has expended about £30,000, for which expenditure there can be no adequate return, unless by the profits from an export trade. There is a highway leading from Hauxley to Amble, which is crossed by the railway between Clark's South Moor and Clark's North Moor, and after the railway passes out of the plaintiff's closes, but before it reaches the staith, it crosses another highway: but the expense of conveying coals to the place of shipment along either of these highways would be such as to preclude the defendant from exporting without loss. The place of shipment on the river Coquet is well chosen, and the railway connecting it with the pit has been judiciously designed and constructed; no unnecessary ground has been taken, nor injury been done, either in making the railway or erecting the engine, and forming [180] the pond and other works connected with the colliery, and the defendant has been always ready to make compensation to the

plaintiff for the damages occasioned by the acts complained of. Railways, such as the defendant has laid down, are now in universal use through the counties of Northumberland and Durham, in the case of collieries. Since the completion of the railway, and before this action was commenced, coals have been carried along it to a great extent, from the pit in Clark's South Moor to the place of shipment in Amble. These coals have been exclusively the produce of the seams in Hauxley, but have passed by the railway, as well over the plaintiff's close in Amble, called Cuddy's Close, as over his Hauxley closes, and large quantities of stone and wood for the purpose of the colliery have also been carried along it across the same closes.

The deeds, of which the following abstract is set forth, are to form part of the case. [The case then set forth an abstract of the following deeds:]

8th March, 1629.—Indenture between Edward Ditchfield and others, of the one part, and Sir William Hewytt and Thomas Hewytt, Esq., (his son and heir apparent) of the other part, being a conveyance, by appointment of the corporation of London, of the town of Amble, with its appurtenances, in the county of Northumberland, together with (inter alia) all those mines of coal there, with the appurtenances; and also of the town of Hauxley with its appurtenances, &c., &c.: habendum to Sir W. Hewytt and Thomas Hewytt, and the heirs and assigns of Sir William Hewytt for ever, to be held of the crown, as of the manor of Earl Greenwich, by fealty, in free and common socage.

23rd November, 1630.—Bargain and sale enrolled, between Sir William Hewytt and Thomas Hewytt, of the one part, and Henry Lawson and Henry Horsley of the other part (the indenture referred to in the third plea); [181] being a conveyance to Lawson and Horsley, of lands and tenements in Amble, parcel of the premises comprised in the foregoing deed; "excepting always and reserved out of this present grant, all mines of coals within the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits:"—habendum to Lawson and Horsley, their heirs and assigns, in fee farm, to hold of the Crown as before mentioned, at certain rents therein stated. This deed also contained a covenant from Sir William Hewytt, that he, his heirs, and assigns, should give and yield to Lawson and Horsley, their heirs and assigns, such accustomed recompense for digging and breaking the ground within the fields and territories of Amble aforesaid, in which any pit or pits for getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases.

Same date.—Bargain and sale enrolled, between Sir W. Hewytt and Thomas Hewytt of the one part, and Richard Brown and Thomas Palfrey of the other part, (the indenture referred to in the fourth plea), being a conveyance to Brown and Palfrey of lands and tenements in Hauxley, parcel of the premises comprised in the deed of the 8th of March, 1629, in the same terms, and containing the same reservation and covenant, as the conveyance to Lawson and Horsley.

1st April, 1785.—Lease from Lord Montague and Sir Herbert Mackworth, lords of the manor of Amble, to John Widdington, (through whom the plaintiff claims the closes in the declaration mentioned), Edward Cook, and William Smith, of all the coal mines and seams of coal belonging to the lessors, lying within and under the lands belonging to the lessees and other persons named, within the townships of Amble and Hauxley, in the parish of Wirkworth and manor of Amble, for nine years from the [182] 1st of May, 1785, at an annual rent of 21l. 5s., on condition that they should not try for, dig, sink, win, or work the said mines or seams of coal, or in any manner impair or diminish the same: there was also a covenant by the lessees to the same effect.

The rent reserved by the said last-mentioned lease was regularly paid.

The defendant did all the acts above alleged to be done by him, claiming to do them under and by virtue of an agreement between Lady Newburgh and the defendant, and Mr. Thomas Brown, by which Lady Newburgh agreed to grant to the defendant and Brown a lease for a term of years of the coal-mines and seams of coal in Amble and Hauxley, with the right to dig pits, and wayleave and stayleave, and all other rights incident and appurtenant thereto.

The term stayleave, according to the custom and understanding of miners and other persons conversant with coal-mines, means a right in the coal-owner of having a station, where he may deposit his coals for the purpose of dispensing them to the

purchaser. This place of deposit and vend is either at the pit-mouth, or, when detached, it is, in the case of land sale collieries, at some station by a highway, and, in the case of sea sale collieries, at a staith, trunk, or spout in some navigable water. Wayleave is the privilege of crossing land for the supply of coals to the purchaser. This privilege is generally the subject of detailed contracts, specifying the particular direction and extent of the wayleave, and there is no usage or understanding amongst persons conversant with coal-mines, by which to interpret the extent of the privilege, when conferred in the general terms used in the deeds above set forth. The narrowest enjoyment of a wayleave is where the sale is at the pit's mouth, and the purchasers cross to the pit with their carts from the highway. Where the sale is at a detached station, the grantee of a wayleave generally [183] sends coal to the station by means of a railway; in the case of sea sale collieries this is universally the mode of transit, and the railway is laid down in the most direct and commodious course from the pit to the place of shipment, for which the coal-owner can obtain leave from the land-owners, without regard to the intervention of highways.

Coals have formerly been wrought for land sale in Amble and Hauxley, and for the supply of salt-pans established there, and there are old shafts within those townships; but there was never any railway connected with these workings, neither had any steam-engine been erected in these townships for colliery purposes, before that of the defendant. Railways were not in use in 1630; but unless there was a steam-engine to drain the pit and raise the coal, and a railway and staith to ship the coals by the lower seams, the defendant's coal-field could not be worked without loss, as has been before stated.

The plaintiff contends, that, on the above facts, he is entitled to a verdict upon the several issues raised in the cause. If the Court should be of that opinion, the verdict is to be entered accordingly, otherwise to be entered as the Court may direct. The defendant, under the above circumstances, contends, that he is justified by the exception or reservation in the before-mentioned indentures, or some of them, in making the railway over the several closes, and in doing the other acts in working the coals in Clark's South Moor. The plaintiff contends, that the reservations or exceptions in these deeds give sufficient wayleave to the nearest highway, in the direction the coals are to be taken from the pit, for the conveyance of the coals, and no further; and that the defendant had no right to make this railway or any road over the highway above mentioned, through the lands of the plaintiff and the other persons; and that the defendant had no right under the deeds, to carry the coals raised in Hauxley over Cuddy's [184] close in Amble, or to make a railroad over that close for such a purpose. Moreover, the plaintiff contends, that the defendant had no right to make embankments, or cuts, or sever the fields as stated, or to lay a permanent railway as done by the defendant; and that the defendant had no right to erect a steam-engine and engine-house, or make the pond, or the other erections in question.

The question for the opinion of the Court is, whether the defendant, to any and what extent, has, under the circumstances above mentioned, exceeded his power and liberty: and the damages, if any, are to be assessed by the arbitrator according to the opinion of the Court, and the verdict and judgment are to be entered up in pursuance thereof.

The case was argued in this term by

W. H. Watson for the plaintiff. The main question in this case is, whether, under an ordinary reservation of "a wayleave and stayleave" for the carriage of coal from a mine, a right to cut and lay down a railway is included; that being a species of way which was not in use at the period of the reservation. The recent case of *Doe d. Wawn v. Horn* (3 M. & W. 340; 5 M. & W. 564) is an authority to shew that the making of a railway across land is an absolute ouster of the occupier of the land. So, where under a lease of wayleave for the purpose of carrying coals, with the liberty of laying waggon-ways over certain lands, the lessee made waggon-ways and inclosed them, so as to exclude all other persons, it was held, that he was ratable to the poor for the ground so inclosed, as having the exclusive occupation of it. *Rex v. Bell* (7 T. R. 598). Here there is an absolute ouster of the plaintiff from his rights over the surface, instead of the mere user of an easement, consistently with his enjoyment of the surface. In *Vin. Abr., Chimin Private (D.)*, 2, it is said—"If [185] a way which a man has becomes not passable, or becomes very bad by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he which has the way

cannot dig the ground to let out the water, for he has no interest in the soil: "citing *Dike and Dunston's case* (Godb. 52, pl. 65). *Lord Darcy v. Askwith* (Hob. 234) was an action by the assignee of the reversion against a lessee for years, under a lease containing, among the general words, "hoscis, hoscorum venditionibus, magnis arboribus, mineris carbonum," &c., for waste in felling oaks. The defendants pleaded that they felled those trees for the making of certain utensils in and about certain coal mines, parcel of the demise, and without which they could not dig and get the coals out of the pits, and that they bestowed the said trees accordingly; and upon demurrer, the Court held, "that the lessor did not, by implication of law, by leasing the coal mines, give power to fell the trees for the use of the mines, and that the rule of law, that the grant of a thing carried all things without which the thing granted could not be had, was to be understood of things incident and directly necessary." *Pit v. Lady Claverinith* (1 Barnard, 318) was a case more nearly applicable in its circumstances to the present. There, on the sale of a manor, the vendor, one Wray, reserved to himself and his heirs a convenient wayleave, such as he and his heirs should think proper, for the carriage of coals through a waste within the manor, from certain coal works of his to the river Tyne. An invention had been discovered about twenty years before, which at the time of the sale had come into frequent use in the north, of making waggon-ways for the more easy carriage of coals, which was done "by levelling ground from one place to another, and then laying planks into it, for making a more easy and short conveyance of them." The defendant, the lessee of some coal works under [186] the heirs of Wray, by virtue of the power in the reservation, made a waggon-way for her coals, upon which the plaintiff filed a bill against her. The Lord Chancellor made a decretal order referring it to the Barons of the Exchequer for their opinion, whether a waggon-way was within the reservation of a wayleave; and they ultimately gave their opinions that a waggon-way was not reserved. *Selby v. Adair* (A. D. 1818, not reported) was a decision directly in favour of the plaintiff. In that case the Vice-Chancellor held that a railway was not comprehended within the reservation of a wayleave, in a grant of the date of 1630. *Senhouse v. Christian* (1 T. R. 560), which may be referred to on the other side, is inapplicable to this case. There the party had granted to him "a free and convenient way, for carts, waggons, wains, and other carriages," over a slip of land therein mentioned, with full and free license to make and lay causeways, when and so often as there should be occasion, for the purpose of carrying (among other materials) coals; and it was held, that, under these words, he had a right to lay a "framed waggon-way." Ashhurst, J., there says: "Under the original grant, he has a right to make a framed waggon-way, which is necessary for the purpose of carrying his coals; it being in the contemplation of the parties at the time of making this grant." *Gerrard v. Cooke* (2 N. R. 109) proceeded upon the same principle, that the grantee was entitled to all privileges necessary to give such a road, as it was the intention of the parties that he should have. That principle is clearly inapplicable to the present case. A way of a description not known at the time of the grant could not possibly be in the contemplation of the parties to it. The clause for compensation makes it dependent upon the customary payments before made; but none had been before made in respect of a railway; how then can the clause now be made to apply [187] to such a case? [Lord Abinger, C. B. I do not see why, if the party has the right of way, he cannot lay down iron rails upon it.] He thereby precludes the owner of the land altogether from using the way, except with carriages of a peculiar construction; and the injury to the land is greater and more permanent. Further, it could not, at the time of this grant, have been expected that the grantor should afterwards purchase other land for the purpose of carrying away the coal. In Com. Dig. Chemin (D. 5), it is said:—"If a feoffor grants a way from D. to Blackacre, and the feoffee afterwards purchases lands adjoining to Blackacre, he cannot justify the using the way to those lands." *Howell v. King* (1 Mod. 190). *Harris v. Ryding* (5 M. & W. 60), is an authority to shew that, under a reservation of coal and other mines, with liberty of ingress, &c., to get the mines, all that the party has by law is a reasonable mode of getting the mines, not injuring thereby the rights of the owners of the surface. The defendants here, therefore, had no right to erect steam-engines and machinery, to make cuttings and embankments, and to exclude the owner of the soil from the ordinary occupation of it, in the exercise of a way, which is a mere easement over the surface. But this railway is clearly an excess of the powers given by the reservation, because, at all

events, the defendant is only entitled to carry it to the nearest highway, from whence he has the means of transporting the coals otherwise.

Addison, *contra*. First, a right to make railways for the carriage of the coals is given by this reservation, without reference to the intervention of highways. Secondly, the defendants had a right to carry the coals got in Hauxley over Amble, and vice versa. The defendant is therefore entitled to a verdict on the issue joined on the third plea, and on the new assignment the plaintiff is entitled only to nominal damages.

[188] It is said that the placing of the rails upon the way in question was an eviction of the plaintiff; and the case of *Rex v. Bell* is cited to shew that a railway is ratable, as being in the exclusive occupation of the proprietors. But it might as well be said the placing of pipes under the soil by a water company—which also are ratable—would be an eviction of the land-owner. *Doe d. Wawn v. Horn* does not apply: the declaration here says nothing about any expulsion or eviction of the plaintiff. The authority cited from Vin. Abr. applies to the digging of trenches to let off water, which, unless done in exercise of a right to repair, (which is clearly incident to a right of way), would not be within the grant; and it does not appear from the case that it was necessary to dig trenches in order to repair the way. In *Pit v. Lady Claverineth*, the Court could only look to the terms of the reservation itself, in which there was no mention of waggon-ways; and it does not very distinctly appear what were the terms of the deed, or the grounds of the judgment. As far, however, as it is relied upon for the plaintiff, it is inconsistent with *Senhouse v. Christian*. The case of *Selby v. Adair*, when carefully examined, is rather an authority to shew, that, under the grant of a wayleave, a waggon-way might be made. [He then entered into an elaborate examination of the pleadings and proceedings in that case, in order to establish this.]

The question in this case is, in truth, nothing but a question of construction, arising on the face of these deeds—viz., what appears from them to have been the intention of the parties when this reservation was made. The Court, in deciding that question, will look to all the surrounding circumstances, and construe them *secundum subjectam materiam*. Now the reservation here is, first, of very extensive mines; secondly, of a wayleave and stayleave, sufficient for all the purposes of the enjoyment of those mines. Whatever is necessary for the fair and reasonable enjoyment of the thing excepted, is reserved as [189] incident to the exception. Such is the general principle laid down in Sheppard's Touchstone (p. 89):—"When any thing is granted, all the means to effect it, and all the fruits and effects of it, are granted also, and shall pass inclusive together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*" [Parke, B. Under that rule things necessary only are granted: the case is not so strong in your favour as where the word sufficient or convenient is used.] The same principle is propounded in 1 Saund. 322 b., and 2 Rol. Abr. N., pl. 1, 2, 3. There are many cases illustrative of this general principle. Thus, in *Roberts v. Karr* (1 Taunt. 495), where A. granted to B. land of unequal width, described as abutting on a road on his own soil, which in the broadest part of it did abut on that road, but in the narrowest part was separated from it by a narrow strip of the grantor's land—it was held, that the grantor and those claiming under him were concluded from preventing the grantee from coming out into the road over this strip of land: that after the description given by him in the deed, he could not be allowed to say that the land on which it abutted was not the road. In *Morris v. Edgington* (3 Taunt. 24), a lessee demised a messuage, consisting of two parts, separated by an intervening reserved gateway and yard, subjected only to a specific right of way for the lessee to a third building, for a specific purpose only. The reservation, strictly interpreted, would have precluded the lessee from all access to the one part, which was accessible only by crossing the yard in one of two directions, the one by entering it from the back part of the residue of the demised premises, the other and more convenient way by entering it from the public street, through the reserved gateway. It was held, that the lessee was entitled to the [190] latter way, through the gateway and across the yard. Mansfield, C. J., there says:—"It would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." *Hodgson v. Field* (7 East, 613) is a very strong case to illustrate the principle before

stated. There, A. and B. being severally seised of parcels of woody ground, and B. having other lands adjoining to his woody ground, and intending to make a colliery under his ground, A. granted to B., his heirs and assigns, liberty for him and them to carry up a sough or drain through A.'s woody ground into B.'s woody ground, and to make two little sough pits in A.'s woody ground for the more easy and safe carrying up the tail of the sough, one of which was to be covered in forthwith, and the other way to be kept open for examining the sough, so long as was necessary for that purpose, and no longer. It was held, that, by this grant, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto. In *Gerrard v. Cooke* (2 N. R. 109), A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from another house belonging to A., the right of using the said piece of land as a foot or carriage way, together with "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage." It was held, that, under these words, B. had a right to put down a flagstone upon this piece of land, in front of a door opened by him out of his home into it. [Alderson, B. Suppose the way granted were across a ploughed field, would the grantee in such case have a right to lay down a flagstone?] Yes, if it were necessary for the con-[191]-venient maintenance of the road in such a state as that he might go over it. It was found in that case that the road might be used without the flagstone, though not so conveniently. In *Abson v. Fenton* (1 B. & C. 195), where, in a private act of parliament, for inclosing the waste lands of a manor, there was a reservation to the lord and his assigns of all mines, &c., "together with all convenient and necessary ways, &c., then already made or thereafter to be made, and liberty of laying waggon-ways, &c., at his and their free will and pleasure, and to do all such other works, acts, and things as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner, as if that act had not been made:" it was held, in an action of trespass against the assignee of the lord, for laying a waggon-way over one of the allotments in an improper direction and manner, that the question to be decided by the jury was, whether the waggon-way had been laid in such a direction as a person of reasonable skill would have selected, and whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land. That case shews, that whatever be the right reserved, the party is authorized to exercise it in the most reasonable and convenient manner. In the present case, if the defendant is to be confined to a way to these highways, leading only from one vill to another, the reservation will become futile. The case of *The Earl of Carlisle v. Armistage* (2 B. & C. 197; 3 D. & R. 414) is an additional authority to the same effect. In *Senhouse v. Christian* (1 T. R. 560), Ashurst, J., states the question to be, whether, under the general grant for the purpose of carrying coals, the party "has not a right to make any such way as is necessary for the carrying of that commodity? There are no great collieries in the northern part of the kingdom, where they have not those framed waggon-ways; and the case itself expressly states, that the defendant cannot [192] so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon-way, which is necessary for the purpose of carrying his coals." Yet it appeared that this kind of waggon-way had been introduced into use since the date of the grant in that case (1722).

But further, there is in these deeds a compensation clause, which may well apply to the making of the roads in question; and the case states that the defendant has offered to make full compensation. The covenant by Hewytt is, "that he, his heirs and assigns, shall give and yield to [the grantees], their heirs and assigns, such accustomed recompense for digging and breaking the ground in the fields and territories aforesaid, in which any pit or pits for getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed in like cases." This may well apply to all injury done by digging for any purpose connected with the getting or conveyance of the coal, in any part of the land where there are pits. It is necessary to dig in order to make ways, and the owner of the land would surely be entitled to compensation for the damage so done. The true construction is, to give compensation for digging or breaking the ground, not only for the purpose of opening pits, but for every thing incidental to the use of them.

Then the defendant is entitled to a verdict on the third plea. The case indeed finds, that no coals have been actually got by the defendant in Amble; but the road might nevertheless be made for the purpose of carrying away coal got in Amble. Then as to the new assignment to the fourth plea; it states only that the trespasses were committed "on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close" than those mentioned in the plea. The plaintiff thereby disputes only that the railway is properly made, and does not raise the [193] question whether any railway could be made. The plaintiff, therefore, is at all events entitled, on this issue, only to nominal damages, it not being suggested that any real damage or injury has been sustained by any improper mode of making or any improper direction of, the railway.

Watson, in reply. First, as to the question on the new assignment. The plaintiff is entitled to recover, on that issue, damages in respect of all the acts done by the defendant beyond what he had a right to do by virtue of the reservation in the grant. The new assignment necessarily admits the right to make ways for carrying the coals, but alleges that the defendant has gone to a greater extent than was necessary for the exercise of the right reserved. It is altogether excess; which could not have been shewn on a traverse of the right alleged in the plea.

The plaintiff is equally entitled to judgment on the third plea. One purpose only is alleged in it for the making of the railway—viz., to carry away coals got in Amble. The defendant had no right, therefore, to lay down a way because he may hereafter get them; and there is nothing in the case from which to infer any present intention in the defendant to get the coals in Amble. Nor has he any right to carry coals got in Amble through Hauxley. The reservation is of the mines of coal within the territories of Amble thereby granted, with a way to and from those mines—i.e. through the territories of Amble. That deed contains no mention whatever of Hauxley; and the case finds that there are mines of coal in each manor.

It is not necessary to dispute the inferences which have been drawn from the cases cited on the other side; but they have no application to the present. The question here is, has a party, under a reservation made in 1630, a right to lay down a railway—a modern discovery, and whereby the land is actually severed, and the owner excluded? Could the defendant, under this reservation, [194] claim a right to make a canal, or a tunnel? The term "wayleave" is used to express a right of way over the surface, which shall leave the owner the full enjoyment of the soil, subject only to that easement. He has a right to obtain the produce of the land from the way itself. But here he is wholly excluded—ousted, according to the decision in *Doe d. Wawn v. Horn*, his fields severed into portions, and the communication between them taken away. With regard to the compensation clause, that clearly does not apply to the making of a way, but only to the digging and breaking the ground for the purpose of making pits, and in which the pits are made: there is no reference whatever in the covenant to the wayleave, although it had previously been expressly reserved. Besides, the clause refers to an "accustomed recompense;" and at that time it was not necessary, nor had ever been customary, to cut the ground in order to make a way; there were then none but land sale collieries, and all the old workings are close to the highway. In the case of *Morris v. Edgington*, the lease was construed with reference to the particular words employed in it, and to the state of things at the time it was made. Here, it is clear that at the time of the deed the parties never contemplated a railway. In *Hodgson v. Field*, the sough pits were absolutely necessary for the enjoyment of the right granted. *Gerrard v. Cooke* is subject to the same observation. In *Abson v. Fenton*, the words in which the reservation was framed were of the most general and ample kind—it included "all convenient and necessary ways, then already made or thereafter to be made," and "the liberty of laying waggon-ways, &c., at his and their free will and pleasure, and to do all such other works, &c., as might be necessary or convenient for the full and complete enjoyment thereof." That clearly comprehended ways then in use, or afterwards to be invented. In *Senhouse v. Christian*, again, the case is put upon the ground, that it was in the contemplation of the [195] parties at the time. But, at all events, the right can only be to carry to the place at which the defendant has an outlet for the coals—viz., to the highway.

Cur. adv. vult.

On a subsequent day in the term, the judgment of the Court was delivered by PARKE, B. In this case, which was argued a few days ago, the Court were satisfied

that the plaintiff was entitled to recover, but delayed giving their judgment, in order to look more attentively into the pleadings, and to ascertain exactly for what trespasses the plaintiff was entitled to compensation.

We entertained no doubt but that, under the exception of the deed of 1630 of the mines of coals in Amble, with the reservation of "sufficient wayleave and stayleave, to and from the said mines, with liberty of sinking and digging of pit and pits," no easements were reserved, except for the purpose of getting the coals under the lands conveyed; or at all events the coals within the territories of Amble (whether the easements extended to the latter, it is not necessary to decide). In like manner, the easements reserved by the deed of the same date, in respect of the coals in Hauxley, could be exercised in respect of those coals only. It is impossible that the Court can give these deeds an effect greater than the words are calculated to convey, in consequence of the contiguity of the two townships, and the circumstances that the coals in each were part of the same mineral field. It therefore follows, that every trespass committed in Amble, for the purpose of conveying coals got in Hauxley, was unjustifiable, and the plaintiff is entitled to recover for them; he is therefore entitled to a compensation for every part of the railroad in Amble, and for the trespasses in carrying the Hauxley coals along it. The third plea, which justifies these trespasses under the [196] deed of 1630, on which issue was taken, must be found for the plaintiff; as the allegation in that plea, that it was convenient and necessary to make a road or way in the closes in Amble, at the time when it was made, to convey coals got in Amble, was not proved. The second plea, founded on a supposed manorial custom, as also the special plea to the first new assignment, were also unsupported by the evidence.

It remains, therefore, to consider, for what trespasses in Hauxley the plaintiff is entitled to recover.

Those complained of are, first, the making a steam-engine, and pond for supplying it, and engine-house, and buildings; secondly, the making a framed railroad of iron on stone pillars or sleepers, from the pit in Hauxley direct to the boundary of Amble, to communicate thence with the river Coquet, with ditches and wooden rails on each side, embracing a width of thirty-five feet, and the construction of embankments, and cutting the soil, in order to make a level railroad. Thirdly, the making embankments and cuttings in two other fields, for a railroad, which was abandoned.

It will be proper to take the several heads of damage in their order. First, as the coals in all the seams are excepted, and a right to dig pits for getting those coals reserved, all things that are "depending on that right, and necessary for the obtaining it," are reserved also, according to the rule in *Sheppard's Touchstone*, 100. Consequently, the coal-owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits. The case finds that the steam-engine which was erected, was necessary for the winning and working the lower seams, which are the principal seams in that coal field; and therefore the defendant had a right to erect it.

The pond for the supply of the engine, and the engine-house, seem to have been necessary accessaries to such an [197] engine, and were therefore lawfully made; but whether the sheds were, is not stated; and if there be a question as to them, the arbitrator may determine it. It may not be improper to observe, that a compensation seems to us to be due for the injury to the soil by making these adjuncts to the pit, the steam-engine, and its accessaries, as well as for digging the pits themselves, under the provision in the deed of 1630; whether there is any due for the railroad, is doubtful.

The second head of damage is the construction of the railway to the boundary of Amble—the inclosing it, and the cutting the soil.

Upon referring to the fourth plea, and the new assignment upon it, (for it is not traversed), it appears to us that it is not open to the plaintiff to contend in this action, that some species of railroad made with stone, iron, and wood, was not convenient, proper, and necessary, under the terms of the reservation; nor that it was not necessary to cut the soil for the purpose of making it level, and to make a mound or embankment. These facts are all averred in the plea, and are not traversed; and the effect of the new assignment is, not strictly to admit the truth of these facts, but to withdraw them entirely from consideration as the subject of the action, and to preclude the plaintiff from complaining of them: and the true grounds of complaint are to be

sought in the explanation of the declaration contained in the new assignment. These are for trespasses on other occasions, of which the special case supplies no proof—and for trespassing to a greater extent than was necessary for exercising the reserved rights, and in parts of the close where there was no right of wayleave.

This renders it necessary to look at the facts found in the case, to ascertain whether the railroad was constructed in a direction, or in a manner, unauthorized by the reservation.

This reservation is to be construed, according to the [198] rule laid down in Sheppard's Touchstone, 100, in the same way as a grant by the owner of the soil of the like liberties: "for what will pass by words in a grant, will be excepted by like words in an exception." Now the reservation is of the right to dig a pit or pits, (which pits are mentioned in the compensation clause to be such as may thereafter happen to be sunk), and of sufficient wayleave and stayleave, connected with those pits. There is no doubt that the object of the reservation is to get the coals beneficially to the owner of them, and therefore it should seem, that there passes by it a right to such a description of wayleave, and in such a direction, as will be reasonably sufficient to enable the coal-owner to get, from time to time, all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such a direction as is then convenient.

Adopting this rule of construction, the question is, whether the direction or mode of construction of the railroad were reasonably sufficient for the purpose of getting the 3rd seam of coal, in a manner beneficial to the coal-owner.

Upon the facts found in the case, we have some little difficulty in determining these questions satisfactorily.

It is found, "that without a railway for shipment, the lower seams could not be worked without loss, as before stated;" and the statement before made is, "that £30,000 was expended on the steam-engine, &c., and that for that expenditure there could be no adequate return, unless by the profits from an export trade." If it is meant (as probably it was) that this sum was necessarily expended, in order to work the lower seams in a reasonably beneficial manner, and therefore that a railway for shipment was necessary for the fair working of those seams, we cannot say that there has been anything improper in the direction or mode of construction of the railway. The direction was [199] proper in constructing a railway for shipment, though it lead to a place where the defendant was a trespasser, inasmuch as it was convenient for the purposes of the coal-mine, which was the meaning of the reservation, and which is the only thing to be looked to in construing it; and whether the defendant would be liable to make amends for wrongful acts in constructing the railroad in another part of the same line, does not appear to be material, so long as the railroad remains unobstructed, and capable of being used in that place. The true question is, whether the entire railroad is convenient: when it is obstructed, (as it may be by the owner of the soil in Amble), and ceases to be passable, it will be no longer convenient for the purposes of the mines, and the part in Hauxley will not be lawfully used. The direction therefore was proper. Nor, upon the supposition that a railway for shipping was necessary, can we say there was any excess in the mode of construction; for the case finds that the railroad has been judiciously designed and constructed; that no unnecessary ground has been taken, or injury been done in making it. The fences and ditches to the railway do not appear to have been found by the arbitrator to be necessary, and therefore in respect of those the plaintiff is entitled to recover.

These observations will enable the arbitrator to assess the compensation.

The only remaining head is, the damage by the partial construction of the abandoned railroad. The defendant has by his conduct shewn, that a railway in that direction was unnecessary, and the plaintiff is entitled to recover for the damage occasioned by it.

Judgment for the plaintiff accordingly.

[200] HIBBLEWHITE v. M'JORINE. Exch. of Pleas. 1840.—The Brighton Railway Act, 1 Vict. c. cxix. s. 155, requires the conveyance of shares to be by writing, duly stamped, to be under the hands and seals of both parties. The clause afterwards calls the instrument a "deed or conveyance," and a "deed of sale or transfer."—Held, that this conveyance must, in order to satisfy the statute, be by deed: and therefore that an instrument of transfer of shares, executed by the

proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser, was void.

[S. C. 2 Railw. Cas. 51; 9 L. J. Ex. 217; 4 Jur. 769. Approved, *Société Générale v. Walker*, 1835, 11 A. C. 20. Referred to, *Humble v. Langston*, 1841, 7 M. & W. 523; *France v. Clark*, 1884, 26 Ch. D. 263; *Magnus v. Queensland National Bank*, 1887, 36 Ch. D. 33; *Powell v. London Provincial Bank*, [1893] 1 Ch. 616; [1893] 2 Ch. 565.]

Assumpsit. The declaration stated, that on the 10th of September, 1838, it was agreed by and between the plaintiff and defendant in manner following: that is to say, that the defendant had that day purchased from the plaintiff fifty shares in the Brighton Railway Company, to be transferred and delivered, and paid for, on or before the 1st day of March, 1839, or at any intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share, together with all calls that might have been paid on the same by the plaintiff; the plaintiff thereby binding himself, his heirs, executors, and assigns, to execute to the defendant, or his nominee or nominees, a legal transfer of the said shares, for which the defendant was to make payment to the plaintiff on or before the 1st day of March, 1839: and it was understood and agreed, that the defendant should be entitled to all new shares that might accrue or be appropriated to the holder of the said fifty shares: it was also agreed, if the payment were not made on the 1st day of March, 1839, that the plaintiff reserved full power to resell the said fifty shares at the defendant's cost and risk, claiming from him any deficiency, or accounting to him for any surplus that might arise from the sale thereof. The declaration then, after an averment of mutual promises, alleged, that the defendant did not require the said fifty shares to be transferred and delivered to him at any time before the said 1st day of March, 1839, and that no new shares had accrued or been appropriated to the holder of the said fifty shares, before the resale thereof thereafter mentioned. It then averred, that on the said 1st day of March, and from thence to the resale thereof by the plaintiff thereafter mentioned, he the plaintiff was ready and willing to transfer and deliver the said fifty shares to the defendant, if the defendant would then have paid for the same; of which the defendant during all that [201] time had notice: and then, to wit, on the said 1st day of March in the year aforesaid, he the plaintiff offered the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on payment by the defendant for the said shares according to the said agreement, &c.: but the defendant did not nor would, then or at any time before the said time of reselling the same thereafter mentioned, accept and pay for the said shares, but altogether refused so to do; whereupon the plaintiff, after the said 1st day of March, and after such refusal and nonpayment by the defendant, to wit, on the 6th day of March in the year aforesaid, resold the said shares, and upon such resale there was a deficiency and loss to the plaintiff of 256l. 6s. of which the defendant afterwards, to wit, on &c., had notice, &c. &c. [alleging nonpayment of that sum]. There was also a count on an account stated.

Pleas—first, non assumpsit; secondly, (as to the first count), that the plaintiff was not ready and willing to transfer and deliver the said fifty shares to the defendant, if the defendant would have paid for the same, nor did the plaintiff offer to the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on such payment as in the said first count in that behalf mentioned, in manner and form, &c.; thirdly, that at the time of making the supposed agreement in that count mentioned, or at any time between that day and the said 1st day of March, the plaintiff was not the proprietor of the said fifty shares in that count mentioned, or of any of them, nor had he good right or title to execute a legal transfer of such shares, or of any of them, according to the said agreement in that behalf; concluding with a verification; fourthly, as to the breach in the first count lastly mentioned, that the plaintiff did not resell the said shares or any part of them, in manner and form, &c.; and fifthly, as to the same breach, that [202] upon the supposed resale there was not a deficiency and loss, in manner and form as in that count alleged. There was a sixth plea, which was disposed of on demurrer (5 M. & W. 462).

The plaintiff joined issue on all the above pleas but the third, and to that replied, that on the 1st of March, the plaintiff was the proprietor of the said shares, and then

had good right and title to execute a legal transfer thereof: on which also issue was joined.

At the trial before Gurney, B., at the Middlesex Sittings after Trinity Term, 1839, the following appeared to be the facts of the case.

On the 10th of September, 1838, the plaintiff and a Mr. Sheldon each sold to the defendant, through their broker, Mr. John Golding, fifty shares in the London and Brighton Railway. The defendant signed the following written contract:—

“Mr. Hibblewhite.

“Liverpool, 10th Sept. 1838.

“Sir,—I have this day purchased from you fifty shares in the Brighton Railway Company, to be transferred, delivered, and paid for on or before the 1st day of March, 1839, or at any intermediate date that I may require them, by paying you for the said shares at par per share, together with all calls that may have been paid on the same: you hereby binding yourself, your heirs, executors, and assigns, to execute to me, or to my nominee or nominees, a legal transfer of the said shares, for which I am to make payment to you on or before the 1st day of March, 1839. It is understood and agreed, that I shall be entitled to all new shares that may accrue or be appropriated to the holder of the said fifty shares. It is also agreed, if the payment be not made on the 1st day of March, 1839, that you reserve full power to resell the said fifty shares at any cost and risk, claiming from me any deficiency, or accounting to me for any surplus, that may arise from the resale of them.—I am, &c.

“Witness, J. Found.

“GEORGE M'MORINE.”

[203] At the time of entering into this contract, the plaintiff was not himself the proprietor of any shares; but on the 12th September he went into the market, and purchased, through a sharebroker, 100 shares, at 12s. 6d. discount, to be delivered to him on the 15th of December following. On that day the plaintiff received 100 certificates for shares, in the form given by the act of Parliament, 1 Vict. c. cxix., s. 140, in the name of Richard Williams Pritchard, numbered from 31.625 to 31.734, together with three transfers from Pritchard, with blanks left for the purchaser's name, the consideration, and the date; one for forty shares, Nos. from 31.625 to 31.674 inclusive; another for forty, from 31.675 to 31.714; and the third for twenty, from 31.715 to 31.734 inclusive. The following is a copy of one of these transfers:—

“London and Brighton Railway Company.

“I, Richard Williams Pritchard, of Liverpool, in consideration of the sum of _____, paid to me by _____ of _____, do hereby assign and transfer to the said _____ twenty fifty pound shares, numbered 31.715 to 31.734 both inclusive, of and in the undertaking called the London and Brighton Railway, to hold unto the said _____ executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said _____ do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness our hands and seals this _____ day of _____ in the year of our Lord, one thousand eight hundred and thirty.

“Signed, sealed, and delivered by the said R. W. Pritchard, in the presence of

“Richard Cobb, 1, Dale-street.

“R. W. PRITCHARD (L.S.).

“Signed

(L.S.).”

[204] Between the date of the agreement and the 1st of March following, two calls of £3 each became due, which were not paid by the plaintiff; but evidence was given of a verbal agreement on the part of the defendant, that the plaintiff should not be required to pay up the intermediate calls, but that he the defendant would prefer taking the shares at their price before payment of those calls. On the 1st March, transfers executed by Pritchard, as above set forth, were produced by the plaintiff's broker to the defendant, and he offered to fill up the blanks for the name of the transferee, with the name of the defendant or his nominee, on the defendant's paying the agreed price. The defendant, however, refused to accept the shares; whereupon they were resold by the plaintiff at the then market price, and the present action was brought to recover the sum of 256l. 2s. 6d. and interest, being the difference between that and the price at par per share.

For the defendant it was objected, first, that the plaintiff was not entitled to recover, inasmuch as he was incapable on the 1st of March of making a good conveyance of the shares to the defendant, Pritchard being then the proprietor of them, and not the plaintiff; secondly, that the conveyance was invalid by the 157th section of the act of Parliament, the calls due before the 1st of March not having been previously paid; and thirdly, that the conveyance tendered to the defendant was void at common law, the name of the transferee not having been inserted in it at the time of its execution by Pritchard. On all or some of these grounds it was insisted that the defendant was entitled to a verdict on the second and third issues. The learned Judge overruled the objections, and a verdict was taken for the plaintiff for the amount claimed.

In Michaelmas Term, Alexander obtained a rule nisi for a new trial, on the grounds above mentioned; against which, in the same term,

[205] Cresswell and Cowling shewed cause.(a) [The arguments on the two first

(a) The following are the clauses of the Act of Parliament, which are material to this case:—

Sect. 140. The said company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time, to cause the names of the several corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares to which they are respectively entitled, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made to cause the common seal to be affixed thereto; and the said company shall, from time to time, cause a certificate or ticket, with the common seal of the said company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said company the sum of two shillings and sixpence, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein; but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof: and such certificate or ticket may be in the words or to the effect following: (that is to say),

“London and Brighton Railway Company.

“Number

“These are to certify that A. B. of is the proprietor of the share (or shares) number of the London and Brighton Railway Company, subject to the rules and regulations and orders of the said company.

“Given under the common seal of the said company, the day of in the year of our Lord .”

Sect. 155. It shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors and administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned, and the form of conveyance of shares shall be in writing duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties, as the case may require: (that is to say),

“I, A. B., of in consideration of the sum of paid to me by C. D. of do hereby assign and transfer the said C. D. share (or shares), numbered of and in the undertaking called ‘The London and Brighton Railway,’ to hold unto the said C. D., his executors, administrators, and assigns, (or successors and assigns), subject to the several conditions on which I held the same immediately before the execution hereof, and I the said C. D. do hereby agree to accept and take the said share (or shares) subject to the conditions aforesaid, as witness our hands and seals, the day of .” And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by the secretary or clerk of the said company, who

points are omitted, as the judgment [206] of the Court proceeded upon the last only.] The question is, whether the transfer executed by the original holder, Pritchard, in blank, was capable of being used as a conveyance of these shares by the plaintiff to the defendant. It is contended, that a deed executed in blank is void, and cannot be used as an instrument of transfer to a purchaser, by afterwards inserting his name. But first, this instrument is not a deed. All that is required by the 155th section of the statute is, that the form of conveyance of shares shall be "by writing duly stamped." There is nothing to require an indenture. There are, indeed, subjoined to the form of conveyance there given, the words "as witness our hands and seals," &c. : but an instrument under seal is not [207] necessarily a deed,—even supposing it to be imperative by the statute to affix a seal, all that is said being that the instrument "may be in the following words, or to the like effect." It is called, in other parts of the clause, "the deed or conveyance," and "the deed of sale or transfer." It is submitted, however, that if it be in writing, and stamped, that is strictly sufficient to satisfy the requisitions of the statute. No delivery is required. To whom, indeed, could it be delivered? Neither of the parties who are to seal it is to have an interest in it; it is to be kept by the company or their officer. There may be a binding contract under seal, without delivery; but the instrument is not a deed without it. Warrants of attorney, awards, &c., are under seal, but are not therefore necessarily deeds. It is clear the seller could never mean to deliver this instrument absolutely until it were also delivered by the purchaser; he would not part with his interest until he had a transferee who was bound by the contract. Delivery, therefore, cannot be necessary in order to make the instrument effectual. Nor are any attesting witnesses required. There is no difficulty as to the stamp; that is required only for the purposes of evidence, and may be subsequently affixed on payment of the penalty; but the instrument is valid as a transfer without it. Many instruments which derive efficiency from the sealing, as a writ, may be sealed in blank, and filled up afterwards. That is always the case with respect to subpoenas. So, mercantile contracts are frequently signed in blank, and when afterwards filled up, become valid and effective instruments. Bills of exchange accepted in blank, upon a blank stamp, may be afterwards filled up to the amount of the stamp (see per Tindal, C. J., in *Schultz v. Astley*, 2 Bing. N. C. 553). So here, the signature of the proprietor is an authority to the bearer of the instrument to fill it up at any time with any name he thinks fit. It is more like a warrant of attorney, authorizing another [208] party to be substituted as the purchaser. A deed would not have been necessary for this purpose at common law; and the Court will not, unless compelled, construe the statute so as to make it necessary. All that is required is, that the Company may have possession of a document signed and sealed by both parties, to shew their assent to the transfer.

But, secondly, supposing that this instrument is to be considered strictly as a deed, yet a deed executed in blank, and delivered to A., to be by him handed over to the party who is to be benefited by it on performance of a certain act, when so handed

shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of two shillings and sixpence, and no more, shall be paid to the said company; and the said company, or the said secretary or clerk, is hereby required to make such entry or memorial accordingly, and on demand to make an indorsement of such transfer on the certificate of each share so sold, and deliver the same to the purchaser for his security, for which indorsement no more than two shillings and sixpence shall be paid; and such indorsement, being signed by the said secretary or clerk, shall be considered in every respect the same as a new certificate: and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking.

Sect. 157. No person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking, after any call shall have been made for any sum of money in respect of such share, unless he or they at the time of such sale and transfer shall have paid the full sum of money which shall have been called for in respect of such share.

over by A., is a good and valid instrument in law. *Texira v. Evans* (cited in *Master v. Miller*, 1 Anstr. 228) is precisely in point. There the defendant, waiting to borrow £400, or so much of it as his credit should be able to raise, executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. The plaintiff lent £200 on it, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him. On non est factum pleaded, Lord Mansfield held it a good deed. [Parke, B. Does it appear whether the agent was authorized by power of attorney?] No; but such authority would not be requisite to enable him to deliver, although it would be to sign or seal: Shep. Touchst. 57. The passage in Buller's *Nisi Prius*, 267, where it is said that "if there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered," is not warranted by the authority there referred to, of *Pigot's case* (11 Rep. 27), as stated in 2 Rol. Abr. 29, pl. 2, 3. That authority refers to an interlineation without the privity of the obligor. In *Hudson v. Revett* (5 Bing. 269; 2 M. & P. 663), where, in a deed of conveyance to trustees for [209] the benefit of creditors, the particulars of whose demands were stated in the deed, a blank was left for one of the principal debts, the amount of which was not exactly ascertained at the time of the execution of the deed by the debtor, but the blank was filled up the next day in the presence and with the assent of the defendant, it was held that the deed was valid notwithstanding. Deeds of arrangement with creditors are always left blank as to the creditors, who afterwards sign. So, in the deeds of settlement of joint stock companies, blanks are left for such parties as they come in. *Markham v. Gonaston* (Cro. Eliz. 627; Moore. 547) is an authority to the same effect as *Hudson v. Revett*, and is inconsistent with the unqualified dictum of Mr. Justice Buller. In *Jennings v. Bragg* (Cro. Eliz. 446; 3 Bulstr. 215), where a disseisee out of possession made a lease for years, and delivered it as an escrow to a stranger, recommending him to enter on the land, and then to deliver it as his deed, who did it accordingly, Anderson, J., said it was a good lease, for it was not his deed until the second delivery, at which time he had good right and power to let it. There the execution and delivery are treated as one whole transaction, consisting of several parts. Bayley, J., takes the same view in *Doe d. Lewis v. Bingham* (4 B. & Ald. 675), holding a deed, whereby a mortgagee conveyed to a mortgagor, and the latter reconveyed to trustees for securing an annuity, as "one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties," and therefore that any alteration made in the progress of such transaction, still left the deed valid as to the parties previously executing it, provided it did not alter their situation. The same doctrine is laid down in *Murray v. Earl of Stair* (2 B. & Cr. 82; 3 D. & R. 678), and *Matson v. Booth* (5 M. & Sel. 223). In *England v. Roper* (1 Stark. Rep. 304), it was [210] held, that, in proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution. Lord Ellenborough says, "If the defendant has been foolish enough to sign in blank, he must take the consequences." This is not, in truth, the alteration of a deed, but the perfecting of one which was incomplete before.

Alexander and Tomlinson, contra. First, this instrument is a deed. All the terms of the statute evidently contemplate a deed. It speaks of a "deed or conveyance," which conveyance must therefore be by deed. So, of a "deed of sale or transfer," i.e. "of sale or of transfer." A deed would be required at common law for the assignment of these shares, which are merely choses in action. Where a plaintiff declares, that by certain articles of agreement which he brings into Court, "sealed with the seal of the defendant" &c., it was agreed so and so—that is a good declaration in covenant. The argument, that a mutual delivery would be requisite in this case, applies equally to all cases of deeds containing mutual covenants. This is, no doubt, a deed from both parties to the Company, but also from the one party to the other, for the purpose of passing the interest in the shares. The Company's being a party is rather an additional reason for requiring a deed, in order to lay the transferee under more stringent obligations by means of covenants.

Assuming, then, that this instrument is a deed, it was void by reason of the non-insertion of the defendant's name, at the time of its execution by Pritchard. It is a general rule of law, that a deed cannot be altered in a material part after its

execution: Com. Dig. Fait (F. 1), *Pigot's case* (11 Rep. 27), *Markham v. Gonaston* (Cro. Eliz. 626). [Parke, B. This is not the case of an alteration.] In *Powell v. Duff* (3 Campb. 181), [211] it was held that a bail-bond executed before the condition was filled in, was void. In *Weeks v. Maillardet* (14 East, 568), it was held to be a good defence, upon non est factum, to an action of covenant on articles of agreement, whereby the defendant bound himself to deliver to the plaintiff by a certain day, "the whole of his mechanical pieces, as per schedule annexed," to shew that the schedule was not annexed at the time of the execution, although it was subscribed and annexed immediately afterwards, by the agent of both parties, but after one of them had left the room. There the deed contemplated the addition of the schedule, and yet the Court held that it could not be added after execution. There are, however, two classes of cases in which deeds have been held good, notwithstanding an alteration or subsequent addition: the one, where the alteration does not affect the other party to the deed: such are those of *Doc d Lewis v. Bingham* (4 B. & Ald. 672), and *Hall v. Chandless* (4 Bing. 123; 12 Moore, 316). In those cases the other party was benefited rather than injured by the alteration. Such also is the case where the name of an additional obligor is added to a bond after its execution by the obligee, who thereby obtains a greater security (*Zouch v. Clay*, 2 Lev. 30; 1 Ventr. 185). The second class of cases is, where, at the time of the execution, there is something which cannot be ascertained, and is therefore to be filled up afterwards. To this class belongs the case of *Hudson v. Revett*, and deeds of composition with creditors: see *Johnson v. Baker* (4 B. & Ald. 440). There the deed becomes complete, on the assent of the parties to the alteration, by re-delivery. These cases do not, however, go so far as to permit the name of a purchaser to be inserted at any time after execution. *Tezira v. Evans* was only a Nisi Prius case, and the report of it is short and unsatisfactory: but if it be an authority for the plaintiff, it stands alone, and [212] is irreconcilable with the other decisions. There, however, it was one entire transaction, and the deed was not, as here, to be transferred from one to another, and filled up by anybody. If this be good, a conveyance of land might be executed in blank, and filled up by any one.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by

PARKE, B. In this case, which was argued last term, upon shewing cause against a rule for a new trial, we are of opinion that the rule must be made absolute.

It was an action brought by the plaintiff to recover damages for not accepting and paying for fifty shares in the Brighton railroad; which, by the contract, were to be transferred, delivered, and paid for, on or before the 1st of March, 1839, or at any intermediate date, that the defendant might require them, by paying for them at par, together with all calls that might have been paid on the same, the plaintiff binding himself to execute to the defendant, or his nominee, a legal transfer of the shares, on or before the 1st of March.

The declaration avers, that on the 1st of March, the plaintiff was ready and willing to transfer the shares, if the defendant would have paid for the same; and offered to the defendant, or any nominee of the defendant, a legal transfer. This averment was traversed in one plea, and in another it was pleaded, that at the time of the agreement, or on the 1st March, or between those times, the plaintiff was not the proprietor of the shares, nor had he good right or title to execute a legal transfer of such shares, according to the agreement.

The replication states, that on the 1st March, the plaintiff was the proprietor of the shares, and then had good right and title to execute a legal transfer thereof.

[213] The question for consideration arises on those two pleas. Upon one or both, the title of the plaintiff to make the transfer may be questioned. It is not material upon which: but there seems no doubt but that it arises on the traverse of the readiness to convey, which must involve a capacity to do so, as there is no other averment in the declaration, which expresses or implies that the plaintiff had a title to convey on the 1st of March. It appeared on the trial, that between the date of the agreement and the 1st of March, some instalments became due, which the plaintiff did not pay; and on the 1st of March, (before which day the defendant had not desired any transfer), the plaintiff's broker, who had purchased fifty shares from one Pritchard, produced to the defendant a conveyance executed by Pritchard, of these shares, with a blank for the name of the transferee, and offered to fill it up with that of the defendant or his nominee, on the defendant's paying the price. The defendant

refused to do so. The plaintiff sold the shares, and the action was brought for the difference.

The objections to the plaintiff's recovering were, 1st, that he was incapable of conveying on the 1st of March, because Pritchard was then the owner, and not the plaintiff; 2ndly, that the conveyance was invalid by the express provisions of the Brighton Railway Act, 1 Vict. c. cxix., sect. 157, as the calls due before that date were not paid; and 3rdly, that the conveyance tendered was void at common law, as there was a blank in it for the name of the transferee.

It is unnecessary for us to give any opinion, except upon the last of these objections; but it may not be improper to observe, that there is great weight in the first, because the defendant has bargained for a conveyance from the plaintiff, which must be intended to be a conveyance in the statutory form; and, consequently, for the implied covenant of the plaintiff for title, and Pritchard's implied [214] covenant is not the same thing. The last objection, however, we are all of opinion, must prevail.

The second objection, which would otherwise have been valid, has been waived, as it appears on the evidence at the trial, that the defendant agreed that the plaintiff should not pay the intermediate instalments; and, as the contract with respect to shares of this description is not required by the Statute of Frauds to be in writing, since they are neither an interest in land, nor goods and merchandizes, there might be a waiver by parol. As there was such a waiver, the only objection would be to the statement of the contract in the declaration, on the ground of variance, which ought to have been made at the trial.

The conveyance required by the statute must, we think, be by deed; and a deed, with the name of the vendee in blank at the time it was sealed and delivered, is void.

The instrument of transfer, by the 155th section, must be under the hands and seals of both parties. It was argued, that it did not follow, from the instrument being under seal, that it was a deed; for warrants of justices, subpoenas, and awards, are under seal, and are not deeds. But this is an instrument containing a contract of the parties; if a contract is required to be by instrument under seal, it must be intended that it should be by deed: and the context shews that the legislature so intended it, for it is afterwards called a deed or conveyance, (probably a synonyme for the same thing), and a deed of sale or transfer, that is, a deed of sale or of transfer.

Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle, that an attorney to execute and deliver a deed for another must himself be appointed by deed. The only case cited [215] in favour of the validity of a deed in blank, afterwards filled in, is that of *Texira v. Evans* (cit. 1 Aust. 228), where Lord Mansfield held, that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, "as it assumes there could be an attorney without deed;" and we think it cannot be considered to be law. On the other hand, there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up.

In Com. Dig. Fait, A. 1, it is said, "If a deed be signed and sealed, and afterwards written, it is no deed. To the same effect is Shepp. Touch. 54. In *Weeks v. Maillardet* (14 East, 568), the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of execution; and it was held, that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail bond was executed, and a condition afterwards inserted, it was held bad as a bail bond: *Powell v. Duff* (3 Camp. 181; and see Bull. N. P. 267). The cases cited on the other side were all of them distinguishable. In one, *Hudson v. Revett* (5 Bing. 372), a blank in a part material was filled up; but, having been done in the presence of the party, and ratified by him, it was held that there was evidence of re-delivery. In another, *Doe v. Bingham* (4 B. & Ald. 672), the blanks filled up were in no respect material to the operation of the deed, with respect to the party who executed before they were filled up, as to him the deed was complete. In a third, *Matson v. [216] Booth* (5 M. & Sel. 223), the point decided

was, that a complete bond was not rendered void by the subsequent addition of another obligor with the assent of all parties.

It is unnecessary to go through the others which were cited on the argument. It is enough to say that there is none that shews that an instrument, which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed, by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal.

In truth, this is an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit.

Rule absolute.

AMES v. LETTICE. Exch. of Pleas. 1840.—A motion for a new trial may be made at any time within four days after the return day of the distringas juratorium, although more than four days have elapsed since the trial.

[S. C. 9 L. J. Ex. 312; 4 Jur. 153.]

In this case Stammers moved for a new trial, but the Court entertained a doubt whether the motion was in time. The cause was tried before Rolfe, B., at the sittings in this term, but more than four days had elapsed since the trial. The distringas juratorium, however, was not returnable until the 29th of January, and this motion was made on the 31st. Stammers referred to Archbold's Country Attorney's Practice, 453, and the cases there cited, to shew that the motion might be made at any time within four days after the return day of the distringas, although more than four days may have elapsed since the trial.

ALDERSON, B. I believe you are in time to move it.

The motion was accordingly made, and a rule was granted.

[217] CROSS AND OTHERS v. LAW, Public Officer, &c. Exch. of Pleas. 1840.—The proper course of proceeding under the 13th section of the 7 Geo. 4, c. 46 (the Banking Copartnership Act), which allows executions on judgments obtained in actions against the public officer of the company to be issued against any member or members of the company for the time being, is by scire facias, and not by suggestion on the roll.

[S. C. 8 Dowl. P. C. 789; 9 L. J. 193; 4 Jur. 802.]

Cowling had obtained a rule calling upon Henry Arrowsmith and ten other persons mentioned in the rule, to shew cause why a suggestion should not be entered on the roll against them, as shareholders, for the damages and costs in this action, and why execution should not issue against them or any of them for the same. (a) It appeared

(a) This rule was obtained under the 13th section of the 7 Geo. 4, c. 46, which enacts, that execution upon any judgment in any action obtained against any public officer for the time being of any corporation or copartnership carrying on the business of banking under the provisions of that act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, on which such judgments may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership.

from the affidavits on which the rule was moved, that the plaintiffs had obtained judgment in an action against Law, as the public registered officer of the Imperial Bank of England, and that the persons mentioned in the rule were members of that Bank at the time of obtaining the judgment, and were believed to continue such at the time of making the affidavits. Simi-[218]-lar rules were obtained on the same grounds against other members, in actions at the suit of other plaintiffs.

Cresswell, Richards, and Crompton, shewed cause against the above rule. The proper mode of proceeding in this case, where none of the persons mentioned in the rule are parties to the record, is not by suggestion on the roll, but by scire facias. Wherever a party, not originally chargeable upon a judgment, is sought to be charged in execution, the course of proceeding is by scire facias. A scire facias must be brought upon a judgment, to warrant an execution of it either by a stranger or against one: *Tenoyer v. Bruce* (1 Lord Raym. 244; Salk. 319). In that case five defendants against whom judgment had been obtained, sued out a writ of error, but before the record was certified one of them died; upon which the plaintiff sued out execution against them all: and the question being whether he could do so without a scire facias, the Court held that there was no need to sue out a scire facias, because there was not any alteration of the record, nor any new person made liable to the execution. Here the direct contrary would be the case. *Bartlett v. Pentland* (1 B. & Adol. 704) may be relied upon on the other side, but that is not an authority on the point. There, the plaintiff having obtained judgment against the secretary of an Insurance Company, sued out execution against one of the members, without entering a suggestion, or applying for leave to sue out such execution; and the question was, whether the course actually taken was the right one, and not whether the entering a suggestion or suing out a scire facias was the proper course of proceeding. In all cases where the execution does not follow the judgment, and other persons are sought to be affected by it, there must be a scire facias: *Buxton v. Martin* (1 T. R. 82). It is clear that no person but the public officer is a party to the record, and [219] it is by the plaintiff's own act, in availing himself of the privilege of suing the public officer, that he is the only party, and therefore he has no right to complain. Then, how are other persons to be made parties to the record but by scire facias? It is true, where there are several parties to the action, and some of them die, a suggestion may be entered, but that is by statute. If it is sought to affect a party in interest by making him a party to the record, it must be done by scire facias.

The 6th section of the statute, 7 Geo. 4, c. 46, makes the returns rendered to the Stamp Office, evidence that the parties named therein were members at the date of the returns. But as those returns are made by the secretary to the company, or some other public officer, the meaning of the section cannot be that a third party who has been returned as a member shall be precluded from shewing that he is not a member; but if the argument be correct, that a suggestion is to be entered, he would be so precluded; as the suggestion, being entered by rule of Court, would not be traversable: *Rex v. Harris* (3 Burr. 1333). The proper course of proceeding is a scire facias, whereby a party would have an opportunity of shewing that he was not a member of the company, and ought not to be made a party to the record, which he would not have if a suggestion were to be entered. How are the members of the company to be made parties to the record in this mode? Are they to go on adding names to the record by suggestion, as the different persons become members of the company, or in what other way? The plaintiffs cannot proceed by this summary mode, when the old mode by scire facias is open to them. Besides, the effect of allowing such a course of proceeding would be to take away the subject's right to bring a writ of error. At all events, the rule prayed for is too large: the plaintiffs ought not to have applied for leave to issue execution.

[220] Cowling, contra. It is conceded, that so much of the rule as respects the execution cannot be supported, if objected to; but it is contended that the first part of the rule ought to be made absolute, and that the entering a suggestion on the roll is the correct mode of proceeding. In *Bartlett v. Pentland* (1 B. & Adol. 709), Lord Tenterden, in delivering the judgment of the Court, says, "It was urged that the execution was irregular, as not being warranted by the judgment; and that there ought to have been previously entered on the roll a suggestion of such facts as were necessary to shew that the execution was warranted by the act of Parliament, so that an opportunity should be given to the person to be affected by it of demurring or

pleading; and we are of opinion that the law is so." This act intended to give a summary remedy, and therefore never meant that a *scire facias* should be necessary; for a *scire facias* is a new action, and various pleas may be drawn and issues raised in it. It may be admitted, that the statute was probably penned by persons not conversant with the practice of the Courts; but sufficient may be collected from its language to shew that it was not intended that the mode of proceeding should be by *scire facias*. In a *scire facias*, a plea in abatement is admissible; but by the 13th section execution may go against any member of the company, which is inconsistent with a proceeding by *scire facias*, where the nonjoinder of the others could be taken advantage of. Again, it is an inflexible rule, that a party cannot plead that to a *scire facias* which he could have pleaded to the original action. In this case, Law could have pleaded to the original action, that he was not a public officer, or that no such company existed; and yet, if a *scire facias* were brought against any member under this statute, the latter would only be precluded from denying what appeared on the record, that is, he would only be precluded from de-[221]-nying that judgment had been recovered against Law as a public officer of a supposed public company; but he might still deny that Law was a public officer, and that such a company in fact existed; and yet this would be inconsistent with the intention of the legislature, which evidently was to expedite, not to delay, the remedy of the creditors of the Bank. [Lord Abinger, C. B. But if we decide that a *scire facias* is the correct course, then it follows that the defendant will not be allowed to raise those points, since Law might have raised them in the original action.] In cases of *scire facias* there are different parties, as heir or executor, or a different judgment is sought than would otherwise be given, as in *Penoyer v. Brace*, and *Buxton v. Mardin*; but here there are no new facts, nor is there a new party to be introduced to the record; for as by the first section of the act, all the incoming partners are made liable for the notes issued, and the sums of money borrowed, and debts incurred, by the copartnership, they were impliedly parties to the record as the action proceeded; the public officer was not a mere nominal defendant for the parties who were partners at the time of the accruing of the debt, or of the commencement of the action, but for the several persons who might, from time to time, be members of the company. In fact, the legislature appears to have intended to make the company approximate to a corporation, which is well known to be the view entertained of partnerships by the mercantile world, by giving it some of the incidents of a corporation; and one of them is, the being sued in a particular name, and not individually. There is not, therefore, the adding of a new fact, or the making a new person party to the judgment. It resembles the ordinary case of suggestions on the roll. If a party to an action dies, the usual course is to have his death suggested on the record, and the action proceeds with respect to the survivors. In a company like the present, it [222] would be very inconvenient to sue all the persons, members of the company at the time of the commencement of the action, and then add to or subtract from the names on the record those who became or ceased to be members during the progress of the suit; and the more so, because all this might be unnecessary, as the plaintiff might not recover in the action; and therefore the legislature directed that the action should proceed as if the changes had been suggested from time to time: but that if the plaintiff should recover, he should afterwards comprise in one suggestion the names of such persons, members of the company, as he should think proper to proceed against. The case, therefore, is analogous to the ordinary one of suggestions, and the parties will not be deprived of the benefit of a writ of error, or the like, since the suggestion may be demurred to or traversed: *Hickman v. Colley* (2 Stra. 1120). It is not contended that the returns made to the Stamp Office by the officer of the Bank are conclusive.

Cur. adv. vult.

On a subsequent day, Cresswell having intimated that the Court of Queen's Bench had given its judgment in favour of the proceeding by *scire facias*—

LORD ABINGER, C. B., said—Such was the inclination of our opinions. I thought, on looking at the Act of Parliament, without reference to any other matter, that it was implied that the Court must make some order for the purpose of ascertaining who were the proper parties against whom to put the judgment in execution; and it occurred to me, that the Court had authority to make such an order. It appears to me, however, to be possible, without the violation of any rule of law, to adopt the

pro-[223]-ceeding by scire facias, and which would seem to be the one most appropriate for such an occasion. We think this case is of too much importance for us to put any construction on the act of Parliament, by which parties who might wish to take the opinions of all the Judges would be prevented from doing so. It is true these joint stock banks place the public in a very disadvantageous position, for it now appears that in these cases there must, or probably will, be a trial of two actions instead of one: first, in order to establish the claim of the creditor against the company, &c.; and secondly, to fix the particular individual liable to execution. However, I do not see how we can adopt any other course than that which the Court of Queen's Bench, on consideration, has taken; and I think we justly may, by a very proper analogy to other cases of proceedings by scire facias, apply those proceedings to the present case. The rule is, wherever you seek to fix one party on a judgment given against another, it must be done by scire facias; and I think that is a principle which applies to the case of a public officer, who is merely the representative of the parties sought to be charged. It appears to me, and I believe that is the opinion of the Court, that the construction of the 13th clause of the statute must be taken to be this:—that the party who wishes to proceed upon the judgment against one of the members of the company not on the record, if he be a member at the time of the judgment and execution, would have a right to his scire facias without an application to the Court; but if the members against whom he should sue out execution should prove to be insolvent, he may then apply to the Court, so as to fix the original members at the time the contract was made, and make them still liable; in that case, he must come to the Court to have his scire facias.

ALDERSON, B. It is proper that the Court should see [224] that there has been a bona fide attempt made to fix all the members of the company for the time being before any execution be allowed to go against members not in that condition.

Rule discharged, without costs.

STOCKDALE AND ANOTHER v. DUNLOP. Exch. of Pleas. 1840.—Messrs. H. & Co., being the owners of two ships, called the “Antelope” and the “Maria,” trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to the plaintiffs 200 tons of oil—100 tons to arrive by the “Antelope,” and 100 tons to arrive by the “Maria.” The “Antelope” did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The “Maria,” having 50 tons of palm oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the “Maria,” together with their expected profits thereon:—Held, that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

[S. C. 9 L. J. Ex. 83; 4 Jur. 681. Discussed, *Felthouse v. Bindley*, 1862, 11 C. B. (N. S.) 877. Applied, *Stock v. Inglis*, 1882, 9 Q. B. D. 720: reversed, 12 Q. B. D. 564. Referred to, *Johnson v. Macdonald*, 1842, 9 M. & W. 602.]

Assumpsit. The declaration stated, that before the making the policy of insurance thereafter mentioned, to wit, on the 31st July, 1838, certain persons carrying on the trade and business of merchants, under the name and style of Thomas Harrison & Co., bargained and sold to the said plaintiffs divers, to wit, 200 tons of palm oil, at a certain rate or price then agreed upon between the plaintiffs and the defendant, to wit, the sum of £36 per ton, to arrive by two ships of the said Thomas Harrison & Co., called the “Antelope” and the “Maria,” that is to say, 100 tons of such oil by the “Antelope,” and the other 100 tons by the “Maria”; and whereas also the said two ships, before the making the said bargain and sale, had been and were engaged upon a trading voyage to the coast of Africa for the said Thomas Harrison & Co., and, at the time of the making the said bargain and sale, were expected to arrive at Liverpool, in the county aforesaid, with cargoes on board thereof respectively, composed, amongst other things, of palm oil; and whereas also, after the making the said bargain and sale, to wit, on the 1st of September, 1838, the said vessel called the “Antelope” arrived at Liverpool aforesaid with divers quantities of palm oil on board, and the said Thomas Harrison & Co. delivered to the said plaintiffs 100 tons of palm oil there-[225]-from, in part performance of the said bargain and sale of the said 200 tons of palm oil

as aforesaid; and the said plaintiffs further say, that, at the time of the said bargain and sale, and of the making the said policy of insurance, the said plaintiffs had reason to expect that they would make divers great gains and profits, to the amount of the sum insured as hereinafter mentioned, in case the said part of the said palm oil so bargained and sold as aforesaid, to wit, the said 100 tons thereof to be brought by the "Maria" as aforesaid, should arrive by the said vessel called the "Maria." The declaration then averred, that after the said bargain and sale, to wit, on the 13th September, 1838, the plaintiffs did make assurance, and cause themselves to be insured, with the defendants, lost or not lost, at and from twenty-four hours after the vessel's arrival at her first port and place of trade on the coast of Africa, and at and from thence to all or any ports or places on the said coast of Africa, or African islands, during her stay and trade on the said coasts and islands, with leave to proceed, &c., and thence to the United Kingdom, with leave to call, &c., upon any kinds of goods and merchandizes, and also upon the body, tackle, &c., in the good ship called the "Maria," until she had moored at anchor twenty-four hours in good safety, &c. &c., valued at £500 on profit, free of average, and without benefit of salvage, for the sum of £150: that, whilst the said ship was prosecuting her voyage, divers large quantities, to wit, 100 tons, of palm oil were loaded and shipped on board the said vessel, and continued so loaded on board thereof from thence until the loss thereafter mentioned, and that the plaintiffs were interested in the profits to arise and be made from the sale and disposal of the said palm oil to a large value and amount, to wit, to the value and amount of all the money by them insured thereon. It then proceeded to aver a loss by the perils of the sea of the ship with the said palm oil on board thereof, on the 18th of July, 1838, whereby the said palm oil, [226] and the expected profits, were wholly lost to the plaintiffs; of all which premises the defendant had notice, and was requested by the plaintiffs to pay the said sum of £150, which the defendant ought to have paid according to the form and effect of the policy so made by him. Yet, &c., [assigning as a breach the non-payment of the money]. There were also counts for money had and received, and upon an account stated.

To this declaration there were several pleas on which issues were joined, but the one which ultimately became important was the third plea to the first count, which was, "that the plaintiffs were not interested in the profits to arise from the sale and disposal of the said palm oil, in the said first count mentioned, in manner and form as in the first count is alleged;" on which plea the plaintiff took issue.

The cause was tried before Maule, B., at the Liverpool Summer Assizes, when it appeared in evidence that Messrs. Harrison & Co. were the owners of two vessels called the "Antelope" and "Maria," trading to the coast of Africa; and that in July, 1838, the vessels being then expected to arrive in Liverpool with cargoes of palm oil, they agreed verbally to sell to the plaintiffs 200 tons of palm oil—100 tons of oil to arrive by the "Antelope," and 100 tons to arrive by the "Maria," at the price of £36 per ton. On the 1st of September, 1838, the "Antelope" arrived at Liverpool with 100 tons on board, which were delivered by Messrs. Harrison & Co. to the plaintiffs in pursuance of the contract. The "Maria" never did arrive, but, having struck the bar at the mouth of the River Brass on the coast of Africa, she was found, on examination, to be so much injured as to be rendered unseaworthy and incapable of proceeding on her voyage: and she was therefore unloaded and condemned. The "Maria" had on board only 50 tons of oil, the whole of which was transhipped, and arrived in Liverpool by other vessels. It was proved that the term "oil to [227] arrive" was a mercantile term, and that, if the oil did not arrive by the vessel, the purchaser had no right to it. It was contended at the trial, that the underwriters were not liable on this policy, on the ground that the plaintiffs had not such an interest in the goods, or the profits to be derived from them, as to make them capable of being insured. The learned Judge directed the jury to find a verdict for the plaintiffs, giving leave to the defendant to move to enter a verdict, on the above ground, on the issue raised on the third plea, as well as on other points reserved on the other issues in the cause, which ultimately became of no importance, the Court being of opinion that this issue ought to be entered for the defendant. Cresswell having in Michaelmas Term obtained a rule accordingly,

Wightman and Crompton now shewed cause. The question is, whether the plaintiffs had any interest in the goods or the profits, in respect of which they could effect an insurance: and it is submitted that they had, there having been a part delivery and

acceptance, by the delivery of the 100 tons which arrived by the "Antelope." Messrs. Harrison & Co. were bound to deliver the oil insured, and could not have objected that there was no written contract. There is no doubt that expected profits may be insured, and so may imaginary profits: *Lucena v. Craufurd* (2 N. R. 300); *Thompson v. Taylor* (6 T. R. 483). In the former case, Lawrence, J., after citing the definitions of the contract of a policy of insurance, says, "These definitions, by writers of different countries, are in effect the same, and amount to this, that insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice, by the happening of the perils specified to certain things which may [228] be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in anywise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have interecepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things." And he afterwards adds, "Interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation; but the having some relation to or concern in the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced, with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing." That statement of the law includes this case, for the plaintiffs had a moral certainty of advantage, and an interest in the subject-matter of the contract from the first, although they might not ultimately get the goods. So, in *Le Cras v. Hughes* (cited in *Camden v. Anderson*, 5 T. R. 710), the captors of a prize at St. Omer were held to have an insurable interest in such prize, on the ground of their having a reasonable expectation of receiving from the Crown the property captured. It is not meant to be contended that a mere vague hope would be insurable; but this is not so, but a reasonable expectation of a profit. It is not necessary that it should be a strict legal right; an equitable one is sufficient; *Hill v. Secretan* (1 Bos. & P. 315). If there was reasonable ground to believe [229] that Messrs. Harrison & Co., as men of honour, would fulfil their contract, that would constitute an insurable interest. *Clay v. Harrison* (10 B. & C. 99) was relied upon at the trial, but that case in truth is in favour, of rather than against the plaintiff. It is also distinguishable, because there the contract was abrogated, and consequently there was nothing on which the insurance could attach. In that case, A., in England, contracted with B. at St. Petersburg, to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods in transitu at Elsinore. A. having become insolvent, it was held, that his assignee under a commission of bankruptcy could not recover on the policy, inasmuch as A., after the stoppage in transitu, had not any insurable interest. The whole turned on the effect of the stoppage in transitu, and Lord Tenterden, after stating the question to be whether the bankrupt had an interest in the goods insured at the time of the loss, says, "We are of opinion, that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage in transitu, had no property in the goods insured, and therefore the action cannot be supported." If Harrison & Co. had entirely repudiated the contract, and had said that they would not deliver the oil, then *Clay v. Harrison* might have been an authority against the plaintiffs, but not otherwise. At all events, here the part delivery established the contract, and made it valid. *Thompson v. Taylor* (6 T. R. 478) is more in point. There a ship was chartered from London to Teneriffe, there to take on [230] board a certain number of pipes of wine, and to proceed to Barbadoes, &c., for which the owner was to receive freight at the rate of so much per pipe; and it was held, that a policy of insurance on such freight attached from the sailing of the ship from London, and that the insurers were liable, though the ship was lost by

being taken as a prize before she arrived at Teneriffe. That case is strong to shew that this was an insurable interest, for there the subject-matter of the contract was destroyed before the contract could take effect. Lawrence, J., says—"It seems to me that the plaintiff had clearly an insurable interest. As to the objection that this was a speculative interest, this is not unlike a case (referring to *Grant v. Parkinson*, Park on Insur. 305) which happened a few years ago, where it was held that the profits of a cargo of molasses might be insured, notwithstanding the statute 19 Geo. 2, c. 37." That is an authority to shew that expected profits may be insured. [Lord Abinger, C. B. Should there not be an interest in the ship, in order to legalize an insurance of expected profits? In that case there was a legal interest in the contract. Parke, B. Where a man has goods on board a ship, then he may insure the expected profits to arise from them. But is there any interest either in the ship or goods in this case? It is not necessary that the party should have a legal interest in the subject-matter of insurance. There was a moral certainty and reasonable expectation of profits to arise from the goods, and that is sufficient. But if not, there was here a part delivery of the goods, which gets rid of the objection that there was no contract which could be enforced. [Parke, B. That was after the loss.] Profits are an exerescence growing out of a principal matter; as was said by Lord Ellenborough, in the case of *Eyre v. Glover* (16 East, 218), "an exerescence upon the value of the goods beyond the prime cost;" and the exerescence may be in-[231]-sured separately by another policy than that of the principal. [Parke, B. It is clear that Harrison & Co. could have insured their profits, because they had the goods: but what interest had the plaintiffs in them? Harrison & Co. could have assigned them to a third person, and he could have insured: but that is a different case from the present.] The profits may be insured independently of the goods. In *Barclay v. Cousins* (2 East, 542), the profits of a cargo employed in trade on the coast of Africa were held to be an insurable interest. So in *Henrickson v. Margetson* (id. 548, note), which was an insurance at and from Hamburg to Bourdeaux, "on imaginary profits," Lord Mansfield said, "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo; but the market varies, and may depend upon twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost." They also cited *Hodgson v. Glover* (6 East, 316), and *King v. Glover* (2 N. R. 206).

Cresswell, Alexander, and W. H. Watson, contra, were stopped by the Court.

LORD ABINGER, C. B. The question is, whether the plaintiffs had any insurable interest in the goods in question, and I am of opinion that they had not. The argument of the plaintiff's counsel rests upon an analogy drawn from the law relating to insurance on freight. It is very true, where a party is entitled to the ship, either wholly or in part, the law will allow him to make a separate insurance on the freight. If there is a charter-party, and the ship is lost, he is entitled to recover for the freight. But if a ship is sent out for goods, and none are received on board, there is no interest to maintain an insurance on the [232] profits. Where goods are received on board of a vessel, and a contract is made to secure them, then, if a loss arises, the assured may recover, because his receipt of the goods has been prevented by perils of the sea; for he has made a contract which he had great reason to expect would be performed. But the cases of freight are not analogous to cases of insurances on the profits to arise from the sale of goods. They stand upon the assumption that the party insuring has in his own power the subject-matter upon which the insurance is effected. In this case, the plaintiffs had no present interest, and none can attach on such a contract as this. If contracts for goods to be purchased in futuro were allowed to be the subject of insurance, it would be allowing a wager policy to be made. But such a doctrine would defeat the legislative provisions on the subject, and create an imaginary interest, which has no foundation in law. Here there was no written contract, nor any contract which the plaintiffs could have enforced. The cases of freight suppose a contract which is capable of being enforced. Here no interest in the goods was passed to the plaintiffs. There is a contract to sell 100 tons of palm oil, to arrive by the "Maria"; if the vessel do not arrive, or the goods do not arrive, the contract is void. Then where is the interest? The transaction amounts in effect to an insurance of a void contract.

PARKE, B. I concur in opinion with the Lord Chief Baron, that the plaintiffs have no insurable interest. I admit that profits may be insured, but that is on the

ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may [233] the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. There the profits are insured as an additional value upon the goods, in which the insurer has a present interest. Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival. They rely upon the honour of the vendor, that the goods shall be put on board the ship specified in the contract, and that they shall be delivered to them when the ship arrives. It is an engagement of honour merely. If it is not a contract capable of being enforced at law, it is nothing. The contract is to sell the goods when they arrive, but there was no memorandum in writing, and consequently no contract which was capable of being enforced, at the time either of the insurance or the loss; and if it ultimately did become capable of being enforced, that was only by the subsequent part delivery and acceptance, which was after the loss had occurred. At the time of the insurance and of the loss, there was merely an expectation of possession on the part of the plaintiffs, founded on the mere promise of the vendors, but there was a total absence of interest in the subject-matter of the insurance. There was no contract which could be enforced, but a mere promise on the part of Messrs. Harrison & Co. to deliver the oil when it arrived. There was no interest whatever, either special or general, in the cargo. The defendant is, therefore, entitled to a verdict on the third plea.

ALDERSON, B. I agree with the rest of the Court in thinking that the plaintiffs had no insurable interest in the cargo of the ship "Maria." The contract of the plaintiffs with Harrison & Co. was a mere verbal contract, incapable of being enforced.

GURNEY, B., concurred.

Rule absolute.

[234] PIM AND OTHERS v. CURELL AND OTHERS. Exch. of Pleas. 1840.—A declaration in case for the infringement of a ferry, described the ferry as being across the river Mersey, "from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster:"—Held, 1st, that the plaintiff might recover under this declaration, although he proved a ferry both ways, as well from L. to B., as from B. to L.; 2ndly, that this description did not import a ferry from the whole township, &c., of B., to the whole parish, &c., of L., but that the plaintiff might recover on proof of a ferry from any point within B. to L.—Under a lease of a ferry, describing it as a ferry across a river both ways, a ferry across the river one way only will pass.—Sembles, that the establishment of a ferry across the river Mersey, having its terminus in Birkenhead, within 400 yards of the plaintiffs' ferry, and upon which the defendants carried passengers and goods for hire in boats from Birkenhead to Liverpool, in itself imported an infringement of the plaintiffs' ferry, for which they might maintain an action.—The plaintiffs derived title to their ferry under a grant from Edward III. to the priory of Birkenhead. The defendants, in disproof of this title, sought to shew that there was a pre-existing ferry from Liverpool to Birkenhead, and from Birkenhead to Liverpool, which rendered the grant of Edward III. void as a grant of ferry. In order to shew that both were ferries one way only, the plaintiffs' from B. to L., and the other from L. to B., the plaintiffs gave in evidence certain proceedings in the Court of Chancery of the Duchy of Lancaster, temp. Chas. I., on an information filed at the relation of the then lessee of the latter ferry under the crown, Sir W. Molyneux, against the proprietor of the former, a Mr. Powell. The information claimed a ferry both ways, and sought to restrain the defendant from proceeding in certain suits in the Court of Requests at Westminster in disturbance of the right of the relator, and prayed process against the defendant to appear in the Duchy Court to answer the premises, and abide the order of the Court. Before answer, the Court made an order, purporting to be "in explanation of an injunction against the defendant to permit the relator peaceably to

enjoy his ferry, and take the profit thereof in such manner as the same had been enjoyed for twenty years last past," and whereby, (on affidavit on the part of the relator, stating that the occupiers of the two ferries had been accustomed for twenty years past mutually to account with each other at certain times and places agreed on, concerning the profits of the ferries, the occupiers of Powell's ferry paying to the occupiers of Molyneux's ferry half the profits of the freight laden on the Liverpool side and landed on Cheshire side, and the latter making some payments to the former for part of the profits of the freight laden on Cheshire side and landed on Liverpool side), the Court ordered that Powell should account and pay as had been accustomed, or in default an attachment should be awarded against him. The answer of Powell also claimed a ferry both ways, founding his title on the grant of Edward III. On the 6th of June, 1627, the Court ordered that an attachment should be awarded against the defendant for his contempt in not accounting according to the former order: and on the 11th of June, a further order was made, that the ferrymen on both sides should weekly account each to other according to the previous usage; that both sides should account each to other for the time past, before the next assizes: that the relator might take out an attachment *de bene esse*, that if the defendant and his ferrymen did not account accordingly they might be attached for their former contempts; and that in case the ferrymen of the relator did not account according to that order, an attachment should be awarded against them. It appeared that depositions were afterwards taken in the suit on both sides, but it did not appear what was its ultimate result.—Held, that none of the above orders were admissible in evidence, as not amounting to any final decree, or containing any adjudication of the Court upon the rights of the parties, but merely directing the continuance of a certain state of things *pendente lite*.—A right of ferry is a matter in which the public are interested, and as to which, therefore, reputation is evidence, and so also is a verdict or judgment of a Court of competent jurisdiction, touching the same right, although between other parties.

[Discussed, *Neill v. Duke of Devonshire*, 1882, 8 A. C. 135. Referred to, *Mercer v. Denne*, [1905] 2 Ch. 538; *Cowes Urban Council v. Southampton Steam Packet Company*, [1905] 2 K. B. 287; *General Estates Company v. Beaver*, [1914] 3 K. B. 924.]

Case for the infringement of a ferry. The declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, &c., were lawfully possessed of a [235] certain ancient ferry, across and over a certain arm of the sea called the river Mersey, from the township, parish, chapelry, or place of Birkenhead, in the county of Chester, to the parish, township, or place of Liverpool, in the county of Lancaster,^(a) for carrying, conveying, and ferrying over and across the said river, from the said township, &c., of Birkenhead to the said parish, &c., of Liverpool, within the said ferry, all passengers and other persons having occasion for the same, and the goods and chattels of such persons, in boats kept by and by the authority of the plaintiffs there for that purpose, they the plaintiffs taking and receiving certain reasonable freights and ferryages, &c. Breach, that the defendants, contriving, &c., on the 1st of August, 1837, and on divers other days and times, &c., wrongfully carried and conveyed divers passengers and goods for hire in certain boats, over and across the said river, from the said township, &c., of Birkenhead to the said parish, &c., of Liverpool, and upon the said part of the said river where the plaintiffs had such ferry as aforesaid, and over, upon, and within the said ferry of the plaintiffs, whereby &c. Another breach alleged, that the defendants carried passengers and goods across the river, from Birkenhead to Liverpool, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry, &c.

Pleas—first, not guilty; secondly, that the plaintiffs were not lawfully possessed of an ancient ferry across and over the said arm of the sea, from Birkenhead aforesaid

(a) The declaration, as originally framed, claimed the ferry both ways, from Birkenhead to Liverpool, and from Liverpool to Birkenhead; but subsequent investigation into the title having satisfied the plaintiffs that their ferry legally existed one way only, viz. from Birkenhead to Liverpool, a Judge's order was obtained to amend the declaration accordingly.

to Liverpool aforesaid, in manner and form as in the declaration alleged :—upon which issues were joined.

[236] The cause was first tried before Vaughan, J., at the Cheshire Summer Assizes, 1838. The plaintiffs claimed as lessees of a ferry across the river Mersey, from Birkenhead to Liverpool, called the “Woodside Ferry,” under a lease granted to them in the year 1833, by Francis Richard Price, Esq., the alleged owner of the ferry. The defendants had, in the year 1837, set up another ferry across the river, from a point in Birkenhead called the Ivy Rock, about 400 yards to the southward of the terminus of the Woodside Ferry, to Liverpool, which they called the “Monks’ Ferry,” and had built, on the Birkenhead side, a pier and hotel, and established steam-boats, which plied regularly during the day. It was for this alleged invasion of the plaintiffs’ ferry that the action was brought.

The plaintiffs derived their title from letters patent under the great seal, dated 11 Edw. 2, A.D. 1318, and 4 Edw. 3, A.D. 1331. By the former, after reciting, that “from the vill of Liverpool, in the county of Lancaster, to the priory of Birkenhead, in the county of Chester, and from the said priory to the aforesaid vill, over [“ultra”] the arm of the sea there, a common passage was had [“commune passagium habeatur,”] and that the men intending to pass over the said arm of the sea had hitherto been obliged to turn aside to the said priory, because in the place of the aforesaid passage there, there were not any houses for the entertainment of such men,” whereby the priory was burdened beyond its means, by the exercise of the necessary hospitality, the King granted to the prior and convent of the said priory of Birkenhead his royal license to erect in the place of the said passage an inn or house of entertainment, for the benefit of the passengers. The letters patent of 4 Edw. 3, after inspecting and confirming the above grant, stated, that the King, “willing to do the said prior and convent a more abundant favour, and for the benefit of those wishing to pass over by water there, granted to the said prior and convent, ‘quod ipsi et eorum successores in perpetuum [237] habeant ibidem passagium ultra dictum brachium maris, tam pro hominibus quam pro equis, et aliis rebus quibuscunque,’ and that they might receive for that passage as reasonably might be done.”

The plaintiffs next put in certain pleadings in a quo warranto, filed by the Attorney-General of the Palatinate of Chester, in the Court of the Earl Palatine, in 27 Edw. 3, (1354), against the prior and monks of the priory of Birkenhead, touching the claims of the convent, and, amongst others, this claim of a right of passage. The Prior pleaded, as to this part of the information, the above grant of the 4 Edw. 3, which he set forth. The Attorney-General then called upon him to state his tolls, which being stated, he replied that they were excessive. The record then contained an award of a venire, but it did not appear what was the result of the proceeding.^(a)

At the dissolution of the monasteries, 27 Hen. 8, (1535), the possessions of the priory of Birkenhead passed to the Crown: and in the 36 Hen. 8, (1544), the King’s receiver of the rents of the late priory accounted to the Crown for “the profit of the ferry-house, and the boat called the ferry-boat, 4l. 6s. 8d.”

By letters patent under the great seal, dated in Nov. 1545, (37 Hen. 8), the King granted to Ralph Worsley, in consideration of 568l. 11s. 6d., all the houses, lands, &c., of the late priory of Birkenhead, “and all the ferry and ferry-house, and boat called the ferry-boat, and all the profit of the same, with all and singular every of their appurtenances, &c.,” to hold the same by the 20th part of a knight’s fee, and an annual rent of 59s. 5d. The plaintiffs clearly deduced the title to the ferry, through several settlements and wills, from Ralph Worsley to Mr. Price, their lessor, and shewed the payment of the annual rent of 59s. 5d., first to the [238] Crown, and subsequently to the grantees of the Crown, from the date of the grant to Worsley until the present time. The inquisitio post mortem of Ralph Worsley, the grantee, dated 15th Eliz., (1572), was read; whereby it was found that he died seised of the manor of Birkenhead, “and of a passage over the water of Mersey, in Birkenhead aforesaid.”

The plaintiffs then put in several documents for the purpose of tracing the title to another (as they alleged) co-existing ferry across the river Mersey, from Liverpool to Birkenhead; ^(a) viz. :—

(a)¹ This document was objected to on the second trial of the cause, and withdrawn.

(a)² This ferry was distinguished throughout the cause by the title of the Liverpool ferry.

13 Hen. 3 (1228). Conveyance from Roger de Maresey to Ranulph, Earl of Chester, of "all his lands between the Ribble and the Mersey," for 40 marks of silver. This grant was confirmed by charter of King Henry 3, in the same year.

18 Hen. 3 (1233). Assignment to Agnes, wife of William de Ferrers, Earl of Derby, of the lands between the Ribble and the Mersey, as one of the sisters and coheiresses of the said Ranulph, Earl of Chester.

38 Hen. 3 (1253). Grant of the King to Edward, his first-born son and heir, of the custody of all the lands which were of William de Ferrers, Earl of Derby, to be had until the full age of the heir of the same Earl.

41 Hen. 3 (1256). Account of Henry de Lee, bailiff of the Lord Edward, in which he rendered account (inter alia) of £10 "for the town of Liverpool, with toll, stallage, passage, &c."

50 Hen. 3 (1265). Grant by the King to Edmund, his son, of the castles and lands of Robert de Ferrers, Earl of Derby, with all their appurtenances.

25 Edw. 1 (1296). Inquisitio post mortem of the Lord Edmund, brother of the King Edward 1, which found that [239] he died possessed of (inter alia) "passagium ultra Mersey," worth by the year 26s. 8d

22 Edw. 3 (1349). Account of the King's minister, whereby, in his return for Liverpool, he accounted for (inter alia) the passage of a boat, &c., demised to John, the son of William del Mer.

Leases, under the seal of the duchy of Lancaster, of the several dates of 2 Rich. 3, (1485); 20 Hen. 7, (1505); 20 Hen. 8, (1528); 37 Hen. 8, (1545—the same year as the grant to Ralph Worsley above mentioned); 1 & 2 Phil. & Mary, (1554); 28 Eliz. (1586), were put in. The first of these described the ferry as "the passage or ferry over the water of Mersey, between the town of Liverpool and the county of Chester, parcel of the duchy of Lancaster, together with the boat, and all other profits, issues, and emoluments to the same passage or ferry appertaining or in any manner belonging. The other leases described it variously as "a boat for a passage over the water of Mersey,"—"a boat and the passage over the water of Mersey,"—"the ferry-boat and the passage over the water of Mersey." The leases of 1545 and 1554 were (each for 21 years) to Sir William Molyneux, and that of 1586 to Richard Molyneux.

The plaintiffs then offered in evidence certain proceedings upon an information filed in the Court of Chancery of the duchy of Lancaster, 22nd May, 2 Car. 1, 1626, by the Attorney-General of the duchy, at the relation of Sir Richard Molyneux, against Thomas Powell, Esq., (great grandson of Ralph Worsley, and then owner of the Woodside Ferry), and two of his ferrymen.

The information stated, that the king was seized in his demesne as of fee, in right of his duchy of Lancaster, of and in the village, town, and lordship of Liverpool, with the appurtenances, in the county of Lancaster, and (inter alia) of and in a certain ferry or passage for the carrying and transporting of all passengers, goods, merchandize, and [240] cattle, by one or more ferry boat or boats, at all convenient and fitting times of the year, from the said village, &c., of Liverpool, over the river Mersey, to a certain place called Birkenhead Wood, on the other side of the same river, and within the county palatine of Chester, and to all and every other place upon the other side of the same river, adjoining or abutting to, or upon the confines of, the said county palatine of Chester; and so, in like manner, from the said place called Birkenhead Wood, and other places in Cheshire, on the other side of the said river Mersey, to the said village, &c., of Liverpool. It then set forth a lease from the Crown, dated 10th May, 2 Jac. 1, (1604), under the seal of the duchy of Lancaster, to Sir Richard Molyneux, Bart., deceased, for a term yet unexpired, at a yearly rent of 14l. 6s. 8d.; and the devolution of the term, upon his death, to Sir Richard Molyneux, his son, the relator. It then alleged, that the defendants, intending wrongfully to dispossess the said Sir R. Molyneux of the ferry and passage, and to gain and acquire the same, and the fees and profits thereof, to them or some of them, &c., had of late wrongfully and unlawfully entered and intruded into and upon the said ferry or passage, and did wrongfully pretend, challenge, and claim the same ferry and passage, and the fees and profits thereof, to be the inheritance of them, or some of them; and had of late hindered, disturbed, and interrupted, and still did hinder and interrupt the said Sir Richard Molyneux, his servants, labourers, and assigns, of and in the said ferry and passage, to have, use, exercise, and enjoy the same with their boats and vessels, for the transportation of passengers, goods, and merchandize, from and to the several

places aforesaid, and in manner aforesaid; and to receive and take the profits thereof, according to the ancient usage heretofore used in that behalf: and in further wrong to his Majesty, and his lessees and fermors of the said ferry or passage, the defendants, or some of them, had then of late [241] made for themselves and used ferry-boats for the carrying and transporting of passengers, &c., over the said river, on the same ferry and passage, in as ample a manner as his Majesty, his lessees or fermors thereof, were rightfully entitled to do; and did wrongfully elaim and use the said ferry or passage, and land their passengers and freight upon his Majesty's soil, within his manor or town of Liverpool; and did likewise take into the same ferry passengers and freight on Liverpool side, and land the same on Cheshire side, without giving any recompense to his Majesty, or his lessees or fermors of the said manor and ferry in respect thereof, &c. The information went on to allege, that the defendants had commenced several suits against Molyneux and several of his servants, in his Majesty's Court of Requests, touching the said ferry and passage, and thereby endeavoured to impeach his Majesty's title to the ferry, and the fees and profits thereof; and to stay due trial and proceeding in divers actions of account by the under tenants and servants of Molyneux against the defendants, touching the profits of the ferry; and had obtained orders and injunctions out of the Court of Requests for the investing and settling of the defendants in the peaceable possession of the ferry, &c.; and that such proceedings trenched upon the King's right and inheritance in the ferry, and the fees and profits thereof, and to the derogation of the Duchy Court, &c. &c. And forasmuch as the town and lordship of Liverpool, and the said ferry and passage, and all other the things aforesaid granted to the said Sir Richard Molyneux, were in the county palatine of Lancaster, and within the order, survey, and jurisdiction of the Duchy Court, and all matters whatsoever for or concerning the same were more aptly and fitly to be heard, ordered, and decided in that Court than elsewhere, the information thereby prayed process against the defendants to appear in his Majesty's Court of Duchy Chamber, at Westminster, to answer the premises, and abide the order of the Court.

[242] The defendants first put in a joint plea or demurrer to the information, alleging that the ferry therein mentioned did not lie nor was to be exercised within the county palatine of Lancaster, but lay out of the body of every county, and was to be exercised and used over the river of Mersey, which river divided the counties palatine of Chester and Lancaster, and therefore the information did not allege any sufficient matter to entitle the Duchy Court to the jurisdiction thereof; and praying judgment whether the Court would take consuance of the suit. This plea was however overruled; and by an order bearing date the 25th Nov., in the same year, purporting to be "in explanation of an injunction formerly granted, by which the defendants were enjoined to permit and suffer the relator, and all claiming under him, peaceably and quietly to enjoy the said ferry and passage, and to take the profit thereof, in such manner and form as the same had been enjoyed for the most part of twenty years last past," the Court, "on consideration of an affidavit of the under fermor of the said ferry, whereby it appeared that the fermors of the said ferry of Liverpool, and the fermors and occupiers of the ferry claimed by the said Thomas Powell over the river of Mersey, had been used and accustomed for the most part of twenty years last past, and above, mutually to account with each other, at certain times and places agreed on between them, for and concerning the fees and profits taken by means of the said several ferries; and that mutual allowances had been made during all the time aforesaid each to other for the said profits, viz. that the fermors of the said Thomas Powell's ferry had always paid to the fermors of his Majesty's ferry the moiety or one half part of the benefit of such freight as was laden and taken in on Liverpool side, and landed on Cheshire side; and that likewise the fermors of his Majesty's ferry had made some payments and allowances to the fermors of Powell's ferry for part of the profits of such freight as was taken [243] into the ferry belonging to his Majesty's fermors on Cheshire side, and landed on Liverpool side;" ordered, that Powell, and all claiming under him, and other persons using or occupying the said ferry, should, on sight of that order, account and pay to the fermors or occupiers of his Majesty's ferry, according as had been used for most part of twenty years past, or in default thereof, an attachment should issue against the said Powell, and all other persons using the said ferry.

On the 2nd February, 1626-7, the defendant Powell filed his answer to the information, in which he set forth the letters patent of 4 Edw. 3, and the subsequent

title to the ferry thereby granted, until it vested in himself: and (after denying the several allegations of the information) stated, that anciently, to wit, from the time of the grant made to the said prior and convent as aforesaid, and until of late years, the sole ferrying and transporting of passengers, goods, and cattle over the said river, in the aforesaid place, was by the tenants or servants of those under whom the defendant claimed his estate in the said ferry, and by no others: but that of late years certain of the townsmen of Liverpool had by little and little encroached upon his and his ancestor's right, in taking upon them to make a boat for the transportation of passengers, goods, and cattle, contrary to justice, and to the prejudice of the defendant; that he the defendant had not at any time made or used any ferry boats for the transportation of passengers, &c., but that the other defendant (his lessee) and other tenants of the ferry before him, had from time to time repaired the ancient and accustomed ferry-boats, and made new boats as occasion required; without this, that the defendant wrongfully claimed or used the said ferry, or otherwise than was lawful for him to do, or had commenced any suits against Molyneux, &c., for any other purpose than the quieting of the defendant, his tenant and servants, in the possession of the said ferry and of the profits thereof, &c.

On the 6th June, 1627, the Court made an order that [244] an attachment should be awarded against the defendants for their contempt in not accounting according to the former order; and on the 11th June a further order was made, that Mr. Powell should cause his ferrymen to account, or else discharge himself by affidavit that he could not procure them to account, according to the former order of the Court: "and that the ferrymen on both sides should weekly account for the profits of the said ferries, each to other, as had been used for the most part of twenty years last past, and for such time past as the ferrymen on both sides had not theretofore accounted for the profits of their ferries, according as they had usually done for the most part of twenty years last past; that both sides should account each to other for the said time past at or before the next assizes to be held at Lancaster; and that the relator might take forth an attachment de bene esse, that if the defendant, and all other his ferrymen, should not account according to the tenor of that order, they should be attached in regard of former contempts appearing to the Court; and in case the ferrymen of the relator did not account according to that order, then an attachment to be awarded against them for their contempt in not accounting."

These proceedings were objected to by the defendant's counsel, as being inadmissible in evidence on two grounds: first, that the suit was *res inter alios acta*; and secondly, that there was no final decree or judgment. For the plaintiffs, *Laybourn v. Crisp* (4 M. & W. 320) was referred to, and on the authority of that case the learned Judge admitted the evidence. Certain depositions taken in the same suit, under a commission issued subsequently to the last order, were also tendered in evidence, but on being objected to, were withdrawn. It did not appear what was the final result of the suit.

The plaintiffs' counsel then put in several leases of the Woodside Ferry by the ancestors of Mr. Price. One of them, being a lease from Alice Price to William Woods, for seven [245] years, dated 6th June, 1752, contained a covenant by the lessee to pay the yearly sum of 40s. to the Honourable Thomas Molyneux, "for the liberty of taking off passengers from Liverpool town side." The lease from Mr. Price to the plaintiffs, which was dated 31st August, 1835, described the ferry as existing both ways, from Birkenhead to Liverpool, and from Liverpool to Birkenhead; and it contained a proviso enabling the plaintiffs to determine the lease upon six months' notice, in case a legal ferry should be established, by act of Parliament or otherwise, within five hundred yards of the plaintiff's ferry.

The plaintiffs then called a number of witnesses, the result of whose evidence was, that as far back as living memory went, there had been a quay, and a regular establishment of boats plying at stated intervals, at Woodside, where the lessee of the ferry had always kept a public-house; carrying passengers formerly at 2d., but since the introduction of steam-boats, at 3d. a head; that during all the time the sailing-boats were in use, the Liverpool town-boats had been in the habit of bringing passengers across to the Cheshire side: that they were never permitted to land them on the Woodside quay, or to take back passengers from the quay, except at one time on payment of a penny each, which was called the "landing penny;" that more or less resistance had also been made at different times to their taking back passengers from

other parts of the Cheshire shore within the alleged limits of the Woodside Ferry, unless in the case of their bringing across parties for recreation, whom they were always allowed to wait for and take back. About twenty years ago, on the introduction of steam-boats, another ferry (so called) was established, with Mr. Price's permission, from a point about 800 yards to the eastward of the Woodside Ferry to Liverpool, which was called the Birkenhead Ferry; and since that time steam-boats had regularly run during the day on both these lines of ferry. In the year 1826, the [246] then lessee of the ferry built a new and more commodious quay, or slip, about 100 yards to the westward of the old quay, which had since been disused. Before the existence of the present town of Birkenhead, there were few houses within the township, and the high road leading from Chester to the water-side came down to the shore at the point called Ivy Rock, and thence ran along the shore as far as the old Woodside quay; beyond which to the westward there was no regular road, but only the open shore of the river. Since the town of Birkenhead has been built, within the last fifteen or twenty years, this road has been destroyed, and the high road from Chester comes directly to the shore at Woodside; and between it and the river are several streets, and a considerable population.

An admission of the defendants' attorney was put in, whereby it was admitted, "that the defendants did, on the 1st day of August, 1837, and on divers other days before the commencement of this suit, carry and convey divers passengers and goods, for hire, in certain boats, from a point in Birkenhead called the Ivy Rock, to Liverpool, and back again." No evidence was however given of the carrying by the defendants of any particular individuals, or whence the persons carried by them came, further than that some of them were seen to come from the present Chester road.

At the close of the plaintiffs' case, Cresswell, for the defendants, applied for a non-suit on several grounds. First, that there was a variance between the declaration and the evidence, inasmuch as the declaration claimed the right of ferry generally from the township of Birkenhead to the parish of Liverpool; whereas the evidence was only of a ferry from a point within the township of Birkenhead, viz. Woodside, to Liverpool: that the declaration ought to have stated the actual termini of the ferry, and not having done so, and the statement being larger than the proof, the plaintiffs could not recover. Further, that the [247] declaration claimed the ferry one way only, but all the evidence was of the exercise of a ferry both ways, which also was a variance. Secondly, that inasmuch as a ferry could only exist, in point of law, as a part of a highway across a river or arm of the sea for the purpose of communicating with highways or villis on either side, the right of ferry had been lost by the change of its site, on the construction of the new quay, whereby it no longer communicated with the ancient highway of which it was before a continuation; or that if the owner of the ferry could so change the site at his pleasure through an entire district, his duty being co-extensive with his right, he was bound to provide the public with the means of landing and embarking throughout the same limits; on which point he cited *Tripp v. Frank* (4 T. R. 666). Thirdly, that there was no proof of any invasion of the plaintiffs' ferry, inasmuch as it was not shewn that any of the persons carried by the defendants would otherwise have crossed in the Woodside boats, or that they came from the road which terminated in the Woodside ferry. Fourthly, that by the erection of the Birkenhead ferry, with Mr. Price's consent, he had lost his exclusive right: that if his right extended through the possessions of the priory, so also did his duty; and that by the license to establish the ferry at Birkenhead he had deprived himself of the means of performing that duty, and so had lost the right. The learned Judge reserved these points, and the case proceeded.

The learned counsel, in his address to the jury, contended, that it clearly appeared by the recital in the letters patent of 11 Edw. 2, that there was, at that time, an existing ferry (for that the word *passagium* must be so construed) across the Mersey, from Liverpool to Birkenhead, and back again; and therefore, that the grant of the [248] 4 Edw. 3, to the prior and convent, could operate only as a license to carry passengers across the river, and receive a toll, without being subject to an information at the suit of the Crown, but not to give them any exclusive right of ferry, or to defeat the rights of the pre-existing ferry.

The defendants then called witnesses, whose evidence, in the main, was to the same effect as those of the plaintiffs, excepting that they spoke more strongly to the interruptions of the ferry by the Liverpool boatmen. They put in also other leases

of, and minister's accounts relating to, the Liverpool ferry. From one of these leases it appeared that, at the period of the grant of the Woodside ferry to Ralph Worsley, in 1545, the Liverpool ferry was in lease to a subject. This ferry continued in the possession of the Molyneux family until the year 1777, when it was sold by them, together with the tolls, harbour dues, &c., of the town of Liverpool, to the Corporation of Liverpool; since which period the exclusive ferry right has never been exercised. An examined copy of the record in a cause of *Price v. Ellison*, Trin. T. 1773, was also put in. It was an action of assumpsit by Mr. Price, the then owner of the Woodside ferry, claiming to recover a toll of a penny, due from the defendant, for landing on the plaintiff's quay and land, within the limits of the ferry. In some of the counts of the declaration, the plaintiff claimed as lord of the manor of Birkenhead, in others as owner of the ferry. The declaration alleged the ferry as existing both ways. It appeared that the plaintiff had sued out several successive writs before he declared; and there was an entry of judgment of non pros., and of the taxation of costs for the defendant. It was contended that the whole documentary title of the plaintiffs established a ferry (if any) both ways, and so disproved the ferry claimed by the plaintiffs: and that this view of the case was confirmed by the evidence of the record in *Price v. Ellison*; since, if it were a ferry one way [249] only, the owner of the ferry could never have considered himself entitled to the "landing penny" claimed in that action.

The learned Judge, in summing up, stated, in the first instance, his opinion upon the points made by the defendant's counsel for a nonsuit:—1. That under the allegation of the declaration, that the plaintiffs were possessed of a ferry from Birkenhead to Liverpool and from Liverpool to Birkenhead, they might recover in respect of a ferry from any particular point in Birkenhead to Liverpool only, if it were established by the evidence. 2. That it sufficiently appeared from the evidence, that the site of the ancient ferry was the same, or very nearly so, with that of the present terminus at Woodside; and that it had in fact communicated with the highway leading thither. 3. That the facts stated in the defendants' admission, and the carrying by them of persons coming from the Chester road, were sufficient evidence to go to the jury of an invasion by the defendants of the plaintiffs' ferry. His Lordship, after stating the evidence, left to the jury the two questions, 1st, whether the plaintiffs as lessees of Mr. Price, were possessed of an ancient ferry from Birkenhead to Liverpool; and, 2ndly, whether, if they were, the defendants had infringed that ferry. The jury found a verdict, on both issues, for the plaintiffs.

In the following term, Cresswell obtained a rule nisi to enter a nonsuit on the several points reserved at the trial: and for a new trial, on the ground that the proceedings in the information against Thomas Powell had been improperly received in evidence; and also on the ground of misdirection:—1st, in the learned Judge's not having stated to the jury, that the grant under which the plaintiffs claimed was a grant, not of an exclusive franchise, but only of a license; and, 2ndly, in his having led them to conclude that the particular position of the ferry originally was not [250] material to the plaintiffs' right to recover. In Easter Term, 1839, cause was shewn against this rule by

The Attorney General, Temple, Evans, Jervis, and Welsby. I. First, as to the objection that there was a variance between the ferry stated in the declaration and that proved. It is not correct to say that there was no evidence that the ferry existed one way only. It appeared that there had never been any station for the Cheshire boats on the Liverpool side, or vice versa, nor was there evidence of any obligation on the convent or their successors to maintain boats on the Lancashire side, or on the Liverpool ferrymen to maintain boats on the Cheshire side, as would necessarily have been the case in a tidal river of this description, had the right of ferry existed both ways. And thus the co-existence of the two ferries may be reconciled. But further, even if there was evidence to prove a legal ferry both ways, the plaintiffs were not bound to set forth the whole of their right in their declaration. [Parke, B. If they have it both ways, they have it one way.] On this principle, in an action on the case for disturbance of common, where the right was alleged to be in respect of a messuage and 150 acres of land, it was held, that the declaration was divisible, and that proof of a right of common in respect of the land only was sufficient to entitle the plaintiff to a verdict: *Ricketts v. Selwey* (2 B. & Ald. 360; 1 Chit. R. 104, 112). But it is further objected, that the plaintiffs claim the

ferry over the entire district of Birkenhead; whereas they have proved it only from point to point. But the declaration is in the usual form when the ferry is claimed from point to point. The termini are never set forth by metes and bounds. It is alleged that the ferry is from this township, &c., of Birkenhead to Liverpool, because Woodside, the station of that [251] ferry, is within the township, &c., of Birkenhead. It might as well be said that the declaration claims the ferry all over Liverpool. It is unnecessary, therefore, to consider whether the right was more largely established by proof, because it is not claimed so extensively as is alleged by the defendants.

II. Secondly, it is said there is no proof of the identity of the present site of the ferry with that granted by Edward 3. There is no foundation whatever for this objection: it clearly appeared that the site has ever since been at Woodside. That was until very recently the only station in Birkenhead, and must reasonably be taken to be the site of the house originally built by the Monks under the license of the Crown.

III. Thirdly, it is objected that there was no evidence of infringement of the plaintiffs' ferry by the defendants. On this part of the argument, the plaintiffs are entitled to assume that they have the right, such as they have alleged it. If so, can it be said that the defendants' admission was not evidence to go to the jury of an invasion of that right? If the ferry established by the defendants had been four instead of four hundred yards distant from the plaintiffs, the objection would equally apply. The point is a perversion of the doctrine established in *Huzzey v. Field* (2 C. M. & R. 432). [Parke, B. There was certainly evidence to go to the jury of the defendant's carrying substantially from the same towns or villis. There is some difficulty in reconciling some of the cases with *Tripp v. Frank* (4 T. R. 666): but this is not the case of carrying one passenger, but of building an hotel, and establishing steam-boats, by which they must have carried a multitude.] But independently of the admission, there was also evidence whence the jury might infer, that some of the persons carried came from Chester [252] or other places in the interior of the country, to go by Woodside. [Lord Abinger, C. B. Supposing you established that you had the ferry, can anybody doubt, that on a writ of *ad quod damnum*, the jury would have found this to be an invasion of it?]

IV. The next objection is, that the right of ferry is destroyed by the setting up of the Birkenhead ferry with the license of the owner of the Woodside ferry. [Alderson, B. If the ferry be from point to point only, it can be maintained as well as before.] That is the answer to the objection. But even if the right be more extensive, existing within certain defined limits, there is no authority for saying that it is lost by the conveying away of a portion of the land within those limits. A right of ferry may exist wholly disconnected from the right in the soil on either side; and it would not be, *quà* ferry, rateable to the poor: *R. v. Ellis* (1 M. & Sel. 652). It is impossible that there can be a continuous quay throughout the whole district of the ferry right: it must be sufficient if the ferryman provide the public throughout the district with reasonable means of landing and embarkation. [Parke, B. I understand the argument for the defendants to be, that by your declaration you are bound to prove a ferry throughout the whole chapelry of Birkenhead, and that you have not done so; but that, if you have, you have lost it by parting with a portion of the shore.] It is sufficient to answer that no such extensive right is in fact claimed.

V. With respect to the alleged misdirection, the summing up of the learned Judge, as stated in the report, is altogether free from exception. He stated to the jury, and expressed his opinion upon, the point as to the alleged variance: he left to them the conclusion to be derived from the usage: the question as to the identity of site, and also [253] as to the infringement. And as to the objection, that he did not leave it to them to say whether the plaintiffs had proved an exclusive ferry, or only a license, it was sufficient to leave to them the question, whether by the documents and the long usage taken together, the plaintiffs had proved that which they had alleged, an ancient legal ferry from Birkenhead to Liverpool. The word *passagium*, used in the grant of Edward 3, is the proper legal term to describe and convey a ferry: and it is the same word which is employed in the documents put in evidence to describe the Liverpool ferry. There is no doubt that the ferry at Woodside has in fact existed for more than five centuries. It has been granted and enjoyed with all the incidents of a legal ferry. There must have been an actual passage across the river for all the time; and it is doubtless that only which is

intended by the "commune passagium" mentioned in the grant of Edw. 2. It is seldom that so strong evidence has been given of the existence of a legal ferry.

VI. The last, and most important question, is as to the admissibility of the proceedings temp. Car. 1, which were objected to at the trial.^(a)

First, this is a case in which reputation would be evidence, and in which, therefore, a verdict or judgment of a Court of competent jurisdiction, or a decree or order in equity, adjudicating upon the right in question, is also evidence, although it be res inter alios acta. This is a question publici juris. The navigable river is a great highway; the boats of the ferry may be considered as a bridge across it. If it be a legal ferry, the owner is bound to keep boats and a station, and is indictable if he fail to do [254] so. All the Queen's subjects have a right, in consideration of the toll, to be carried over it: *Paune v. Partridge* (1 Salk. 12; 1 Show. 232; 3 Mod. 294); *Huzzey v. Field*. It is, indeed, much more publici juris than the boundary of a manor or a parish. The case of *Reg. v. Sutton* (8 Ad. & E. 516; 3 Nev. & P. 376) is very analogous to the present. There, on an indictment for the nonrepair of a bridge, charging the defendants with a liability ratione tenuræ, a record, setting forth a presentment, in the time of Edw. 3, against a Bishop of Lincoln, who was thereby charged with nonrepair of the same bridge, and liability to repair, a trial of this presentment at the assizes, and an acquittal of the Bishop as not liable, was held admissible in evidence for the defendants. It appeared from the same record, that the jury, being asked who was bound to repair, answered, that they did not know; and being asked when and by whom it was first built or repaired, said, about 60 years since, and then of alms by the Bishop of Lincoln. This finding also was held to be evidence. [Alderson, B. That was when the jury were summoned de vicineto, and their functions were less limited than at present. Parke, B., referred to *Brett v. Beales* (Moo. & M. 416).] In *Rex v. Antrobus* (2 Ad. & E. 788), the Court of King's Bench, on the trial of an information against the sheriff of Cheshire for not executing a criminal, held evidence of reputation that the sheriff was exempt and that the corporation of Chester were bound to execute, not to be admissible; but the propriety of that decision may perhaps be doubted. In the case of *The City of London v. Clerke* (Carth. 181), which is the foundation of this class of cases, it was held, in an action on the case, in which the plaintiffs prescribed to have a toll on all malt brought by the west country barges to Lon-[255]-don, that verdicts obtained against other west country maltsters were admissible in evidence against the defendant, though he was neither party nor privy to those suits. On the same principle, in *Reed v. Jackson* (1 East, 355), a verdict against one defendant in trespass, on an issue of a justification of a public right of way, negating the right, was held evidence in trespass for breaking the same close, against another defendant who justified under the same right. A navigable river being in law a public highway, that case is strictly analogous to the present. In *Rogers v. Wood* (2 B. & Adol. 345), the document tendered in evidence was held inadmissible, on the ground that it could not be considered as the decree of any court of competent jurisdiction.

Then the further question is, whether these orders of the Duchy Court, or any of them, were sufficiently final, or sufficiently adjudicatory on the right now in question, to render them receivable. There are many cases in which, upon similar questions, orders and proceedings not absolutely final have been admitted. In *Tooker v. Duke of Beaufort* (1 Burr. 146), a commission under the seal of the Court of Exchequer, to inquire as to the boundaries of a manor, and an inquisition taken thereon, were held admissible in evidence, although not conclusive, on a question to seeking the same right. So, in *Brisco v. Lomar* (8 Ad. & E. 198; 3 Nev. & P. 308), on a question as to the boundary between two manors, the finding of a jury summoned under a commission from the Duchy Court of Lancaster, to determine the boundary between those manors, on the petition of the then owners, was held admissible in evidence; although it did not appear that any steps had been taken after the return of the verdict to the Duchy Court. In those cases the commissions were only interlocutory proceedings, and do not appear ever [256] to have been acted on to the extent of a final decree. In *Laybourn v. Crisp* (4 M. & W. 320), on an issue directed by the Equity Court of Exchequer, to try the right of the deputy day-meters of London to the exclusive

(a) At the close of the Attorney-General's argument, the other counsel for the plaintiffs were relieved from arguing all the points except this last.

measuring, &c., of all oysters brought into the port of London for sale, and to the amount of their compensation, a decree of that Court, in 1783, in a cause between third parties, touching the same right, whereby an issue was directed to try the latter question only; and a subsequent decretal order, from which it appeared that the issue was found for the plaintiffs, and an account was directed,—were held admissible in evidence. [Parke, B. That was a decree in the place of a verdict, which is the material thing. The important point is, to shew that this order recognises Powell's right to the Birkenhead ferry.] The proceedings appear to be these: Molyneux claims to be owner of the ferry both ways, and in effect prays an injunction against Powell—who also claims a ferry both ways—to restrain him from proceeding in certain suits instituted by him against Molyneux, in the Court of Requests, in order to establish his ferry right. Powell, in his answer, sets out his right, founding it upon the grant of Edward 3. The first order of the 25th November, 1626, is an order nisi only; but that of the 11th June, although not a final decree in the suit, is an order recognising and establishing the mutual rights of the parties, as owners of two co-existing ferries across the river Mersey. The existence of the several ferries is no longer disputed, but the question between the parties is, how they shall share the profits of each. It is an order as final as a Court of Equity had the power of making in the case, being an order restraining the party in the exercise of his admitted right. [Lord Abinger, C. B. The difficulty is, whether it is not merely a provisional arrangement, without any decision, or distinct assumption of the existence [257] of the right of ferry in the defendant.] The order is inconsistent both with the claim of the relator and of the defendant, to their full extent; but the Court proceeds on an assumption, that each is entitled one way only, viz. Powell from Birkenhead to Liverpool, Molyneux from Liverpool to Birkenhead; and therefore directs them mutually to account for the profits received by each, according to their previous usage, viz.—Powell in respect of freight laden on the Liverpool side; Molyneux in respect of freight laden on the Cheshire side. Unless a ferry in each one way were assumed, the order would have been to account both ways. Further, it is to account weekly for all future time. And it is clear it must have been upon consent, which renders it stronger, as an admission of the mutual rights of the parties. It is no doubt an interlocutory order; but it is one dealing with the rights of the parties. A Court of Equity does not, like a Court of law, conclude the rights of the parties by one order or judgment. In *Horwood v. Schmedes* (12 Ves. 316), an order to account is considered as a decree. It is such an order as that if the party who obtained it abandon it, it may be acted on by the other party. An appeal lies from interlocutory orders of a Court of Equity: *Wall v. Attorney-General* (11 Price, 668). The stat. 7 Geo. 2, c. 20, s. 2, which enables the Court, on bills of foreclosure, to proceed, on the defendant's request, to make an order or decree before a regular hearing, is a parliamentary recognition of the practice of the Court in this respect. After a mere order for an issue for trial of a right, and after trial, the Court does not allow the plaintiff to dismiss his bill: *Carrington v. Holly* (Dickens, 280); and so also, after a mere general decree to account: *Gilbert v. Faules* (2 Freem. 158). Here there is finality enough to shew that the Court adjudicated upon the right. The Court had nothing further to do; they issued the pro-[258]-cess, and put into the hands of the party the means of using it. Upon the whole, therefore, it is submitted that the last order was rightly admitted in evidence, upon the principle established by the authorities which have been referred to; and if so, the previous proceedings were admissible as explanatory of it.

Cresswell, Crompton, and E. V. Williams, in support of the rule. I. The statement of the right in the declaration was negatived, the evidence being applicable to a ferry both ways. It is said this is immaterial, for that if the plaintiff proved more than he claimed, that would enable him to recover in this action. If this were like a right of common, or other easement, that would be true: in such cases there is no commensurate obligation or duty. But in the case of a ferry, there being corresponding and co-extensive duties to be performed by the proprietor, he must state his right correctly as against the public, in order that they may have from his statement a correct acknowledgment of the extent of his duties also. It is only by reason of the performance of the duty that he can support the franchise, and maintain his action for the invasion of it: see the *Y. B.* 22 Hen. 6, c. 14, referred to in *Hurzey v. Field* (2 C. M. & R. 436). The duty is in the nature of a consideration for his ferry:

if the ferry exist both ways, his duty is to carry both ways: the consideration is not separable. It is like the case of a consideration for a promise; the whole consideration must be stated, though not the whole promise: so here, the whole right ought to be stated, because that shews what is the consideration. [Parke, B. Suppose the plaintiff had produced a grant of a ferry, imposing also larger obligations, as, for instance, to keep a mile of road in repair—do you mean to say he must have stated all that?] It is a grant of an entire thing, and ought to be entirely stated. If the plaintiff were indicted for not carrying [259] from Liverpool, this verdict would be evidence for him. [Lord Abinger, C. B. The great mass of the evidence was of a ferry one way only.] Then, if it were ambiguous which was the right, that question should have been left to the jury; whereas it was treated as being wholly immaterial.

II. Further, this was a claim of ferry from the whole district of Birkenhead, and not from any particular part of or point within it; and as the right was proved as applicable to a single point only, viz. Woodside, in this also there was a variance. It is said the description in the declaration is only of a claim from any particular point within the district from which it might be proved. The precedents are all against such a general statement of the right. They either describe the ferry as existing from A. to B., or by a name given to it, as in *Tripp v. Frank*, and *Huzzey v. Field*.^(a) The particular locality of the ferry is material, and the owner cannot change it, as in the case of a market, to another point within the district. The very statement that a ferry is a highway over water, uniting two highways by land, shews this to be so: the site of a highway cannot be changed. If the site of the ferry be changed, it will no longer unite two highways. The Crown, therefore, could make no such general grant throughout a whole district, as is claimed by this declaration. At common law, all the king's subjects had a right to pass over navigable rivers; and in order to avoid the inconvenience of a precarious and uncertain transit, the Crown has the prerogative of granting a ferry to an individual, subject on his part to the duty of providing a [260] certain and invariable means of passage. Such a grant assumes, however, an existing highway. At all events, having once fixed the site of the ferry, by making a highway to communicate with it, the grantee cannot change it. But here the grant itself (if the declaration is to be taken as claiming a right over the whole district) shews that no such right was conferred: it shews there was a pre-existing ferry both ways, and an ascertained place of passage on the Cheshire side; and all the parol evidence applied to the terminus at Woodside: there was no evidence of any other, or of any ancient change of site. [Maule, B. Suppose a plaintiff claimed a ferry from Middlesex to Surrey, must that be understood to mean from the whole of each shore? If it be unlawful from the whole frontage to the whole frontage, then, if the construction be ambiguous, it must be understood to mean from point to point.]

III. Thirdly, assuming it to be a ferry from point to point, there would be no infringement of it, unless by carrying in fraud of the ferry, or persons really desirous of going, and who would otherwise have gone, by the plaintiffs' ferry: *Tripp v. Frank*, *Huzzey v. Field*. The admission was accordingly so framed as to raise the point decided in *Huzzey v. Field*. It is like the case, where, in an action of trespass, the defendant admits the trespass, but puts the plaintiff to prove the right. It ought, therefore, to have been left to the jury to say whether the persons carried by the defendants were taken in order to defraud the plaintiffs' ferry, or bonâ fide to be carried to the other side for other purposes; otherwise it is merely *damnum absque injuriâ*. There are many authorities applying this principle to the case of markets: *Prior of Dunstable's case* (Y. B. 11 H. 6, 19 a.), *Blakey v. Dimsdale* (Cowp. 661), *Prince v. Lewis* (5 B. & Cr. 363). There are only three cases in the books relating to ferries, prior to the case of *Tripp v. Frank* (4 T. R. 666); viz. the authority [261] already referred to in 22 Hen. 6, *Churchman v. Tunstall* (Hardres, 162), and *Blissett v. Hart* (Willes, 508). *Churchman v. Tunstall* appears to be a disputed case. [Parke, B. No: only the report of it in Hardres is incomplete. The statement of it in *Huzzey v. Field*

(a) E. V. Williams referred to a precedent in Serjt. William's MS. collection, in which the ferry was described, in some counts of the declaration by its name; in others as a ferry from A. in the county of C., to B. in the county of D., and back again; and in others, as a ferry from a certain part of the shore of the county of C., between A. and B., to a certain part of the shore of the county of D., between E. and F., and back again.

is correct: the decision ultimately was for the plaintiff. The case of *Tripp v. Frank* appears to have applied the same doctrine to ferries as the cases above cited established with respect to markets. Lord Kenyon says,—“If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiffs’ right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them.” The same principle is adopted in *Hussey v. Field*. If the plaintiffs’ present claim be sustainable, then, however extensive the town of Birkenhead may hereafter become, the whole population will be excluded from going, except by their ferry. Is it enough, then, to shew merely that persons have been carried by the defendants, who, but for the establishment of their ferry, must have gone by Woodside? Suppose there were no communication from the new town of Birkenhead to Woodside—would it then be an invasion to carry the inhabitants? Again, how does it appear that the parties would have gone by Woodside rather than Birkenhead ferry? The infringement, in respect of which alone the plaintiffs are entitled to recover, must be shewn to have been by carrying persons who were travelling by the highway which the Woodside ferry was established to connect.

IV. [The fourth point, as to the establishment of the [262] Birkenhead ferry, was treated as falling within the second.]

V. This was not a grant to the monks of an exclusive ferry, but only of a license to carry passengers for hire, without being subject to a quo warranto. If the pre-existing ferry, which is recited in the grant itself, were then in the Crown, it might lawfully make a subordinate grant to them of such a privilege. It does not appear that the Crown meant to abridge any right that the public had under the existing ferry, but to grant an additional benefit. At all events, the utmost that can be said is, that the terms of the letters patent are not so plain as to exclude a construction by usage: and all the evidence of enjoyment in this case was far more consistent with a right of this limited nature, existing concurrently with a ferry right both ways, than with an exclusive ferry from Birkenhead to Liverpool, in derogation of the other ferry. The learned Judge, therefore, ought to have left to the jury the user, and all the other circumstances of the case, to explain the ambiguity in the grant: he should have desired them to look at the grant concurrently with the usage, and to say whether it was a grant of an exclusive right, or only of a subordinate license of exemption from the existing monopoly. Suppose there had been a grant to the convent to sell butcher’s meat in two particular streets, and it were afterwards set up as a market: on proof of a pre-existing market including those limits, the construction would necessarily be that the Crown granted only an exemption from the existing monopoly. On this point, they referred to the case of *The Abbot of Strata Marcella* (9 Rep. 28 a.), and *Chad v. Tilsed* (2 Brod. & B. 403; 5 Moo. 185).

VI. Lastly, as to the admissibility of the proceedings between Molyneux and Powell. In the first place, evidence of reputation is admissible only where it relates to [263] rights in which all the public have an interest, and may, therefore, be expected to converse and inquire about them: and in the same cases, verdicts and judgments, in cases where the right has been enforced against the public, are admissible as being equivalent to a submission to the right by the public. But this was no proceeding against the public; neither of the parties set up any claim against the public. [Parke, B. How then can you say the public have anything to do with it, where a party sues an individual for trespass on his soil, and he pleads a public right of way? Lord Abinger, C. B. In a suit where a party seeks to establish a right of ferry against a party claiming a hostile right, à fortiori, he establishes it against the public.] In *Rex v. Antrobus*, evidence of reputation was excluded, on the ground that it was a question between the county and city sheriffs, in which the public were not interested. So here, what interest had the public in the question what accounting there was to be between these parties, which is the only matter to which these orders relate?

But assuming that a decree between third parties, on the right in question, would have been admissible, these orders were not so. It appeared that the depositions tendered in evidence by the plaintiffs were subsequent to the last order: it is clear, therefore, that it was not a final decree. Nor does it contain or involve any distinct

finding on the right at all: it is merely for the purpose of quieting the possession during the progress of the suit. This appears to have been a proceeding in the nature of a writ of intrusion, a jurisdiction over the matter in dispute having been wrongfully assumed by the Court of Requests, which appears, from the description of it in the 4th Inst. 97, to have been a kind of illegitimate Court of Equity. The information only prays process to compel the defendants to appear in the Duchy Court, and abide its order. There is a similar prayer in [264] *Walsingham's case* (Plowd. 547), which was a bill of intrusion at the suit of the Crown. It appears from West's *Symboleography*, p. 292 of Pleadings in the Exchequer, that the form then was to pray the quieting of possession until the hearing. Here, an injunction, though not prayed in terms, is applied for contemporaneously with the information. As far as relates to the order for an injunction, that clearly was no adjudication on the right; it is merely *ex parte*, in furtherance of the plaintiff's bill. The next order (which was before answer) is only in further explanation of the injunction. Powell was then in contempt for disobedience to that order. Then the order of the 11th of June, 1627, is made in consequence. There appears to have been some dispute as to the terms of the injunction, and they are accordingly settled, for the purpose of quieting the possession *pendente lite*. With regard to the argument drawn from the stat. 7 Geo. 2, c. 20, s. 2, that is rather in favour of the defendant; for the statute assumes, that, but for its provisions, the order could not be made before hearing: it is a parliamentary exception. Here the answer involves no admissions; it is altogether in denial of the right claimed by the information: and it is founded altogether on the future depositions—it states that the defendant “hopeth to prove,” &c. &c. This is a proceeding analogous to the appointment of a receiver at the present day, or an order for the settling of the possession *pendente lite*, in a suit for a specific performance: *Gibson v. Clarke* (1 Ves. & B. 500), *Pitt v. Davis* (3 Russ. 182, n.); a mere provisional arrangement, in no respect decisive of the right in dispute. The cases cited on the other side are altogether distinguishable: in all of them there was a verdict or judgment of a Court of competent jurisdiction upon the right in dispute.

Cur. adv. vult.

On a subsequent day in the same term,

[265] LORD ABINGER, C. B., said—In this case, which was argued the other day at so much length, the Court have come, perhaps I should say with some reluctance, considering the great expense of this proceeding, to the opinion that there ought to be a new trial, on one ground, and on one ground only; and that is, the admission of the evidence of the proceedings in the Court of Chancery of the duchy of Lancaster, which were objected to at the trial. At one time, I thought that these proceedings might be looked at as proceedings in equity in order to adjust the interests and rights of both parties, because it appeared, especially upon the very ingenious argument of Mr. Jervis, and upon a partial inspection of the documents, as if the suit in the Court of Requests, which had been commenced by the parties under whom the plaintiff claimed, had been stayed by injunction from the Court of Chancery of the duchy, for the purpose of adjusting, not only the rights of the relator who claimed under the Crown in the suit in the Duchy Court, but also of the party who had commenced the suit in the Court of Requests, and who is represented by the plaintiffs in the present action; but, upon looking further at the proceedings, that does not appear to have been the case. The documents which were received in evidence by the learned Judge consist of two interlocutory orders of Duchy Court; and it appeared to us, at one time, that the second of those orders might be considered as a final order, and that no further proceedings had been contemplated by the parties. It very often happens in the Court of Chancery, that an order is made for adjusting the rights of parties, and if both are satisfied with it, they remain quiescent, and seek for no further judgment of the Court. But there are several circumstances in this case that tend to shew that this was not so here. In the first place, it appeared upon the learned Judge's note, that, on the plaintiffs' counsel offering certain depositions in evidence, an objection was made that there was no decree on [266] those depositions, and they were accordingly withdrawn. Now those depositions were clearly taken after the order in question, and that shewed it was not in the contemplation of the parties, or of the Court, that the order should be a final one. Again, when we come to look at the proceedings regularly in their order—the bill, answer, and orders—it appears that it was not the intention of the Court to decide upon the rights of

either party; but that, for the purpose of the investigation, and to prevent any inconvenience resulting from the divisions between the parties, until the Court arrived at the proper period for decision, these orders were made, in order to keep peace between them; and that, in the meantime, the Court would not determine anything inconsistent (if I may so say) with the status quo, until it had heard fully both parties, and received the evidence. Under these circumstances, the very most that could be made of the orders would be, that they furnished evidence—certainly merely evidence—of the fact existing at the time; namely, that both parties claimed the ferry; but that is not the principle on which such orders can be received in evidence. The opinion of this Court is, that in the cases where reputation is evidence—that is, cases involving a general right, in which all the Queen's subjects are concerned—a verdict or a judgment, upon the matter directly in issue between the parties—although between other parties—is also evidence; not, however, that it is evidence of any specific fact existing at the time, but that it is evidence of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, and the question of usage at that time. But we shall greatly extend the rule of law, and most probably introduce great uncertainty in the mode of receiving or rejecting testimony of this sort, if we apply it to an interlocutory order of this nature, not involving any judgment upon the rights of the parties. It is clear, that the answer alone can in no sense be evidence. Therefore, as we think [267] these orders were improperly received in evidence, there must be a new trial on that ground.

PARKE, B. The order itself affirms no proposition of fact; it does not affirm any ferry from Birkenhead to Liverpool.

ALDERSON, B. It seems to me that the order amounts to no more than to direct the continuance, during the suit, of a certain state of things which existed at the time the order was made, without passing any judgment upon the facts, or on the rights of the parties. It appears to me to affirm nothing at all.

MAULE, B., concurred.

Rule absolute for a new trial.

The cause was tried again at the Chester Summer Assizes, 1839, before Patteson, J. The evidence was substantially the same as on the first trial, except that the plaintiffs did not put in the proceedings which had been held by the Court to be inadmissible, nor the proceedings in quo warranto of the 27 Edw. 3; and that the defendants gave in evidence several documents which shewed that, at the date of the letters patent of 4 Edw. 3, the ferry which had vested in the crown on its forfeiture by Robert de Ferrers, was outstanding in the hands of a subject.^(a)

The Attorney-General, in the course of his reply for the plaintiffs, contended that there was no evidence of the identity of the ferry mentioned in those documents with the ferry the existence of which was recited in the grant of Edw. 3, and that it did not appear, from any of the documents relating [268] to it, that its terminus was in Birkenhead. The learned Judge, in summing up, left it as a question to be decided by the jury, whether the ferry recited in the grant was identical with that mentioned in the various documents put in by the defendants; having expressed his opinion, that if, at the time of the grant, there was an existing ferry from Liverpool to Birkenhead, and back again, which was then in the hands of a subject, the grant of another ferry within the same limits would be void. A bill of exceptions to the direction of the learned Judge, on several grounds, (including those taken at the former trial), was tendered by the defendants' counsel. The jury having again found for the plaintiffs,

Wilde, Serjt., in Michaelmas Term, moved for a new trial on two grounds: first, that it having been assumed throughout the trial, as an admitted fact, that the ferry recited in the grant of Edw. 3 was the same as that mentioned in the various documents relating to the Lancashire or Liverpool ferry, and no point having been made on this question until the reply, the learned Judge ought not to have left that as a question to the jury; or at all events, that the verdict, as to this point, was contrary to the evidence: secondly, that under the description of the Woodside Ferry, in the

(a) The plaintiffs did not put in evidence the early documents relating to the Liverpool ferry, which they read on the former trial: but they were proved by the defendants.

lease to the plaintiffs, which stated it as a ferry both ways, a ferry from Birkenhead to Liverpool only would not pass.

LORD ABINGER, C. B. We cannot say there is any misdirection upon the evidence in the cause. If the question as to the identity of the ferries arose at all, it was right to leave it to the jury. We cannot grant a rule on the ground that the verdict was against the evidence without consulting the learned Judge. As to the last point, the construction of the lease, we reserve our judgment upon it until we see the precise terms of the lease.

[269] On a subsequent day,

PARKE, B., said—We have conferred with my Brother Patteson, and he informs us that the question was left to the jury as to the identity of the ferries, and that he is not dissatisfied with their verdict. There will therefore be no rule on that ground. As to the other point, we have had an opportunity of looking at the terms of the lease, and we think it cannot be construed so strictly as that a ferry one way only could not pass under it. There is no authority to shew that a right of ferry one way may not pass under a conveyance of a ferry both ways. There will therefore be no rule.

Rule refused.

The bill of exceptions was subsequently abandoned by the defendants.

VACATION SITTINGS AFTER HILARY TERM.

EYRE v. SHELLEY. Exch. of Pleas. 1840.—An attorney may recover his fees for business done between the 15th of November and the first day of Hilary Term, although, when the business was done, he had not entered his certificate pursuant to the stat. 37 Geo. 3, c. 90, s. 27.—To an action for work and labour as an attorney, the defendant pleaded, that although, during the time when the work was done, the plaintiff was an attorney duly admitted and enrolled, he had not, during any part of that time, obtained or entered the certificate required by law, authorizing him to practise as an attorney during any part of the said time, pursuant to the statute; and the plaintiff during all that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same:—Held, that this plea was bad on special demurrer, for duplicity.—Semble, that it was also bad on special demurrer, for describing the certificate, not in the terms of the statute, but by words involving its legal operation and effect.

[S. C. 8 Dowl. P. C. 185; 9 L. J. Ex. 247; 4 Jur. 415. See further 8 M. & W. 154.]

Assumpsit for work and labour as an attorney, for money paid, and on an account stated. Plea, as to the sum of 426l. 4s. 10d., parcel &c., that that sum was claimed by the plaintiff to be due to him for work and labour, as attorney for the defendant, in bringing and defending certain actions in the Court of Queen's Bench, and materials provided in and about that work and labour, and for fees due and payable to the plaintiff in respect thereof, done before the 16th day of November, 1833; and [270] that although, during the time when the said work and labour was so done as aforesaid, &c., the plaintiff was an attorney of the said Court of Queen's Bench, duly admitted and enrolled, yet he had not, during any part of the time when the said work and labour was done or in progress, obtained or entered the certificate required by law in that behalf, authorizing him the plaintiff to practise as such attorney during any part of the said time, pursuant to the statute in such case made and provided; and the plaintiff during all that time wrongfully and wilfully neglected and omitted to take out and obtain, and was without, such certificate, and never had obtained or entered the same, contrary to the statute, &c. Verification.

Replication, that before and during all the time in the plea mentioned, the plaintiff had duly obtained the certificate required by law in that behalf, authorizing him the plaintiff to practise as such attorney, during the whole of the said time, pursuant to the statute, &c.

Special demurrer, on the ground that the replication stated only that the certificate

had been obtained by the plaintiff, and took no notice of the allegation in the plea that it had not been duly entered. Joinder in demurrer.

The case was argued in Hilary Term by

Petersdorff in support of the demurrer. The replication is bad on the ground suggested. The stat. 37 Geo. 3, c. 90, s. 27, prescribes that "every certificate, so to be obtained as aforesaid, shall be entered in one of the Courts, in which the person described therein shall be admitted, &c., within the time thereinbefore prescribed, or before such person shall be permitted to practise as an attorney." And s. 30 enacts, that "if any person shall in his own name, or in the name of any other person or persons, sue out any writ or process, or commence and prosecute, carry on, or defend any action or suit, &c., without obtaining a certificate in the manner thereinbefore directed, or without entering the same in one [271] of the Courts aforesaid," &c., he shall forfeit the sum of £50, and is thereby made incapable to maintain any action for any fee, &c., "on account of prosecuting, carrying on, or defending any action, suit, or proceedings, &c., without such certificate as aforesaid." Both the obtaining and the entering the certificate are therefore necessary, in order to enable the party to practise as an attorney, or to recover his fees as such. The plea accordingly alleges that the plaintiff did not comply with either of these two requisites; but the replication only alleges that he had obtained the certificate. [Parke, B. Is not the plea bad, as alleging only that the plaintiff had not obtained or entered a certificate, "authorizing him to practise as an attorney?" There is no provision in the statute making a certificate necessary for that purpose; the only effect of not obtaining it is to subject the party to a penalty, and to disable him from maintaining an action for his fees.] These words in the plea must be taken, not as referring to the general right of the plaintiff to practise as an attorney, but as descriptive of the instrument which is necessary to enable him to maintain an action for his fees. But if not, the words are mere surplusage, and may be rejected; and if it be alleged that they present an ambiguity, or render the plea liable to the objection of duplicity, that should have been made a ground of special demurrer.

Peacock, contra. The replication is good. The allegation in the plea that the certificate had not been entered, is altogether immaterial, and it was therefore unnecessary to notice it in the replication. The only effect of not entering the certificate is to subject the attorney to a penalty of £50, but that omission does not prevent him from suing for his fees. [Parke, B. The statute expressly enacts that if he shall carry on any action or suit, &c. without obtaining a certificate, or without entering the same, he shall forfeit £50; and that he shall be incapable of main-[272]-taining any action for his fees on account of proceedings carried on by him without "such certificate as aforesaid," i.e. such certificate so obtained and so entered. The plea is clearly double, because it contains two distinct defences, viz. that the plaintiff either has not obtained his certificate at all, or, if he has, that it has not been entered pursuant to the statute: but it is not objected to on that ground.] At all events, *Bowler v. Brown* (2 Ad. & E. 116; 4 Nev. & M. 17; 3 Dowl. P. C. 80) is an express authority, that in order to render the attorney liable to the disability imposed by the statute, the omission to enter his certificate was wilful, with an intent to evade the higher duties imposed by the stamp act. The plea ought, therefore, to have alleged that the plaintiff wrongfully and wilfully had neglected and omitted to enter the certificate. If the construction were otherwise, every country attorney whose certificate had not been taken out through the neglect of his town agent, would be rendered incapable of recovering his costs, and also be liable to a penalty of £50. [Parke, B. The Court of King's Bench decided that case on the supposition that the words in the 30th section, "with intent to evade the payment of the higher duties by the said act imposed," overrode the whole clause; but I cannot help thinking the decision very doubtful.] Then, the plea is bad in substance, and therefore on general demurrer, on the ground already suggested, viz. that there is no such thing as a certificate authorizing an attorney to practise. Moreover, it tenders an issue of law instead of fact, viz. that the plaintiff has not obtained or entered the certificate required by law: thereby referring it to the jury to ascertain what is a sufficient certificate in point of law. On this point he cited *Ashby v. Harris* (2 M. & W. 673), and *Lloyd v. Wood* (5 Ad. & E. 228). [Parke, B. In declaring as reversioner, it is not necessary to state what his reversion is, though the [273] nature and existence of the reversion would frequently involve difficult questions of law.]

Petersdorff, in reply. The case of *Bowler v. Brown* is virtually overruled by *Willen v. Chambers* (7 Ad. & E. 524; 2 Nev. & P. 392). If there be anything in the objection that the plea is bad, as involving matter of law, it should have been taken on special demurrer, as in *Ashby v. Harris*. In *Lloyd v. Wood*, the declaration was bad in substance, as disclosing no cause of action.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The declaration in this case was for work and labour as an attorney. There was a plea, as to 426l. 4s. 10d., parcel of the money mentioned in the declaration, that such a sum was claimed to be due to the plaintiff for costs as an attorney, in prosecuting suits in the King's Bench done before the 16th of November, 1833; and that although the plaintiff was an attorney of that Court, duly admitted and enrolled, yet he had not, during any part of the time when the work was done or in progress, obtained or entered the certificate required by law, authorizing him to practise as such attorney, during any part of that time, pursuant to the statute; and the plaintiff during all that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never hath obtained or entered the same, contrary to the form of the statute.

The plaintiff replies, that, before and during all the time in the plea mentioned, he had duly obtained the certificate required by law in that behalf, authorizing the plaintiff to practise as such attorney.

[274] To this replication there is a special demurrer, assigning for cause, that the replication does not state that the certificate had been entered.

The plea would undoubtedly be bad for duplicity, on special demurrer, but it is cured by pleading over. Probably it would have been bad on special demurrer, and we are inclined to think on special demurrer only, for describing the certificate, not in the terms of the act of Parliament, but by words involving its legal effect and operation.

The replication also would be bad, without doubt, if it answered only one of two grounds of defence, both available, contained in the plea. It does answer one, namely, the practising without a certificate; it does not answer the other, namely, the practising without having entered that certificate, according to the provisions of the statute: and the question in the case is, whether the omission to enter a certificate is an answer to an action for business done at any time during the year to which the certificate applies.

Upon the pleadings, we must assume, that if the business was done in one year, between the 15th of November and the 15th of November, there was a certificate duly obtained, but never entered; if in two or more years, there were two or more certificates, but each omitted to be entered; and the question is, whether the omission to enter a certificate deprives the plaintiff of his remedy by action for business done in every part of the year. If there be a part of the year during which the attorney might do business in the conduct of suits lawfully, so as to make a legal contract for payment of his services, without having entered his certificate, the plea is bad in substance, so far as it relates to the not entering the certificate, inasmuch as it does not aver that the business was not done in that part of the year, or years, embraced in the general terms of the declaration.

And, upon a careful review of the statutes on this subject, which raise a question of some nicety, we think it [275] was not illegal in this sense for a certificated attorney to carry on a suit between the 15th of November and the 1st day of Hilary Term in any year, without having entered his certificate, though he would have been liable to a penalty, if, after having so carried it on during a part, he did not enter his certificate before the expiration of that interval.

The first statute requiring a certificate was the 25 Geo. 3, c. 80, which enacts, "that every attorney admitted or enrolled in the King's Courts at Westminster shall, previous to his prosecuting or defending any suit, have a certificate of his admission or enrolment, upon which a stamp duty is to be charged. In order to obtain it, he is to deliver a written paper, stating his place of residence, to the proper officer named in the 4th section of the statute, which written paper is to be duly stamped, according to his place of residence, and the officer is to enter the name &c. of each attorney producing such paper, and to subscribe to such paper a certificate that such attorney is duly enrolled. These certificates are to remain in force from the 1st of November

to the 1st of November, and be renewed ten days before they expire. By section 7, any one who shall sue out any writ, or prosecute or defend any action for reward, without having obtained such certificate, shall forfeit £50, and is disabled from suing for any fee or reward for prosecuting or defending such actions.

Under this statute, the entry was of the name and residence, and preceded the certificate; and all practice without a certificate was not merely subject to a penalty, but no remuneration could be recovered for it.

The 37 Geo. 3, c. 90, s. 26, completely changes the machinery for obtaining the stamp, and requires the certificate to denote the fact of payment of the duties, and not of enrolment, and to be given by the commissioners of stamps; and, after it has been obtained, makes it necessary that it shall be entered with the officer of the Court [276] mentioned in the 25 Geo. 3. The time for taking it out is varied. It is provided, that every attorney admitted and enrolled shall annually, between the 1st of November and the end of Michaelmas Term than next following, during such time as he shall continue to practise, or before such person shall commence to prosecute or defend any action or suit, obtain a certificate to denote the payment of duties. The certificate to be issued between those dates is to bear date on the 2nd of November, and at every other time, on the day when it is issued, and is to determine on the 1st of November. Those days are afterwards, by the 54 Geo. 3, c. 144, altered to the 15th of November and 16th of December.

The 27th section provides, that every certificate shall be entered within the time thereinbefore prescribed, (viz. between the 1st of November and the end of Michaelmas Term), or before such person shall be permitted to practise; and by the statute 44 Geo. 3, c. 59, s. 3, this part of the 37 Geo. 3 is repealed, and it is provided that any person who is by that act (37 Geo. 3) required to obtain such certificate in any year after the 1st day of November, may enter the same at any time before the commencement of Hilary Term then next following; and the certificate so entered shall be as valid as if it had been entered within the former time.

The 30th section imposes the penalties for non-compliance with the previous enactments. If any one shall prosecute or defend, without obtaining a certificate, or without entering the same, he shall forfeit £50, and is made incapable of maintaining any action or suit for fees, &c., for prosecuting or defending any suit, without such certificate as aforesaid.

The question in the case depends upon the construction of these clauses, the 30th and 27th.

The 30th does not use the terms "without having entered his certificate, or without such certificate so entered [277] as aforesaid:" it prohibits the suit for fees only, if there is no certificate. It does not use the language of the 25 Geo. 3, "without having obtained a certificate," and probably for this reason, that, under that statute, the certificate was required to be obtained before any business was done. Under this, the business may be done between the 1st November and the end of Michaelmas Term, and the certificate antedated so as to render it legal; but it seems that unless there be a certificate obtained before, or so antedated, the action could not be maintained, in respect even of business done in that interval. It appears to us that this prohibitory clause applies to the want of certificate only.

Is the practice then rendered illegal by the 27th section, so as to disable the attorney from suing for it? Every practising which is prohibited by penalty at the time it takes place, is illegal; but that which is not prohibited at the time it takes place, is not; though the attorney be liable to a penalty for a subsequent neglect or omission.

The 27th section inflicts the penalty upon an attorney for not entering; which must be either "within the time aforesaid," (that is, now, between the 1st of November and the 1st day of Hilary Term), or before such attorney shall be permitted to practise. Now, in all cases falling within the second branch of this alternative, by which the practice is prohibited, unless there be, not only a certificate, but an entry thereof, before it takes place, it is clear that the practice is unlawful without entry, and no action will lie to recover a compensation for it; but in the cases falling within the first branch, it appears that it is enough to make the entry before the end of the limited time. In the meantime, the practice is lawful; a contract to pay the price is lawful; the price may be sued for the instant it is due, and the want of the subsequent entry cannot render it illegal by relation; but if, at the end of the prescribed time

for entry, there is no entry, then the attorney [278] is liable to a penalty. It appears to us, that the business done between the 15th of November and the 1st day of Hilary Term falls within the latter alternative; any business done at any other time of the year, within the former: and the plea is bad, as it does not shew that the business was of that description: for it is consistent with every averment in the plea, that the business was done between the 15th of November and the 1st day of Hilary Term, in one or more years.

As this is a sufficient ground for our judgment, we do not think it necessary to advert to another objection made to the plea, founded on the case of *Bowler v. Brown*; namely, that though the omission to take out the certificate is averred to be wilful, it is not averred that the omission to enter it was so; nor do we give any opinion as to the authority of that case.

Our judgment must, for the reasons before given, be for the plaintiff.

Judgment for the plaintiff.

TRICKEY v. LARNE. Exch. of Pleas. 1840.—Plea, to an action by drawer against an acceptor of a bill of exchange for 20l. 8s. 6d., that before the drawing and acceptance of the bill, it was agreed between the plaintiff and defendant that the plaintiff should do certain carpenter's work for the defendant for £63; that the defendant paid the plaintiff £43 in part payment of the £63, and afterwards accepted the bill of exchange, on account of the residue of the £63; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work, necessary to be done under the agreement; and that the £43 was more than the whole work done was worth:—Held bad, on motion for judgment non obstante veredicto, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable.

[S. C. 8 Dowl. P. C. 174; 9 L. J. Ex. 141.]

Assumpsit by drawer against acceptor of a bill of exchange for 20l. 8s. 6d., with a count on an account stated. Plea to the 1st count, that before the drawing and accepting of the said bill of exchange in the declaration mentioned, it was agreed between the plaintiff and the defendant, that the plaintiff should do for the defendant certain carpenter's and joiner's work, in a workmanlike manner, [279] for the sum of £63; that the defendant afterwards, to wit, on the 14th day of March, 1839, paid to the plaintiff the sum of £43, in part payment of the said sum of £63; that the plaintiff, on the 22nd day of May, 1839, drew the bill of exchange in the first count mentioned, and the defendant accepted the same, on account of the residue of the said sum of £63; that the plaintiff did not perform his said agreement, but wholly neglected and refused to perform certain works which were necessary to be done under the said agreement, and performed other works which were necessary to be done under the said agreement in a bad and unworkmanlike manner, so as to be of little or no use to the defendant; that the said sum of £43, so paid by the defendant to the plaintiff for the said work, was much more than the whole work done by the plaintiff was worth; and that the said bill of exchange was drawn and accepted in manner and under the circumstances in this plea mentioned, and in respect of which there was such want and failure of consideration as aforesaid, and for and in respect of no other monies or debts whatsoever. Plea to the second count, non assumpsit.

Replication to the first plea, de injuriâ.

At the trial before Rolfe, B., at the Middlesex Sittings in Michaelmas Term, the jury found a verdict for the defendant. Crowder having obtained a rule to shew cause why the judgment should not be entered for the plaintiff, non obstante veredicto, on the first issue,

Busby now shewed cause. This plea discloses a sufficient defence to the action, at least on general demurrer or after verdict. It shews a total failure of consideration as to the bill of exchange. [Parke, B. Why more as to the bill than the other part of the £63? You do not allege that the £43 was paid for work done, and that the bill was given for the residue to be done, and that it was not done. It is one entire contract, and the plea shews [280] only a partial failure of consideration for the bill and the money payment.] The plea alleges that the bill was given for the residue of

the £63, and that the work done was worth only the £43 previously paid. Suppose the bill had never been given nor the money paid, the defendant would clearly have had a right, in answer to an action for the price of the work, to say it was worth only so much, and that in respect of the remainder the contract could not be enforced. [Parke, B. No doubt; but this is one entire sum paid, partly in money, partly in a bill, upon one contract, and there is only a partial failure of consideration upon that contract.] By the contract the defendant was not bound to pay anything until the whole work was done in a workmanlike manner: therefore, as the plaintiff thought fit to receive the £43 while the work was in progress, and the jury have found that that sum covered all he was entitled to, he ought not to be allowed to recover also on the bill.

PARKE, B. It ultimately turns out that the plaintiff is entitled to £43 only; but that does not shew a total failure of consideration; and the defendant cannot succeed, unless he shews that the consideration for the bill has totally failed. The defendant should have stipulated, when he gave the bill, that it was not to be paid unless work was done to a greater value than the £43. The £43 had been paid when the bill was given, but the plea does not aver that it was given for the balance of the account beyond the £43. The defendant is in the same position as if payment had been made for the whole work by a bill for £63; in that case there would not have been a total failure of consideration; so here, he chooses to pay down, in money and a bill together, the price for work contracted to be done: then the work being defectively done, there is a partial failure of the consideration to which the bill is in part applicable as well as the money, not a total failure of consideration on the bill.

[281] ALDERSON, B. The bill and money are given for work contracted to be done, which ultimately turns out to be worth only £43. It is clearly a partial failure of consideration as to the whole payment, and drives the defendant to his cross action.

GURNEY, B., concurred.

Rule absolute.

Crowder and Whitmore were in support of the rule.

ARMFIELD v. BURGIN AND ANOTHER. Exch. of Pleas. 1840.—To a declaration in debt, containing a count upon a bill of exchange for 33l. 3s. 9d., with counts for goods sold, and upon an account stated, each in the sum of £70, and demanding in the usual form the sum of 173l. 3s. 9d., the defendants pleaded, except as to £20, parcel of the sum of 173l. 3s. 9d. in the declaration demanded, and for the payment of which said sum of £20 the plaintiff has given the defendant credit in his particulars of demand, actionem non, because the defendants now bring into Court the sum of 13l. 12s. ready to be paid to the plaintiff, and they further say that they were never indebted to the plaintiff to a greater amount than the said sum of 13l. 12s. in the introductory part of this plea mentioned:—Held, that the plea was bad on special demurrer; that it ought to have shewn some answer as to part, and pleaded payment into Court as to the residue.

[S. C. 8 Dowl. P. C. 247; 9 L. J. Ex. 251.]

Declaration in debt, containing three counts: the first on a bill of exchange drawn by the plaintiff, and accepted by the defendants for the sum of 33l. 3s. 9d.; the second for £70, for goods sold and delivered; and the third for £70 due on an account stated. The declaration demanded, in the usual way, the sum of 173l. 3s. 9d. Particulars of demand were delivered, which gave credit for £20.

The defendants pleaded, except as to the sum of £20, parcel of the said sum of 173l. 3s. 9d. in the said declaration demanded, for the payment of which said sum of £20, parcel as aforesaid, the plaintiff has given the defendants credit in his particulars of demand delivered in this action, the defendants say that the plaintiff ought not further to maintain his action, because the defendants now bring into Court the sum of 13l. 12s. ready to be paid to the plaintiff, and the defendants further say that they never were indebted to the plaintiff to a greater amount than [282] the said sum &c. in respect of the cause of action in the introductory part of this plea mentioned. Verification.

Special demurrer, assigning for causes, that the plea purports to answer the whole

declaration, and is in fact an answer to part only, and that the plea is a plea of payment into Court of the sum of 13l. 12s. in satisfaction of all the debts and causes of action in the declaration mentioned, except £20 parcel thereof; whereas such debts together amount to 173l. 3s. 9d., and, after deducting therefrom the said sum of £20, are a much larger sum than the said sum paid into Court, and the whole of such debts and causes of action should have been pleaded to.

Ogle, in support of the demurrer. The plea is bad, inasmuch as it does not answer the whole of the declaration. Besides, it is bad as pleading the payment into Court of a smaller sum than the amount of the bill of exchange, and the sums mentioned in the other counts. As the plea stands, it is applicable to all the counts. [He was then stopped by the Court.]

Portescue, in support of the plea. If the first objection was ever available at all, it cannot be taken advantage of now. The proper course was for the plaintiff to sign judgment for so much as was unanswered by the plea. Upon this record, the plea must stand upon its validity as a plea pleaded to a part only of the sum demanded in the declaration. The other objection to the mode of pleading is not assigned as a cause of demurrer. [Parke, B. By the new rules,^(a) never indebted is no plea where the action is on a bill of exchange—is not that a ground of objection on general demurrer?] It is a fallacy to suppose that this is a compound plea, consisting of distinct averments of a payment into Court, and that the defendant was never [283] indebted as to the residue. It is a distinct plea, and is in the form given by the late rules of pleading, and by those rules declared to be applicable, and directed to be used in all cases where money is paid into Court. This is evident from the old form of plea which was first given, and which concluded with nil debet instead of never indebted, and that form was made applicable to all cases in which money was paid into Court, though by a former rule nil debet was declared to be no plea in any case. With regard to this plea being good on general demurrer, *Finlayson v. M'Kenzie* (3 Bing. N. C. 824; 5 Scott, 20; 6 Dowl. 71) is an authority. There the Court of Common Pleas held that the old form of a plea of payment into Court as applied to a bill of exchange, was good on general demurrer, though bad on special demurrer. In deciding the latter point, however, the attention of the Court was not directed to the fact, that the plea of nil debet was equally prohibited as applied to the common counts, as to a count on a bill of exchange. [Alderson, B. Does not the difficulty arise from the altered form of the plea of payment into Court? I can understand that it might apply to a bill of exchange, as long as the form of nil debet was retained; but how can you say you were never indebted? Does not the bill constitute a debt?] The bill is only *prima facie* evidence of a debt. Before the new rules of pleading, a payment into Court upon a bill of exchange admitted only the making of the contract in fact, and a right to recover to the amount paid in; but every other defence was open. *Reid v. Dickons* (5 B. & Ad. 499; 2 N. & M. 369), *Cor v. Parry* (1 T. R. 464). It is therefore submitted, that this plea is good in form as well as in substance; for the latter, *Finlayson v. M'Kenzie* is a clear authority. In *Marshall v. Whiteside* (1 M. & W. 192), Parke, B., in giving judgment, after referring to *Jourdain v. Johnson* (2 C. M. & R. 564), speaks of it as deciding, that “where there is a plea of [284] payment of money into Court, it need not be pleaded to each count, but may be pleaded generally to the whole declaration.” Then, as to the amount claimed under the money counts, *Kingham v. Robins* (5 M. & W. 94) is an authority that the plea of payment into Court under those counts only admits a liability upon some one or more contracts, to the extent of the sum paid in. Here the amount paid into Court, together with the £20 for which credit is given in the particulars, which are referred to in the introductory part of the plea, exceeds the amount of the bill of exchange, and it might be that nothing at all was due on the common counts. If this plea should be held bad on the ground alluded to, it will be impossible hereafter to pay money into Court at all to a count in debt on a bill of exchange, for the plea must contain the concluding averment of *nunquam indebitatus*. [Parke, B. If the full amount were paid into Court, that averment would be surplusage.] It would not be so in all cases, as, for instance, where money is paid into Court on a bill or note payable a certain time after demand with interest, where the amount of interest and principal is usually alleged under a *videlicet*, and is not material.

(a) Reg. Gen. H. T., 4 Will. 4, tit. Covenant, and Debt.

Ogle, in reply. This plea does not follow the new form of the plea of payment of money into Court, in this, that it is not pleaded as to part. The objection to the plea is a matter of substance, and renders it a nullity.

PARKE, B. The plea is clearly bad on special demurrer, but in the special causes assigned the defect is not pointed out; which is, that the plea of never indebted is improper to so much of the demand as consists of the promissory note. You had better amend without costs on both sides. It is clear that you cannot plead *nunquam indebitatus* to a count upon a bill of exchange. Where, in an action of debt on a bill of exchange, a sum of money is [285] paid into Court less than the amount of the bill, the defendant should shew some answer as to part, and plead the payment into Court as to the residue, in which case the concluding averment in the plea of never indebted would become surplusage.

Leave to amend.

EDMONDS v. LAWLEY. Exch. of Pleas. 1840.—An act of bankruptcy having been committed on the 6th of July, a *bonâ fide* execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th of July the 2 & 3 Viet. c. 29, was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees:—Held, that the execution was protected by the statute.

[S. C. 8 Dowl. P. C. 234; 9 L. J. Ex. 143. Referred to, *Nelstrop v. Scarisbrick*, p. 684, post.]

Trover against the sheriff of Warwickshire for converting the plaintiff's goods.

Pleas, first, that the plaintiff was not possessed; secondly, that one George Jackson was, at the time of issuing the fiat in bankruptcy thereafter mentioned, a trader, &c., and, as such trader, had, on the 1st of April, 1839, become indebted &c., and thereupon to wit, on the 6th of July, become and was a bankrupt; that afterwards, and before the committing of the grievances, to wit, on the 7th of July, Henry Bosanquet and others sued out of the Court of Queen's Bench a writ of *fieri facias* against the said George Jackson, directed &c. and indorsed, to levy, &c.; under and by virtue of which writ, after the bankruptcy and before the issuing of the fiat as thereafter mentioned, to wit, on the 8th of July, the defendant, as sheriff as aforesaid, seized and took in execution the said goods and chattels for the purpose of levying &c., and did afterwards by sale thereof levy &c.; that the said goods and chattels were at the time of the bankruptcy the property of the said George Jackson, and liable to be taken &c.; that afterwards, to wit, on the 24th of July, on the petition of C. G., the Lord High Chancellor issued his fiat, directed to certain persons thereby nominated and appointed commissioners, &c.; by whom the said George Jackson was adjudged a bankrupt &c.: that notice was published in the *Gazette*, and at a meeting [286] duly holden at &c., the plaintiffs were chosen and became assignees, and entitled as such to the possession of the said goods and chattels, which possession is the same mentioned in the declaration. The plea then averred that the writ was *bonâ fide* executed and levied by the defendant, as sheriff, before the date and issuing of the fiat; that the said Henry Bosanquet and others had not, nor had the defendant, notice of any prior act of bankruptcy committed by the said George Jackson; and that the judgment upon which the said writ was issued, was not founded on a warrant of attorney or *cognovit*, given by the said George Jackson by way of a fraudulent preference to any creditor. Verification.

To the second plea the plaintiff replied, that the defendant, as such sheriff as aforesaid, seized and took the said goods and chattels in the declaration and the second plea mentioned, after the said George Jackson had become a bankrupt as aforesaid, and before the passing of the statute 2 & 3 Viet. c. 29. Verification.

Rejoinder. That the fiat in bankruptcy was not made and issued until after the passing of the 2 & 3 Viet. c. 29.

Special demurrer, on the ground that the statute 2 & 3 Viet. c. 29, is not retrospective, and that the execution having been levied after an act of bankruptcy, and before the passing of that statute, is not protected by it, though the fiat was dated and issued after it came into operation.

Wightman, in support of the demurrer. The question in this case depends upon

the construction of the recent statute 2 & 3 Vict. c. 29, and whether that act is to have a retrospective operation or not. The first section enacts, "that all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide exe-[287]-cuted or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed;" and it then goes on to provide, that the act shall not apply to protect any fraudulent preference, &c. Now here the plea states that the execution was levied on the 8th of July, after the act of bankruptcy had been committed, but before the fiat, which was issued on the 24th. The act was passed on the 19th, and so came in immediately between the execution and the fiat. The act has no retrospective operation; and as soon as the fiat was issued, and the assignees were chosen, they were, by the retrospective operation of the bankrupt laws, placed in the same situation as if the fiat had been issued, and the assignees chosen, at the time when the cause of action accrued. It is on that ground that a sheriff, who has taken the goods of a bankrupt in execution, has been held liable in trover, under circumstances which otherwise would have excused him: *Potter v. Starkie* (4 M. & Sel. 459), *Price v. Helyar* (1 M. & P. 541; 4 Bing. 597), *Balme v. Hutton* (1 C. & M. 262), *Garland v. Carlisle* (2 C. & M. 31). The Courts have admitted the hardship upon the sheriff; but they felt themselves bound to give effect to the retrospective power of the bankrupt law. If this act had not passed, the assignees would clearly have been entitled to the goods, on the ground that, when they were seized by the sheriff, there was a vested right in them by relation back to the act of bankruptcy, and the act cannot be construed to have a retro-[288]-spective operation, so as to deprive them of that right. This case may be illustrated by reference to a decision upon the 4th section of the Statute of Frauds, by which it is enacted, that "no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless there be some note or memorandum thereof in writing;" and in *Gilmore v. Shuler* (2 Lev. 227; 2 Show. 16; 2 Mod. 10; 1 Vent. 330; 2 Sir T. Jones, 108), where there was a verbal promise of marriage before the passing of that act, it was held that an action might be maintained upon it after the act came into operation, on the ground that the act had no retrospective operation, and could not extend to a parol agreement made previously to the passing of the act; that as the cause of action was vested before the act passed, the act could not have a retroactive operation to take away the right so vested. Here there was a vested right before the act came into operation, and it cannot have the effect of taking away the right so vested. The words of the act are, "all executions, &c., bonâ fide executed or levied before the date and issuing of the fiat;" there is nothing to shew that it was intended to relate to prior executions, or to affect the operation of the bankrupt laws. It clearly means future executions, and future contracts. Lord Coke says, "It is a rule and law of Parliament, that nova constitutio futuris formam imponere debet, non præteritis" (2 Inst. 292). [Parke, B. You say we must not construe this act so as to defeat any vested right; but in whom was there any vested right, or who had any vested right to these goods at the time the act passed, except the bankrupt, subject to the rights of the creditors? I agree that we ought not to construe general words so as to affect vested interests; but in whom was there any vested interest in this case at the time the act passed?] Admitting that there was no vested interest in [289] the assignees at the time the sheriff seized, as soon as the fiat was issued, and the assignees were chosen, their right reverted back to the time of the seizure by the operation of the bankrupt laws, and a cause of action then accrued. [Parke, B. That argument would have been well founded, if the act had been prospective: but if it had been so, the words would have been, "all executions, and attachments hereafter to be executed or levied."] Suppose the fiat had issued two days before the act passed, and before assignees were chosen, unless the Court hold the act to be prospective, an execution creditor would be protected by it; inasmuch as, no assignees having been chosen, there would be nothing but an inchoate right at the time.

Shee, *contra*, was stopped by the Court.

PARKE, B. The question in this case turns upon the construction of the 2 & 3 Viet. c. 29, s. 1. The words of the act are very general, none of them future, and if taken according to their grammatical construction, will apply to all contracts, either bygone or future. The sound rule of construction with respect to acts of Parliament is, that the words are to be read in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature. If such construction would have the effect of defeating any antecedent vested right, we ought to construe the act so as to support and not to defeat it. If, in this case, a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right. Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it so as not to defeat [290] the right of the assignees. But with respect to all fiat^s issued after the new act has come into operation, we think there is no injustice in saying, that the assignees must take the property subject to the new law. The defendant, therefore, is entitled to judgment.

ALDERSON, B. I am of the same opinion. At the time that the act passed, the state of things was this—an act of bankruptcy had been committed, upon which a fiat might at some future period be taken out, but none had then been issued; immediately a *bonâ fide* execution had been levied. Under the old law the creditor would have had the property to satisfy his debt, subject to its being divested in case a fiat issued, overriding his execution, within two months. The legislature seem to have thought that that was not a very just position for the creditor to be placed in, and they say that that shall not take place in future. I think that by thus construing the act, we give it a prospective and not a retrospective operation.

GURNEY, B. I entirely concur with the rest of the Court. By putting this construction on the act, we carry out the remedy intended by it, without doing any injustice.

ROLFE, B. I agree with the rest of the Court. What has been said by my Brother Alderson solves the difficulty; we do not by this construction give the act a retrospective but a prospective effect, for the title of the assignees was incomplete at the time it passed. The argument urged applies to cases where all the acts had been done which were necessary to vest the property in the assignees.

Judgment for the defendant.

[291] GALWAY v. ROSE. Exch. of Pleas. 1840.—Assumpsit. The declaration stated that on &c., the defendant made his bill of exchange, and directed the same to A. & Co., payable to B. or his order, three months after date, which period had elapsed before the commencement of the suit; that B. then indorsed it to the plaintiff; that it was presented for acceptance and protested for non-acceptance, of which the defendant had notice; that the bill being wholly unaccepted and unpaid, afterwards &c., when it became due on &c., was presented for payment to A. & Co., who refused to pay the same, whereupon it was protested for non-payment, of all which the defendant had notice. And whereas also the said defendant before &c., to wit, on &c., was indebted to the plaintiff &c., on an account stated; and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said several sums respectively on request. To this declaration there was a demurrer for duplicity and uncertainty:—Held, that whether the first part of the declaration was considered as two counts, or one only, it was not demurrable on either of those grounds.

[S. C. 8 Dowl. P. C. 239; 9 L. J. Ex. 151; 4 Jur. 320.]

Assumpsit. The declaration stated that the defendant, on the 21st of November, 1835, in parts beyond the seas, to wit, at Cahir, in Ireland, made his bill of exchange in writing, and directed the same to certain persons by and under the name, style,

and description of Messrs. Arint & Borough, Dublin, and thereby requested the said Messrs. Arint & Borough to pay to one Captain Bushe or his order £397, three months after the date thereof, which period had elapsed before the commencement of the suit. The declaration then alleged that the said Captain Bushe then indorsed the said bill to the plaintiff: that it was presented to the said Messrs. Arint & Borough for acceptance, but that they refused to accept the same, whereupon the said bill was duly protested for non-acceptance, whereof the defendant had due notice; and the said plaintiff further says, that the said bill being wholly unaccepted and unpaid, afterwards, and on the day when it became due, to wit, on the 24th of February, 1836, the said bill was presented to the said Messrs. Arint & Borough for payment, but that they would not pay the same when so presented to them, but wholly declined and refused, whereupon the said bill was duly protested for non-payment, of all of which said last-mentioned premises the defendant had notice: and whereas also the defendant before the commencement of this suit, to wit, on the 8th of January, 1839, was indebted to the plaintiff in £600 on an account stated; and the defendant, in consideration of the premises respectively, then, to wit, on the day and year last aforesaid, promised the plaintiff to [292] pay him the said several monies respectively on request, yet the defendant has disregarded his promise, and has not paid any of the said monies, or any part thereof; and by reason and means of the dishonour of the said bill in the said first count mentioned, as in that count mentioned, he, the plaintiff, having indorsed and negotiated the said bill, to wit, on the day and year in the first count first mentioned, afterwards, to wit, on the day and year last aforesaid, as such indorser of the said bill as aforesaid, was called upon and obliged to pay, and did then pay and become liable to pay divers charges and expenses attendant upon and occasioned by the dishonour of the said bill as aforesaid, and the return of the same to him the plaintiff, to wit, the charges and expenses of protesting the said bill, as in the said first count mentioned, commission, postage, and divers other charges and expenses, amounting together to £10; to the damage of the plaintiff of £1000.

The defendant demurred to the first count of the declaration, assigning for causes, that the declaration stated that the bill was dishonoured by the same being presented for and refused acceptance, and that the same was dishonoured by being presented for and refused payment, and that either of the said dishonours was sufficient to maintain the action upon the bill to its full extent, and that it was altogether uncertain upon which of the said dishonours the plaintiff intended to rely, and that no certain or single issue could be taken; that the cause of action in the first count was stated uncertainly and in the alternative, and not directly and positively, as in effect it stated, that the bill was either dishonoured by a refusal to accept or a refusal to pay; and also that the statement of the special damage to the first count was altogether insufficient and uncertain, in that although it is alleged that there were two dishonours of the bill, yet it is stated in the allegation of special damage that the costs and expenses were occasioned by the dishonour of [293] the said bill, but by which of the said two several dishonours did not appear.

To the last count the defendant pleaded non assumpsit.

Mellor, in support of the demurrer, was in the first instance stopped by the Court, who called upon

Butt to support the declaration. The first count does not contain two causes of action, but only two considerations for the promise; namely, the non-acceptance and the non-payment of the bill. But if the Court should be of opinion that it discloses two distinct causes of action, then they are two counts, and the demurrer is too large. [Parke, B. They are not in the form of two distinct counts.] There is no necessity for any formal commencement; but if there be an objection on that ground, it should have been pointed out as a cause of special demurrer. *Jourdain v. Johnson* (2 C. M. & R. 564) is an authority to shew that the use of the word respectively, in the allegation of the promise to pay, will constitute them several counts. In a note to *Webber v. Twill* (2 Saund. 122, n. 2) it is said that "the common counts in a declaration may be contained in one count, stating that the defendant was indebted to the plaintiff in a given sum, as for instance £1000, as well for goods sold and delivered by the plaintiff to the defendant, as for money lent and advanced, and money paid by the plaintiff to the defendant, and money had and received by the defendant for the plaintiff, and that, in consideration thereof, the defendant promised to pay:" for which position *Rooke v. Rooke* (Cro. Jac. 245) is cited as an authority.

Mellor, contra. The first count is double. It is laid down as a rule in Stephen on Pleading, 292, "that the declaration must not, in support of a single demand, allege several distinct matters by any of which that demand is [294] sufficiently supported." The authorities which establish this rule are collected in 1 Chitty on Pleading, 6th ed. 226. Now here the declaration shews a complete cause of action, by alleging a protest for non-acceptance, *Crossly v. Ham* (13 East, 502, per Bayley, J.); it then alleges a presentment for and refusal of payment, which is another cause of action; which renders it double, and uncertain for which cause of action the plaintiff is proceeding. It is, therefore, in violation of the above rule. But then it is said it may be treated as two counts, and that the objection as to the informal commencement of the second count should have been pointed out as a cause of special demurrer: the answer to that is, that it is in effect pointed out as a cause of demurrer, when it is alleged that the count is uncertain and in the alternative, and that is sufficient. The case cited has therefore no application. The plaintiff, who has manifestly treated it as one count, has no right to turn round upon the defendant and say, What I have pleaded, and you have taken as one count is, in reality, two counts informally pleaded. A party has no right so to plead as to mislead his opponent.

PARKE, B. The declaration is good, in whatever way it is viewed. If the first part of it be considered as two counts, then the word "respectively" attaches a separate promise to each count, and the only objection would be that the second count is informally commenced; but with regard to that there is no special cause of demurrer assigned. If, on the other hand, the declaration be viewed as one count only, it is equally good; for then there are different causes of action arising out of different considerations, all of which are executed. According to the old form given in Saunders's Reports, there might be several different considerations included in one count in *indebitatus assumpsit*; and if we consider this as [295] one count only, it amounts to this, that the defendant became liable to the plaintiff on a bill of exchange, in consequence of the non-acceptance thereof, and also on account of the non-payment thereof, and also on an account stated; the whole concluding with a promise to pay. Then how does that differ from the case of the common counts, for work and labour, goods sold and delivered, &c.? By analogy to the practice before the new rules, and which seems to rest on a sound foundation, we must hold the declaration good. Before the new rules, the whole would have been an issue under the plea of non assumpsit, but now the defendant must traverse the facts of presentment for payment and acceptance.

The rest of the Court concurred.

Judgment for the plaintiff.

DOE D. CURZON AND OTHERS v. EDMONDS. Exch. of Pleas. 1840.—In 1788, estates were settled, by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor, (whose heiress at law she was), in fee. In 1818, by deeds to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828:—Held, that inasmuch as the estate of J. F. was carved out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in the above deeds, as he would have had if he had continued alive; viz. twenty years from the year 1822, when his remainder came into possession.—Whether a writing amounts to an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14, is a question for the Judge, and not for the jury, to decide.—A party in possession, adversely, of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years. The bargain subsequently went off, and no rent was paid or lease executed:—

Held, that this letter was not an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14.

Ejectment for lands in the parish of Morden, in the county of Dorset. At the trial before Coleridge, J., at the Dorchester Summer Assizes, 1839, it appeared that the action was brought to try the title of J. S. W. Sawbridge [296] Erle Drax, Esq., and Jane Frances, his wife, two of the lessors of the plaintiff, to some fields at Morden, in the possession of the defendant as tenant to a Mr. John Filliter, under the following circumstances:—

By indenture of lease and release and settlement, dated the 6th and 7th of March, 1788, being the settlement made on the marriage of Richard Erle Drax Grosvenor, Esq., (therein called Richard Grosvenor), with Sarah Frances his wife, then Sarah Frances Drax, the daughter and heiress of Edward Drax, and niece of Thomas Erle Drax, (who was seised in fee of an estate called the Morden estate, including the manor of Morden, as heir at law of Sir Edward Erle, Bart.), the said estate was limited to the use of the said Edward Drax for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the sons of the said Edward Drax successively in tail, with remainder to the use of Sarah Frances Drax for life, with remainder to trustees to preserve, with remainder to the use of the first and other sons of Sarah Frances Drax successively in tail; with divers other remainders over which did not take effect, the ultimate reversion being limited to the use of Thomas Erle Drax in fee. Thomas Erle Drax died without issue in 1789, leaving Edward Drax his next brother and heir at law; and he also died in 1791, leaving Sarah Frances Grosvenor his only child. By indentures of settlement on the 22nd and 23rd of May, 1818, to which Richard Erle Drax Grosvenor and Sarah Frances his wife, and Richard Edward Erle Drax Grosvenor, their only son, were parties, and by a common recovery suffered in pursuance thereof, the same estates were limited (subject to several powers of appointment, which were not exercised) to the use of Richard Erle Drax Grosvenor for life; with remainder to the use of the said Sarah Frances his wife, for life; with remainder to the said Richard Edward Erle Drax Grosvenor and his assigns for life; with remainder to his issue in tail; with remain-^[297]der to the use of Jane Frances Grosvenor, his sister, (the lessor of the plaintiff), and her assigns for life, with remainder to her issue in tail, with other remainders over. Richard Erle Drax Grosvenor died in July 1819, and Sarah Frances, his wife, in 1822. Richard Edward Erle Drax Grosvenor, the son, died in 1828, unmarried and a lunatic, leaving his sister Jane Frances, then the wife of Mr. Drax, the lessor of the plaintiff, him surviving.

The fields in question were inclosed from the wastes of the manor of Morden in the year 1794, by two persons of the name of Serjeant and Smith; who, in 1803, sold them to a Mr. Wright, of Wareham. Wright occupied them about seven years, without any rent being paid by him or demanded in respect of them. In 1811, he let them to a Mr. Thomas Bailey, an innkeeper of Wareham, at a rent of 3l. 3s. per annum. In 1814 Wright became a bankrupt, and in April of that year a sale by auction was advertised of his estates, by a printed particular, in which these fields were not mentioned. Mr. Filliter, an attorney at Wareham, was the solicitor to the assignees, and kept all the papers belonging to the bankruptcy. In July 1814, the assignees of Wright demanded from Bailey, and he paid them, a half-year's rent, due in respect of the fields in question. Thomas Bailey died at Christmas 1814, and his son John Bailey succeeded him as innkeeper. John Bailey attended the Court Baron of Morden manor in 1814 and 1815, and paid a quit rent of 2s 6d. in respect of the fields in question. In 1815, John Bailey paid to Filliter's clerk a half-year's rent then due for the fields, and received from him a receipt (in Filliter's handwriting) as follows:—

"1815, 10th April.—Memorandum that Mr. John Bailey has this day paid me the sum of 1l. 11s. 6d., being half a year's rent of a meadow at Northport, belonging to Mr. Grosvenor, and due Lady-day last.

"£1 11s. 6d.

"For MR. FILLITER,

"THOMAS ARNOLD, Jun."

[298] At that period, Bailey's tenancy terminated, pursuant to a notice to quit given by the assignees of Wright to his father, in September 1814. No direct evidence

was given as to the subsequent occupation of the property, until the year 1832, when, Filliter being in possession of it, Mr. Shettle, the steward of the manor, applied to him to pay a quit rent or acknowledgment in respect of it. Nothing, however, was paid; and on the 1st of May, 1834, Shettle wrote to Filliter as follows:—

“Dear Sir,—Mr. Drax is desirous of knowing your determination on the subject on which I have already several times communicated with you, relative to the land formerly held by Mr. Wright. You will recollect that I proposed on the part of Mr. Drax, that you should continue to occupy the lands in question by paying a moderate rent, and to enter into an agreement for holding the same. Your early decisive reply will oblige,—Yours truly,
“THOMAS SHETTLE.”

Filliter replied by requesting a personal conference on the subject, which being declined, he wrote as follows:—

“Wareham, 13th May, 1834.

“Dear Sir,—Before I can well give the required reply, I think it but fair and reasonable that I should be acquainted with the amount of the rent, as well as the terms intended to be proposed—the latter I believe you stated to be twenty-one years.—I remain, &c.
“GEORGE FILLITER.

“Mr. Shettle, &c.”

To this letter Mr. Shettle replied:—

“Mapperton, 19th May, 1834.

“Dear Sir,—I am desired by Mr. Drax to say he cannot at present fix the amount of the rents for the lands in question, but he expects you will forthwith give the reply [299] which I have repeatedly requested of you, or he will place the matter in the hands of the solicitor.—I am, &c.,
“THOMAS SHETTLE.”

Mr Filliter replied by the following letter:—

“Wareham, 24th May, 1834.

“Dear Sir,—Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have at length made up my mind to accede to the proposal you made, of paying a moderate rent, on an agreement for a term of twenty-one years.—I am, &c.,
“GEORGE FILLITER.”

Nothing further passed on the subject until 1837, when Shettle called on Filliter by Mr. Drax's direction, and offered him the fields on lease at a rent which he declined to pay, whereupon this ejectment was brought, in Michaelmas Term 1838.

At the trial, it was contended for the defendant, that the right of the lessors of the plaintiff to recover was barred by an adverse possession of upwards of twenty years, viz. from the year 1815; inasmuch as Mrs. Drax's title accrued under the deeds of 1788, modified by the deeds of 1818, and therefore the Statute of Limitations began to run against her from the latter period. For the plaintiff it was insisted, first, that her right of action accrued in 1828, on the death of her brother, the preceding tenant for life; but, at all events, that the letter of Filliter of the 24th of May, 1834, amounted to a sufficient acknowledgment in writing of the title of the lessors of the plaintiff, to satisfy the 14th section of the 3 & 4 Will. 4, c. 27. The learned Judge left it to the jury to say whether the letter amounted to an acknowledgment of title or not, expressing his opinion that it did not, as it was made only with a view to an [300] arrangement which was not carried into effect. The jury found for the defendant, and the learned Judge thereupon gave the plaintiff leave to move to enter a verdict for him, in case the Court should be of opinion that the Judge ought to have decided on the effect of the letter, and that it amounted to an acknowledgment of title; or in case they should be of opinion that the adverse possession did not begin to take effect, as against Mrs. Drax's interest, until a period within twenty years.

In Michaelmas Term last, Erle obtained a rule nisi accordingly, against which Crowder (with whom was Bond) now shewed cause. First, there was in this case

a sufficient adverse possession of twenty years, to bar the lessors of the plaintiff. At the period of the execution of the deeds of 1788, Mrs. Drax was not in esse, and could take only under the general limitation to the issue of Sarah Frances Drax. Between that period and the execution of the deeds of 1818, viz. in 1815, the adverse possession of Filliter commenced. Under the deeds of 1818, the present Mrs. Drax took a vested interest for life. But as regarded an adverse possession before begun, the giving her a particular estate could not change the nature of that possession, which was already running against the parties then entitled. In 1815 Richard Erle Drax Grosvenor was entitled to the possession. He could not afterwards change the nature of the estate, and thereby make a longer adverse possession than twenty years necessary to satisfy the statute. The claim of the lessors of the plaintiff is altogether referable to the settlement of 1818. Now, if things had remained in the same situation, without the execution of that deed, the parties entitled in 1815 would clearly have been barred: could they then vary their rights by afterwards executing that deed? No doubt the title in possession of Jane Frances Drax commenced in 1828; but she takes by virtue [301] of the deed of 1818; and when her title was so created the adverse possession had begun to run. [Parke, B. When those under whom the defendant claims took possession, the limitations of the deed of 1788 were in force, and it gave a remainder in tail to the heirs of the body of Sarah Frances Drax, i.e. to Richard Edward Erle Drax Grosvenor. Then, in 1818, he converted his estate tail into a fee, and out of that carved the estate of the lessor of the plaintiff. Therefore, independently of the late statute, the ejectment would have been in time within twenty years after his estate in remainder came into possession, viz. in 1822.] Then this objection arises: that the lessor of the plaintiff claims under a recovery suffered at a period when the land was held adversely, and therefore there was no good tenant to the præcipe. [Rolfe, B. If the recovery did not operate on the estate tail, then, inasmuch as Richard Edward Erle Drax Grosvenor is dead without issue, Mrs. Drax takes as the heir at law of Richard Erle Drax, under the ultimate limitation in the deed of 1788, and then her possession did not accrue until 1828, according to the third section of the statute.] The effect of the recovery would, however, probably be to create a fee, there having been no adverse act previously to that period: then the adverse possession continued as against the parties entitled by the creation of that fee. [Parke, B. But the estate for life is created out of the preceding estate tail, therefore the lessor of the plaintiff has the same time for bringing her ejectment as the tenant in tail himself had, viz. from 1822, when his remainder came into possession, until 1842.] The estate tail was destroyed by the recovery. [Parke, B. No; it was only enlarged into a fee, out of which the new estate tail to himself, and the estate of the lessor of the plaintiff, are carved.]

Erle and Cockburn, *contrà*, were stopped by the Court.

PARKE, B. It is clear the lessor of the plaintiff had [302] the same time to bring an ejectment as the tenant in tail himself would have had if he had continued alive. The effect of the deed of 1818 and of the recovery was, to bar all remainders over, and to create new estates out of his estate tail: therefore the parties who take such estates have the same time that he had, viz. twenty years from 1822. With respect to the other point, although it is unnecessary to decide it, it is clear that the effect of the acknowledgment is a question for the Judge (see *Morrell v. Frith*, 3 M. & W. 402). Here, however, the learned Judge was quite right in the opinion he expressed, that it was no acknowledgment of title, because there was no final bargain.

ALDERSON, B. The learned Judge left it to the jury with an expression of an opinion which we think right, and the jury found according to that opinion.

ROLFE, B., *concur*.

Rule absolute.

LUCEY v. INGRAM. Exch. of Pleas. 1840.—Case against the owner of a vessel, for an injury done by her in running foul of the plaintiff's barge. Plea, that at the time of the injury, the vessel was being conducted, and was navigating the river Thames, under the conduct of a licensed pilot in charge of the vessel, under and in pursuance of the provisions of the 6 Geo. 4, c. 125, and that the damage happened to the plaintiff by the default, incompetency, and incapacity of such

pilot. Replication that before the said time when &c., the vessel had, on completing a voyage from India, been brought by a licensed pilot into the St. Katherine's Dock, and that having there discharged her cargo, was, just before and at the said time when &c., being removed, and in the course of removal, for the purpose of going out of that dock to a certain dry dock in the port of London to be repaired, and that the said vessel was not, at the said time when &c., otherwise navigating or passing upon the said river Thames.—Held, first, that the circumstances stated in the replication brought the case within the exception in the 63rd section of the act, and that the owner was not bound to employ a pilot.—Secondly, that the words “wanting a pilot,” in the 72nd section, are not to be confined to such vessels as are, by the provisions of the act, bound to take a pilot, but are to be construed as applying to any vessel, the master or owner of which thinks fit to require one.—Thirdly, that inasmuch as under the 72nd section the pilot could not lawfully refuse to go on board and take charge of any vessel wanting a pilot when required by the owner so to do, he must be considered, when so required and employed, as acting under some of the provisions of the act, and not as the private servant of the owner, and therefore that the owner was protected by the 55th section of the act from his *prima facie* liability in respect of the injury occasioned by the act of the pilot, whilst he was so employed by the owner.

[S. C. 9 L. J. Ex. 196. Followed, *General Steam Navigation Company v. British and Colonial Steam Navigation Company, Limited*, 1868, L. R. 3 Ex. 330; affirmed, L. R. 4 Ex. 238. Explained, *The Lion*, 1869, L. R. 2 P. C. 531; 6 Moore, P. C. (N. S.) 172. Not applied, *The Guy Mannering*, 1882, L. R. 7 P. D. 135.]

Case. The declaration stated, that the plaintiff, before and at the time, &c., was lawfully possessed of a certain [303] barge or lighter, of great value, &c., then lawfully being in the river Thames, and the defendant was also possessed of a certain ship or vessel in the river aforesaid, and then had the care, direction, and management of the same; yet the defendant, not regarding his duty in that behalf, whilst the said barge, and also the said ship, were so respectively in the said river, to wit, on &c., took so little and such bad care of the said ship, and governed and navigated the same in so unskilful, negligent, careless, and improper a manner, that the same, by and through the negligence, &c., of the defendant in that behalf, then with great force and violence ran foul of and struck the said barge of the said plaintiff, and thereby then and there greatly broke, damaged, and injured the same, &c.

To this declaration the defendant, after setting forth an appointment by the Corporation of the Trinity House, pursuant to the stat. 6 Geo. 4, of one John Gilbert to act as a pilot between London Bridge and Gravesend, pleaded that the said ship or vessel, the defendant then being the owner thereof, was at the time of the committing of the said supposed grievance, being conducted, and was navigating and passing upon the river Thames aforesaid, within the limits aforesaid in the said license mentioned, to wit, between London Bridge aforesaid and Gravesend aforesaid, under the conduct of the said John Gilbert, as such pilot as aforesaid; that the said ship or vessel then was under the charge of the said John Gilbert, and he was then acting in charge thereof, as such pilot as aforesaid, under and in pursuance of the provisions of the said statute, the said John Gilbert then being duly qualified as such pilot as aforesaid to have the charge thereof. And the defendant further says, that the said loss and damage in the said declaration mentioned, happened to the plaintiff from and by reason and means of the neglect, default, incompetency, and incapacity of the said John Gilbert, so acting in charge of the said ship or vessel as aforesaid. Verification.

[304] To this plea the plaintiff replied, that before the said time when &c., in the said declaration mentioned, the said ship or vessel of the defendant had been and was brought into the port of London, to wit, into a certain dock called St. Katherine's Dock, in the said port, by a pilot duly licensed according to the provisions of the statute in the said last plea mentioned, and that the said ship or vessel, upon the same being so brought into the said port, completed a certain voyage, to wit, a voyage from India with cargo, and that the said ship thereupon, and before the said time when &c., discharged the said cargo, and remained and continued in the said dock, from thence until the removal of the said ship or vessel therefrom, as hereinafter mentioned. And the plaintiff in fact further saith, that just before and at the said

time when &c., the said ship or vessel of the defendant was being removed, and was in the course of removal in the said port, for the purpose of going out of the said dock, to wit, in order that the same ship or vessel might be taken to a certain dry dock, within the said port of London, to be repaired. And the plaintiff further saith, that the said ship or vessel was not at the said time when &c., navigating or passing upon the said river Thames, within the limits in the said last plea mentioned, otherwise than as is hereinbefore mentioned. Verification.

Special demurrer, and joinder.

Platt, in support of the demurrer. The question is, whether the fact of the ship being in the charge of a licensed pilot brings the defendant, the owner of the ship, within the protection of the 55th section of the last Pilot Act, 6 Geo. 4, c. 125; by which it is enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity [305] of any licensed pilot, acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act." This depends upon whether, under the circumstances stated in the replication, the pilot was in charge of this ship, in pursuance of any of the provisions of the act; and it is submitted that he was so in charge, and that the defendant is exempted from liability. The second section of the statute provides, that it shall be lawful for the corporation of the Trinity House of Deptford Strond, to appoint competent persons duly skilled to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing as well up and down, or upon the rivers Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, between Orfordness and London Bridge, as also from London Bridge to the Downs, &c. &c., and that all ships and vessels, sailing, navigating, and passing as aforesaid, shall be conducted and piloted within the limits aforesaid, by such pilots so to be appointed and licensed, and by no other pilots or persons whomsoever. Then the 25th section provides, that the rates mentioned in the tables marked A. and B., in the schedule thereto annexed, shall be the rates or prices demanded and received by any such pilot: and in schedule A. the rates are charged from particular points to other points within the limits, regulating the sum to be paid for each distance, according to the vessel's draught of water, and for intermediate distances a proportionate rate is to be paid. There is also a scale of charges for removing a ship or vessel from her mooring into a dry or wet dock, according to the tonnage. Then, in the 63rd section, is this proviso, which is important: "that when any ship or vessel shall have been brought into any port or ports in England, by any pilot duly licensed, nothing in this act contained shall extend or be construed to extend to subject to any penalty the master or mate, or other person, belonging to such ship or [306] vessel, and having the command thereof, or if in ballast, any person or persons appointed by any owner, or master, or agent of the owner thereof, for afterwards removing such ship or vessel in such port or ports, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel." The object of that clause is to provide for cases where vessels, in consequence of the dock being full, are obliged to remain outside at moorings assigned for them, until there is room for them to come into dock, and then they are warped in without any pilot being employed; and it was also intended to apply to cases where the vessel, after discharging her cargo, leaves the dock, when, in case of the export dock being full, the vessel is put into the tier in the river. That would be only a change of moorings, and the object of the act was to protect the owner from liability to a penalty for not employing a pilot on such occasions only. But it is not competent for the owner to navigate the ship within the prescribed limits, without putting her in charge of a licensed pilot. The allegation in the replication here is, "that the said ship or vessel of the defendant was in the course of removal in the said port, for the purpose of going out of the said dock, to wit, in order that the same ship or vessel might be taken to a dry dock, within the said port of London, to be repaired." But such a removal is not necessarily a mere change of moorings, as contemplated by the 63rd section, but may comprehend a navigation of the ship on the river, within the limits of the port, from one dock to another, for the distance of some miles, for the purpose of taking her to a dry dock to be repaired. But even assuming that the defendant was not bound to employ a pilot, still, under the 72nd section, a pilot cannot refuse to take charge of any vessel if required so to do, and if he does so, then

he must be considered as being in charge of the vessel in pursuance of the provisions of the act. That section enacts, "that every pilot licensed as aforesaid, who [307] shall, when not actually engaged in his capacity of pilot, refuse or decline, or wilfully delay to go off to, or on board of, or to take charge of, any ship or vessel wanting a pilot, and within the limits specified in his license, upon the usual signal for a pilot being displayed from such ship or vessel, or upon being required so to do by the captain, or by the master or other person having the command of such ship, &c., unless it shall be unsafe for such pilot to obey such signal or comply with such requisition, or he shall be prevented from so doing by illness or other sufficient cause, shall forfeit for every such offence any sum not exceeding £100, nor less than £10, and shall be liable to be dismissed from being a pilot, or suspended from acting as such." Now, according to that section, a pilot cannot refuse to take charge of a vessel, without subjecting himself to the penalties of the act, and when he does so take charge of the vessel, the public have the protection which the law contemplated, and the owners are not liable. The pilot was duly qualified to take charge of this vessel in her passage from St. Katherine's Dock to the dry dock, for the purpose of repair; and having taken charge of her, he was acting in the charge of the vessel, in pursuance of the provisions of the act. He cited *Huggett v. Montgomery* (2 N. R. 446), *Bowcher v. Noidstrom* (1 Taunt. 568), *Nicholson v. Mounsey* (15 East, 384), *Attorney-General v. Case* (3 Price, 302), *Carruthers v. Sydebotham* (4 M. & Selw. 77), *Bennet v. Moita* (7 Taunt. 258), *Ritchie v. Bowsfield* (id. 309), and *M'Intosh v. Slade* (6 B. & C. 662; 9 D. & R. 738).

Erle, contra. The replication is good, and the facts stated in it bring the case within the 63rd section of the act. If so, it was optional in the owner to take a pilot on board; and if he took one voluntarily, then the pilot must [308] be considered as a mere servant of the owners, and they are responsible for his negligence. In order to exempt himself from liability, and to bring himself within the protection of the 55th section, the owner is bound to shew that he was compellable by law to employ a pilot. *M'Intosh v. Slade* is an authority in favour of the defendant. The judgment there proceeds upon the principle, that if it be optional on the part of the owner to employ a pilot, and he does so, he is not exempted from liability by so doing. Now here the facts stated in this replication shew that the ship had arrived at her destination, that her voyage was at an end, and that the removal was merely from one dock to another, which brings the case within the 63rd section; the owner was therefore not bound to take a pilot. In *M'Intosh v. Slade*, Bayley, J., says, "There was no question but that the injury was occasioned by the neglect or default of the pilot; so that the owners were clearly entitled to an acquittal under the 55th section of that act, if, under the circumstances, it was necessary that the brig should have a pilot on board at the time: but it was insisted, that the protection under section 55 extended to no case where the ship was under no obligation to have a pilot on board; and it was contended, that at the time this injury was done, this brig was under no such obligation. It is upon this latter point our opinion is founded; and we have had the benefit of conferring with Lord Tenterden upon the subject." It was there held, that the owners were bound to have a pilot on board, as the voyage was not at an end. But here the voyage was at an end, and the owner was under no obligation to take a pilot to remove the ship from one dock to another for the purposes of repair. [Parke, B. Suppose it be optional in the owners to take a pilot or not, still the pilot is bound, by the 72nd section, to take charge of a vessel when required; and then the question is, whether the owner is not protected by the 55th section.] In *M'Intosh v. Slade*, that point was before the Court, but [309] it was not then decided; and in the absence of any authority, the Court will incline to promote the public convenience, and that will best be done by deciding in favour of the personal responsibility of the owners, which will prevent them from running improper risks, to the danger and injury of the public.

Platt, in reply. If the obligation of the master to take a pilot on board is to be the test, the 55th section of the act, as applied to many of its provisions, would be of no use or avail whatever. By the 60th section it is enacted, that it shall be lawful for his Majesty, by an Order in Council, to permit and authorize ships and vessels, not exceeding the burthen of sixty tons, and not having a British register, to be piloted and conducted without having a duly licensed pilot on board. Now, supposing a ship, having the permission there mentioned to exclude a licensed pilot, comes within the limits of the port, and for the safety of the cargo takes a licensed pilot on board

notwithstanding, is the owner to be held liable, because he had the choice whether he would employ one or not? The same argument applies to the 61st section. It is submitted, that the 55th section does not apply only to cases where the master is obliged to employ the pilot, but to all cases where a pilot is employed, and takes charge of a vessel within the limits mentioned in the 2nd section of the act. If the act be not so construed, it will lead to great injustice and inconvenience.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This was an action brought by the plaintiff to recover damages for an injury sustained by him, in consequence of a ship of the defendant having run foul of the plaintiff's barge, in the river Thames, between London and Gravesend. The defendant pleaded, that at the time when [310] the accident occurred, his ship was navigating and passing on the river Thames, under the conduct of a licensed pilot, who then had the charge of the ship as such pilot, under and in pursuance of the provisions of the Pilot Act, and that the damage was occasioned to the plaintiff by the default and incapacity of such pilot, so acting in charge of the ship.

The plaintiff replied, that, previously to the accident, the defendant's ship had, on completing a voyage from India, been brought by a licensed pilot into the St. Katherine's dock, and having there discharged her cargo, was, at the time of the accident, in the act of being removed from the St. Katherine's dock to a certain dry dock in the port of London, for the purpose of being there repaired; and was not otherwise navigating or passing on the river Thames.

To this replication the defendant demurred, and the question for the decision of the Court is, whether, according to the facts on this record, the defendant is relieved from his *prima facie* liability to answer to the plaintiff in damages for the injury occasioned by the neglect of the person who had, in fact, the charge of his ship.

This depends entirely upon the construction of the last Pilot Act, 6 Geo. 4, c. 125. By the 2nd section of that statute it is provided, that all ships navigating and passing on the river Thames (except as hereinafter provided) shall be conducted and piloted, within certain limits there specified, including the limits between London Bridge and Gravesend, by pilots appointed and licensed for that purpose by the Corporation of the Trinity House, and by no other person whatsoever; and penalties are imposed by the act on persons, who, not being licensed pilots, take charge of any ship within the limits in question. The 55th section enacts, that no owner of any ship shall be answerable for any damage which shall happen to any person by reason of the neglect or incapacity of any licensed pilot, acting in the charge of such ship under any of the provisions of that act.

[311] The 63rd section provides, "that when any ship shall have been brought into any port by any licensed pilot, nothing in the act contained shall subject to any penalty the master, or person having the command of such ship, for afterwards removing her in such port for the purpose of entering into or going out of any dock, or for changing her moorings."

The 72nd section enacts, "that every licensed pilot who shall, without lawful excuse, refuse to take charge of any ship wanting a pilot, upon being required so to do by the master, or any person having the command thereof, or being interested therein, shall for every offence forfeit 100l."

Under the 55th section of the act, the defendant is clearly exempted from all liability to the plaintiff, if, at the time of the accident, the pilot was, according to the averment in the plea, in charge of the ship in pursuance of any of the provisions of the act.

The plaintiff does not dispute that the pilot was in fact in charge of the ship, but he says, by his replication, what amounts to this—that, at the time of the accident, the ship was in circumstances in which the act has not made a pilot necessary; and, consequently, that the pilot was not in charge of the ship in pursuance of the provisions of the act, but could only be considered as the private servant of the owner.

If the replication does shew that the employment of the pilot was indeed mere matter of private arrangement between the parties, that the owner was not bound to employ a pilot, and that the pilot might lawfully have declined to take charge of the ship when called on by the owner, then the argument of the plaintiff might be well founded. But if, under the circumstances, the owner was bound to employ a pilot, or if the pilot, when called on by the owner, was bound to take charge of the ship,

then we think that he would be acting under and in pursuance [312] of some of the provisions of the act, and that the owner is entitled to the indemnity given by the 55th section.

It is clear that, in the present case, the owner need not have employed a pilot at all. The ship is stated in the replication to have been merely in the act of being removed from the St. Katherine's Dock, where she had discharged her cargo, to a repairing dock, which brings the case precisely within the exception in the 63rd section.

But we think that, under the 72nd section, the pilot was bound, when called on, to take charge of the ship, for the purpose of removing her to the dry dock, and, consequently, that he was in charge of the ship under the provisions of the act.

That section requires any pilot, not having a lawful excuse, to take charge of any ship wanting a pilot, when called on by the master or owner so to do; and the question is, what is the meaning of these words, any ship wanting a pilot? If they mean any ship being bound by the provisions of the act to take a pilot, then, inasmuch as the owner or master was certainly not bound, under the circumstances appearing on this record, to take a pilot, the 72nd section would not apply. But we think this is not the true meaning of these words, and that they must be construed to mean any ship the master or owner of which thinks fit to require a pilot.

Had the act contained no other exemption from the obligation to take a pilot, except that contained in the 63rd section, there might have been no great difficulty in holding that the words wanting a pilot, in the 72nd section, meant for which a pilot is necessary under the provisions of the act, the effect of which construction would be to make the obligation on the master to take a pilot, and the obligation of the pilot to serve, co-extensive.

But, in looking to the act, it appears there are other very extensive classes of cases, in which the masters of ships are exempted from penalties for not taking a pilot, but in which, [313] nevertheless, it is impossible to believe that the legislature did not mean to make it the duty of the pilot to serve if called on.

It is only necessary to refer to section 59, by which "all British registered ships coming from the Baltic or North Sea by the North Channel, all ships laden with stone coming from Guernsey or Jersey," and many others, are exempted from penalties for not taking a pilot.

So also, by section 62, masters of vessels residing at Dover, and being also part-owners, are exempted from the necessity of taking a pilot.

Could the legislature possibly have meant, that if the master of a trading vessel from Archangel, or of a ship laden with stone from Jersey, should, on arriving within the prescribed limits, have need of, and make a signal for a pilot, (see section 19), that a licensed pilot should be at liberty to decline to take her in charge, on the ground that she was not a ship wanting a pilot? It is moreover clear, that the 72nd section in terms imposes on the pilot the duty of taking in charge any ship of her Majesty, when required by the officer in command so to do, and yet the 86th section expressly enacts, that no ship belonging to her Majesty shall be bound to take a pilot; from all which it is obvious, that the words, "wanting a pilot," cannot be confined to the ships for which the statute makes a pilot necessary. The correctness of this view of the case is further confirmed by the 25th section of the act and the schedules to which it refers, the effect of which is to fix the particular sum to be demanded by a pilot, when engaged in this very duty of removing a ship into a dry or wet dock; and it is not probable that the legislature would have fixed the rate of payment, if the service rendered by the pilot was mere matter of private contract, and that which he might, if he had thought fit, have declined to perform.

Supposing it, then, to be established, as we think it is, [314] that the pilot, when called on by the owner, was bound to take charge of the ship, for the purpose of removing her from the St. Katherine's Dock to the dry dock, and that he was bound to perform this service at the rate of payment fixed by the act, we think he certainly was acting in the charge of the ship, in pursuance of some of the provisions of the act, namely, the provisions contained in section 72, which obliged him to take the ship in charge when required so to do, and the provisions contained in section 25, and the schedules which precluded him from charging above a certain sum for his services. And as the 55th section exempts the owner from responsibility in respect of accidents happening by reason of the default of any pilot, acting under or in pursuance of any

of the provisions of the act, we think the defendant is not liable to answer to the plaintiff for the injury he has sustained.

In coming to this conclusion, we do not impugn any of the previous decisions.

In *M'Intosh v. Slade* (6 B. & C. 657), the ship having put into the London docks, but not having broken bulk there, was afterwards removed under charge of a pilot to a quay higher up the river, for the purpose of there discharging her cargo, and while she was in the act of being so removed, the accident occurred through the default of the pilot. On the part of the plaintiff it was there contended, first, that under the circumstances of the case, the master was not bound to take a pilot; and secondly, that as he was not bound to do so, he could not, by voluntarily doing what he need not have done, bring himself within the protection of the 55th section. The Court decided, that under the circumstances of that case, the master was bound to take a pilot, so that the other question did not arise.

We do not advert particularly to the other cases cited at the bar; it is sufficient to say, they are none of them inconsistent with our decision in this case. It [315] may, indeed, be admitted, that in many of the cases, the Judges, in giving their judgments, refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation on which it can rest independently of the statutes; but the language of the exempting clause in the last Pilot Act certainly carries the doctrine further, and it may well be conceived that this extension of the common law doctrine was not accidental, but intentional. The object of the legislature in establishing pilots, has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound under a penalty in a great measure to divest himself of its control, and to give up the charge to the pilot. As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot. But the legislature has considered that there may be some classes of cases, in which the presumption of due competency on the part of the master is so great, as to make it safe to relieve him from the obligation of taking a pilot, if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do, and in most of such excepted cases preventing the master from employing any person other than a licensed pilot, if he does not undertake the navigation himself. The language in which the legislature has exempted masters or owners from responsibility on account of accidents arising from the fault of the pilot, is certainly compre-[316]-hensive enough to embrace these latter cases, as well as those in which the taking a pilot has been made matter of absolute obligation; and it may have been considered desirable to give this more extended exemption, as an inducement to take a pilot, even in cases where such a course might, perhaps, be safely dispensed with. It is always the interest of the public, that the ship should be under the control of a pilot, because the legislature has taken what it considers due security for his competency; and therefore, even where taking a pilot is optional on the part of the master, the legislature may well have intended to encourage his employment, by extending, according to our construction of the 55th section, the benefit of exemption from responsibility. Whether, however, this has or has not been intentional on the part of the legislature, we think the extended construction must prevail. The case before us is clearly within the words of the exempting clause; and we must therefore hold it to be within its spirit and meaning, unless (which is not the case) some manifest inconvenience or inconsistency should result from our so doing.

For these reasons, we think that the judgment must be for the defendant.

Judgment for the defendant.

DONALDSON v. THOMPSON. Exch. of Pleas. 1840.—In an action by the indorsee against the maker of a promissory note, the first count alleged that the defendant made the note, payable on a certain day, that he delivered the note to the payee, and promised to pay the same according to the tenor and effect thereof; that default was made in payment of the note when it became due, whereby the defendant became liable to pay the amount. The second count was upon an account stated, and alleged that on &c. (a day long subsequent to the note becoming due) the defendant became and was indebted to the plaintiff in &c., on an account then stated between them; and the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request:—Held, that this was an action on a promissory note, within the meaning of the new rules, and that the plea of non assumpsit was admissible.

[S. C. 8 Dowl. P. C. 209; 9 L. J. Ex. 150.]

Assumpsit. The declaration stated, that the defendant, on the 1st of July, 1835, made his promissory note [317] in writing, and thereby promised to pay to one Dorothy Critchley, or order, £345, by instalments, in manner following: that is to say, the sum of £15, part thereof, on the 1st July, 1837; the sum of £15, further part thereof, on the 1st July, 1838; and the sum of £315, the residue thereof, on the 1st of July, 1839, and then delivered the said note to the said D. C., and promised her to pay the same according to the tenor and effect thereof; and the said D. C. then endorsed the same to the plaintiff; and the plaintiff in fact saith, that afterwards, to wit, on the 1st of July, 1839, default was made in payment of the said sum of £315 in the said promissory note specified, which had then become due and payable, whereby and according to the tenor and effect of the said note and of the said indorsement, the said defendant then became liable to pay to the plaintiff the said sum of £315 in the said note specified, and which so became due before the commencement of this suit. And whereas also the defendant, on the 1st of December, 1839, became and was indebted to the plaintiff in £500, on an account then stated between them: and the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, promised the plaintiff to pay him the said several sums of money on request, yet he hath disregarded his promises, and hath not paid the said several monies above mentioned, or any of them, or any part thereof.

Plea, non assumpsit.

Special demurrer, assigning for cause, that by the new rules of H. T., 4 Will. 4, Pleadings in particular Actions—Assumpsit 2, the plea of non assumpsit, in all actions upon bills of exchange and promissory notes, is declared to be inadmissible, and the plaintiff hath above in the said first count declared upon a cause of action arising upon a promissory note, and the said plea purports to be an answer to such cause of action, and appears on the face of it to be an answer to the whole declaration.

[318] Crompton appeared in support of the demurrer, but the Court called on

Cowling to support the plea. This is not an action on a promissory note, within the meaning of the new rules, which apply only to actions on bills or notes simpliciter, where the promise to pay is merely the promise implied by law. Here the promise alleged in the declaration is not the ordinary promise to pay the note according to the tenor and effect; but that long after the note had become due, and after default had been made in the payment, the defendant promised to pay the amount of it. The rule was intended to prohibit the use of this plea, only in cases where the bill or note is the sole ground of the action, and the promise relied upon is the promise implied by law. *Tumms v. Platt* (2 M. & W. 720) is an authority to that effect. It was there held, that if an executor declares on a bill or note payable to his testator, laying a promise to pay himself, such promise may be denied by a plea of non assumpsit, notwithstanding the new rules. The declaration is a departure from the forms given by the new rules; and having stated a promise subsequent to the note becoming due, it must be presumed that the plaintiff seeks to recover upon it, and not upon the promise implied by law from the note itself, and therefore the plea is good. The Court then called upon

Crompton, in support of the demurrer. The first count of the declaration is in the form given by the rules of T. T., 1 Will. 4, only that there being a count

as for another cause of action, one promise is laid at the end, applicable to both counts. [Parke, B. The objection is, that you allege a promise on a different day.] That would only be ground of special demurrer. [Parke, B. If they had demurred specially, you might have said that you meant to rely upon an express promise on a subsequent day.] It is unnecessary, in an action on a promissory note, to allege any pro-[319]-mise at all, as the promise is implied by law. The day stated in the second count is immaterial, and means any day the party pleases. It would be sufficient for the plaintiff at the trial to produce and prove the note, and then it would appear that it was made by the defendant, and that it was due, which would entitle the plaintiff to recover the amount of it. That shews that the declaration is on a promise implied by law, and that the day is immaterial. The plea is intended as a traverse of the making of the note, which the new rules have prohibited from being done by the plea of non assumpsit, and such plea is therefore inadmissible.

Cowling, contra. This form of declaration is not in accordance with the new rules. The promise alleged in the form there given, in an action by the indorsee against the maker, is a promise to pay according to the tenor and effect of the note; but that is not the promise here laid, but a totally different one, namely, a promise to pay on a day subsequent to the note becoming due. If it be otherwise, and there be also the implied promise to pay according to the tenor and effect, then there are two promises relating to the same cause of action.

PARKE, B. This is an action by the indorsee against the maker of a promissory note; and on referring to Bayley on Bills,(a) I find it is unnecessary to allege any promise, as the promise is always implied by law. If the cause had gone to trial, it would not have been necessary for the plaintiff to prove anything but the note itself, in order to support the issue raised on this plea. The plea is therefore clearly inadmissible since the new rules.

The rest of the Court concurred.

Judgment for the plaintiff.

[320] DOE D. PAYNE v. THE BRISTOL AND EXETER RAILWAY COMPANY. Exch. of Pleas. 1840.—The Bristol and Exeter Railway Act, 6 & 7 Will. 4, c. xxxvi., s. 25, enabled the Company, in ease (inter alia) any person whose lands should be required for the purposes of the act, should, for twenty-one days after notice in writing given to him, neglect or refuse to treat, or should not agree with the Company for the sale of his interest, to issue a warrant under their common seal, or under the hands of three at least of the directors, to the sheriff of the county in which the lands should be, commanding him to summon and return a jury, who should inquire of, assess, and give a verdict for the amount of money to be paid for the purchase of such lands, and for compensation for damage thereto: and that the sheriff should accordingly give judgment for such purchase-money, &c., which should be binding and conclusive upon all persons; fourteen days' notice being given of the time and place of the inquiry. A subsequent clause of the act (s. 242) enacted, that the whole of the sum therein mentioned as the probable expenses of making the railway, &c., should be subscribed for before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway, should be put in force.—An inquisition taken under s. 25, recited that notice had been given to the party that his lands were required by the Company for the purposes of the act, and that he had not within twenty-one days afterwards agreed with the Company for the sale of them; and also that fourteen days' notice had been given of the time and place of the inquiry before the sheriff:—Held, in ejectment by this party against the Company for these lands, subsequently taken by them under the act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been subscribed; but that if this were the fact, it should come by way of answer from the plaintiff.—The 57th section of the act enacted, that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except where a greater breadth should be necessary for waiting places, embankments,

(a) P. 408; referring to *Wegersloffe v. Keen*, 1 Stra. 214. See *Griffith v. Roxbrough*, 2 M. & W. 734.

cuttings, &c. &c.: and the 59th section provided, that the Company, in making the railway and other works, should not deviate from the line delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should extend into the lands or property of any person not mentioned in the book of reference to the plan, unless omitted by mistake: and the Company were empowered to make such deviations in the section as might be necessary in consequence thereof:—Held, that this section only prohibited the Company from making the substituted line of the railway itself at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c.: the intention of the act being to give the Company the same incidental powers with respect to the deviated line, as they had with respect to the original line.—Held, also, that a party whose lands were so taken could not object that the Company had taken, for the same purpose, lands of another person not mentioned in the book of reference.—The 47th section of the act enabled the Company, on payment of such sum as should have been awarded by the jury to the party, or, in case (inter alia) he should refuse or neglect to convey the lands, on payment of it into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to the credit of the party, subject to the order of the Court, to enter upon and take the lands. By the 257th section, the compulsory powers of the act were limited to the period of two years after the passing of the act; which expired on the 19th of May, 1838. By a subsequent act, 1 Vict. c. xxvi. (which received the royal assent 12th June, 1838), s. 1, all the powers and clauses of the former act were to extend to the works, &c., to be done under that act, as if repeated and re-enacted in it. S. 2 repealed s. 47 of the former act. S. 12 revived the time limited by the former act for taking and using lands, and extended and enlarged it for three years from the expiration of the two years mentioned in the former act: and s. 14 enacted, that upon payment of such sums as should have been awarded by the jury into the Bank of England, as in the recited act directed, the Company should have power to enter &c., [re-enacting s. 47 in terms].—An inquisition was taken under the 6 & 7 Will. 4, within the two years limited by that act. On the 11th of June, 1838, the Company obtained an order of the Court of Exchequer for payment of the purchase-money into the Bank; and on the 21st they paid it in accordingly, the plaintiff not having in the meantime offered to convey:—Held, that these proceedings were warranted by the 1 Vict. c. xxvi., s. 14, and might be founded on the inquisition taken under the former act.

[S. C. 2 Rail. Cas. 75; 9 L. J. Ex. 232. Referred to, *Darling v. Pontypool, Caerleon, and Newport Railway*, 1874, L. R. 18 Eq. 738.]

Ejectment to recover a piece of land in the parish of Uphill, in the county of Somerset. At the trial before [321] Erskine, J., at the last Somersetshire Assizes, it appeared that, in the month of June, 1839, the plaintiff being in possession of the land in question, the defendants took possession of it under the compulsory powers of their act of Parliament, 6 & 7 Will. 4, c. xxxvi., fenced it off, and excluded the plaintiff from the occupation of it. The defendants put in a warrant to the sheriff of Somersetshire, signed by three directors of the Company, pursuant to the 25th section of the act, to summon a jury, and hold an inquisition, to assess the purchase-money to be paid to the plaintiff for the land in question, the plaintiff having refused to treat with the Company for the sale of his interest therein. They then put in the inquisition itself; of which the following is a copy:—

“An inquisition indented, taken pursuant to the act hereinafter mentioned, at &c., on the 27th day of November, in the 1st year &c., before me, Alexander Adair, Esq., sheriff of the county aforesaid, by virtue of a certain warrant hereunto annexed, under the hands and seals of James Brown, James Gibbs, and William Morgan, being three of the directors of the Bristol and Exeter Railway Company, established and incorporated by an act of Parliament passed &c., on the oath of Christopher George, &c., good and lawful men of my said county, qualified, according to the laws of this realm, to serve on juries in her Majesty's Courts of Record at Westminster, notice in writing having been heretofore duly given to Charles Henry Payne, by or on behalf

of the said Company, according to the said act, that the lands, hereditaments, and premises hereinafter mentioned were required by the said [322] Company for the purposes of the said act, and the said C. H. Payne not having, within the space of twenty-one days and more after the giving of such notice, agreed with the said Company for the sale, conveyance, or release of the said lands, hereditaments, and premises, or of his estate and interest therein: and notice in writing of the time and place at which the jury were required to be returned, having been duly given fourteen days and more before the said 27th day of November, which said C. George, &c., being sworn to inquire of and concerning the matters mentioned in the said warrant, and thereby directed to be inquired of, assessed, and ascertained by them in manner therein mentioned; and the said Company, by their counsel, having, at the time and place aforesaid, appeared before me and the said jurors, and having adduced evidence before me and the said jurors touching the matter in question; and the said C. H. Payne, in the said warrant named, having also appeared, but having declined to adduce any evidence, or otherwise to take part in the proceedings then and there had before me and the said jurors: the said jurors on their oath aforesaid say, that they do assess and give a verdict for the sum of 98l. 10s., to be paid to the said C. H. Payne for the purchase of the estate, right, title, and interest of the said C. H. Payne of and in certain arable and pasture ground, portions of certain lands and premises, containing in the whole, by admeasurement, 1a. 1r. 12p., little more or less, being parts of three certain pieces or parcels of land, situate and being in the parish of Uphill, in the said county of Somerset, distinguished in the map or plan, and book of reference, deposited in the office of the clerk of the peace of the said county, and referred to by the said act, by the numbers 15, 34, and 39, as regards lands in the said parish of Uphill; and of all clay, stone, mines, and minerals, under the same, necessary to be dug or carried away, or used for the purposes of the said act, and found not deeper than [323] the line of the section in the said act mentioned and referred to, and in the said warrant mentioned, about to be taken and used in execution of certain of the powers granted by the said act: and the said jurors do in like manner assess and give a verdict for the further sum of £58, to be paid to the said C. H. Payne by the said Company, as well by way of satisfaction, recompense, or compensation for the damages which have, before the said 27th day of November, been done to or sustained by the said C. H. Payne, by reason of the execution of any of the works by the said act authorized, as for the damage to be by the said C. H. Payne sustained by reason of the severing or dividing the lands aforesaid: and I the said sheriff do hereby, pursuant to the said act, adjudge and order the several sums of 98l. 10s. and 58l., making together the sum of 156l. 10s., to be paid by the said Company to the said C. H. Payne. In witness, &c."

The defendants then put in an order, dated 12th June, 1838, for payment of the purchase-money into the Bank of England, pursuant to the 42nd section of the act, application having been on that day made to the Court of Exchequer for that purpose; and proved that on the 21st of June the sum of 156l. 10s., the amount awarded to the plaintiff by the jury, was accordingly paid by them into the Bank, to be placed to the account of the Accountant-General of this Court, to the credit of the plaintiff. The engineers of the defendants proved, that, in the language and understanding of scientific men, the centre of the railway was the middle point between the two outside rails: and it was admitted that the centre, so defined, was, at the place in question, only 99 yards distant from the line of the railway laid down on the plan deposited with the clerk of the peace, pursuant to the act of Parliament; and that the eastern or extreme boundary of the land, No. 34 on the plan, taken by the Company from the plaintiff, was 125 yards distant from the line on the plan deposited [324] with the clerk of the peace. That portion of the land which was more than 100 yards from the line on the plan, was used for the purpose of making a slope to an embankment. It appeared also, that, in making this deviation, the Company had taken part of a field called Tynings, the property of a Mr. Kniveton, not mentioned in the plan deposited with the clerk of the peace, or in the books of reference thereto.

It was objected on the part of the plaintiff, first, that the inquisition was void, for not setting out all the preliminary proceedings necessary by the act of Parliament to enable the Company to put in force the powers thereby given for the compulsory taking of lands; and particularly that the whole capital had been previously subscribed, as required by s. 242. Secondly, that the Company had no right to enter

upon the land in question at all, inasmuch as it was above 100 yards distant from the line of the railway as delineated on the parliamentary plan, whereas the power of the company under the act, to deviate from that line, did not extend to a greater distance than 100 yards (s. 59). Thirdly, that by the 257th section of the act, the powers of the Company to take lands for the purpose of the railway ceased, (except by consent of the owners), at the expiration of two years from the passing of the act, viz. on the 19th of May, 1838; and that although by the act of 1 Vict. c. xxvi. (which received the royal assent on the 11th of June, 1838), the powers of the former act were extended to things to be done under that act, as if it were thereby re-enacted, yet an inquisition taken under the former act, the powers of which had altogether ceased, could not be made the foundation of compulsory proceedings under the latter; or that if it could, the 14th section of the latter act only enabled the Company to pay the purchase-money into the Bank of England, on the neglect or refusal of the owner of the land to make a good title after the passing of that act; and it could not be said that between the 12th [325] of June, when the order was made for paying in the purchase-money awarded to the plaintiff, and the 21st, when it was paid in, there could be any such neglect or refusal. Fourthly, that the proceedings were void by reason of the Company having, in making the deviation in question, passed through lands not mentioned in the books of reference, and having so departed from the parliamentary line of the railway. The learned Judge intimated an opinion in favour of the defendants on all these points, and directed a verdict for them, giving the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion, that, on the facts above stated, he was entitled to a verdict. Erle, in Michaelmas Term last, obtained a rule accordingly. As to the first point, he cited *R. v. Bagshaw* (7 T. R. 363), *R. v. Wilson* (3 Adol. & Ell. 817; 5 Nev. & M. 164), *Reg. v. South Holland Drainage Committee* (8 Adol. & Ell. 436; 1 Per. & D. 79), and *Reg. v. Trustees of Swansea Harbour* (8 Adol. & Ell. 439; 1 P. & D. 512).

Butt and Montagu Smith (with whom was Bompas, Serjt.) now shewed cause (*e*)

(*e*) The following are the clauses of the acts of Parliament which were quoted in the course of the argument, and which are material to the case:—

6 & 7 Will. 4, c. xxxvi.—Sect. 5. It shall be lawful for the said company, and they are hereby empowered, to make and maintain the railway and branch railways hereinafter mentioned, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the book of reference deposited with the respective clerks of the peace for the counties of Somerset and Devon, and for the city and county of the city of Bristol, and the city and county of the city of Exeter, save as hereinafter mentioned; that is to say [describing the line].

Sect. 6. And whereas maps or plans and sections, describing the line of the said railway, and the lands upon or through which the said railway is intended to be carried or made, together with books of reference thereto, containing lists of the names of the owners or reputed owners and occupiers of such lands, have been deposited with the clerks of the peace for the counties of Somerset and Devon, and for the city and county of the city of Bristol, and the city and county of the city of Exeter, be it therefore enacted, that the said maps or plans, sections and books of reference so deposited, shall remain with and be kept by the said clerks of the peace respectively; and all persons interested in any manner in such lands shall have liberty, at all reasonable times, to inspect and to make extracts from or copies of the said maps or plans, sections, and books of reference respectively, paying to the clerk of the peace in whose custody the map or plan, section, or book of reference so inspected or referred to may be, for every inspection, the sum of one shilling, and for copies or extracts from the said books of reference, after the rate of sixpence for every 100 words; and the said maps or plans, sections, and books of reference, or true copies thereof, or of so much thereof respectively as shall relate to any matter which may be in question, certified by the said clerks of the peace, or one of them, shall be, and are hereby declared to be, good evidence in all courts of law or elsewhere.

Sect. 8. For the purposes and subject to the provisions and restrictions of this act, the said company, their agents and workmen, and all other persons by them authorized, are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same or any part thereof,

First, the inquisition is [326] good. It sufficiently states the notice to the plaintiff that his land was required for the purposes of the act, and his [327] refusal to treat within twenty-one days : that is all which is rendered necessary by the 25th section, as preliminary [328] to the proceeding before the sheriff, and it could not be necessary

and to set out and appropriate for the purposes of this act such parts as they are by this act empowered to take or use, and in or upon such lands to bore, dig, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for the making, maintaining, altering, repairing, or using the said railway or other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act ; and also for the purposes and according to the provisions and restrictions of this act, to make or construct in, upon, across, under, or over the said railway or other works, or in, upon, across, under, or over any lands, streets, hills, valleys, roads, rail-roads, tram-roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences ; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engines, and other buildings, machinery, apparatus, and other works and conveniences, as the said company shall think proper, &c. &c. ; and to do and execute all other matters and things necessary or convenient for making, maintaining, altering or repairing, and using the said railway and other works by this act authorized ; they, the said company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said company making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by reason of the execution of all or any of the powers hereby granted ; and this act shall be sufficient to indemnify the said company, and all other persons, for what they shall do by virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained.

Sect. 25. And for settling all differences which may arise between the said company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted ; be it further enacted, that if any person, corporation, or trustee, so interested or entitled, and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid ; or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money, &c., as shall be offered by the said company, and shall give notice thereof in writing to the said company within 21 days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury ; or if any of such parties as aforesaid shall, for the space of 21 days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, neglect or refuse to treat, or shall not agree with the said company for the sale, conveyance, and release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein ; or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance, or release, as shall be necessary or expedient for enabling the said company to take and use such lands, or to proceed in making the said railway and other the works aforesaid ; or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest, or charge, which they may claim to be entitled unto or interested in, in case they shall be required to do so by the said company ; or

for him to set forth on the face of his inquiry [329] all that was necessary to give the directors authority to issue the order. All the proceedings taken together [330] are to shew that the Company had a right to take the lands: but the only duty of the sheriff is to inquire into [331] their value, and the damage done to them. The verdict and judgment are, indeed, to be binding on all persons, [332] but merely as

in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made; then and in every such case the said company shall, and they are hereby required, from time to time to issue a warrant, either under their common seal or under the hands and seals of three at least of the directors of the said company, to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise, or in case such sheriff, or his under-sheriff, shall be one of the said company, or enjoy any office of trust or profit under them, or shall be in any ways interested in the matter in question, then to any of the coroners of such county not interested as aforesaid, or if all the coroners shall be so interested then to some person then living in the county and free from personal disability, who shall have filled the office of sheriff or coroner in the said county, and not be interested as aforesaid, (a person having more recently served either office, being always preferred), commanding such sheriff, coroner, or other person, to impanel, summon, and return, and the sheriff, coroner, or other person is hereby accordingly empowered and required to impanel, summon, and return, a jury of at least twenty-four sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in his Majesty's courts of record at Westminster; and the persons so to be impanelled, summoned, and returned, are hereby required to appear before the said sheriff, under-sheriff, coroner, or other person, at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons to be impanelled, summoned, and returned, a jury of twelve men shall be drawn by the said sheriff, &c., or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in his Majesty's courts of record at Westminster are by law directed to be drawn, &c. &c.; and the said sheriff, &c., is hereby empowered and required, on request in writing by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses, touching the matters in question, and may authorize or order the said jury, or any six or more of them, to view the place or matter in controversy; and such jury shall, upon their oaths, or being quakers upon their affirmations, (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called upon to give evidence, the said sheriff, &c., is hereby empowered and required to administer), inquire of and assess and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said company from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future or temporary or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company, and which cannot or will not be further obviated, removed, or repaired by them; which satisfaction, recompense, or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, &c., shall accordingly give judgment for such purchase-money, satisfaction, recompense, or compensation, as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever. Provided always, that in such inquiry, the person or corporation claiming compensation shall be the plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to. Provided also, that not less than fourteen days' notice, in writing, of the time and place at which such jury are so required to be returned shall be given by the said company to the party with whom such controversy shall arise, either by delivering such notice to such party, or by leaving the same at his place of abode, or with the clerk, or agent, or principal officer of the corporation, in the case of a corporation, or with some tenant or occupier of

to the amount to be paid; they do not change the property, or give a title to the possession of the [333] land. The jury are not even to ascertain who is the party entitled to receive the money; they are simply to decide upon the amount to be received. Every thing necessary to give the jurisdiction for this purpose is stated in

the premises intended to be valued, or respecting which or any damages to which any such question shall arise.

Sect. 42. In case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this act, or for any interest, or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, or to such interest in the premises, to the satisfaction of the said company, or shall be absent from England, or shall not be conveniently found, or if any party entitled unto or to convey such lands or such interest therein, cannot be conveniently known or discovered, or be not shewn to the satisfaction of the said company to be such party, then and in every such case it shall be lawful for the said company to order the money so agreed or awarded as aforesaid to be paid into the Bank of England, in the name and with the privity of the Accountant General of the said Court of Exchequer, to be placed to his account, to the credit of the parties interested in the said lands, (describing them so far as the said company can do), subject to the control and disposition of the said Court; which said Court, on the application of any party making claim to such money or any part thereof by petition, is hereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said Court shall seem proper; and the cashier of the Bank of England who shall receive such money is hereby required to give to the said company a receipt for such money, mentioning and specifying therein for what and for whose use (described as aforesaid) the same is received.

Sect. 47. Upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury in manner aforesaid, for the purchase of any lands, rents, or other charge, or as a compensation for any loss or injury as aforesaid, to the respective proprietors of such lands, or other persons respectively interested and entitled to receive such money or compensation respectively, within three calendar months after the same shall have been so agreed upon or awarded; or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse or be unable from illness to receive such money as aforesaid, or shall refuse or neglect, or be unable to make a good title to such lands, (to the satisfaction of the said company), or if any party entitled unto or to convey such lands shall not be known, or shall die after such agreement or award, or shall be absent from England, or shall refuse or neglect, or be unable from illness or otherwise to convey the same, then upon payment of such money into the Bank of England as hereinbefore directed, to the credit of the parties interested in such lands, or in case such money shall have been agreed or awarded to be paid for the purchase of any such lands or such compensation as aforesaid, which any corporation, trustee, or person under disability, is hereby capacitated to convey, upon payment of such money into the Bank of England as hereinbefore directed, to an account ex parte "The Bristol and Exeter Railway Company," then and in every of such cases it shall be lawful for the said company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all estate, use, trust, and interest of all parties therein, shall thenceforth be vested in, and become the sole property of the said company, to and for the purposes of this act; and such payment, tender, and conveyance, or such deposit in the Bank of England as aforesaid, shall operate to merge all outstanding or other terms of years, and to bar and destroy all dower and estate tail, and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever of and in the said lands, &c.

Sect. 57. The lands to be taken for the line of the said railway shall not exceed twenty-two yards in breadth, except in those places where a greater breadth shall be judged necessary for carriages to wait, load, or unload, and to turn or pass each other,

the inquisition. It is said that it ought to state the fact that the whole capital has been subscribed, because, by s. 242, that must be done "before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway shall be put in force." But what is there to make it necessary that this fact should appear on the inquisition? The sheriff is not to adjudicate upon the rights of the parties; it is a mere inquest of office to ascertain the value. [Parke, B. The

or for raising embankments for crossing valleys or low grounds, or for cuttings, or for erection and establishment of any fixed or permanent machinery, toll-houses, warehouses, wharfs, or other erections and buildings, except at or near the terminations of the said railway and the branches thereof, in the respective parishes of Temple, (otherwise Holy Cross), in the city and county of the city of Bristol; Bridgwater, in the county of Somerset; and Tiverton and St. Thomas, in the county of Devon; and except also on commons, downs, or waste grounds, unless with the previous consent in writing of the owners or occupiers of any lands which the said company shall be desirous of appropriating to the obtaining greater space for the purposes hereinbefore mentioned.

Sect. 59. No deviation from the line laid down on the plan so authenticated as aforesaid, between the points marked V. & W. thereon, shall extend to a greater distance than ten yards on either side of such line, nor between the points marked V. & X., and W. & Y., on the said plan, more than twenty yards on the western side of the said line, nor between the points marked Y. & Z. on such plan more than ten yards on the westward side of the said line so laid down, without the previous consent in writing of the owners and occupiers respectively of the lands adjoining the said railway; and that the said company, in making the said railway and other works by this act authorized, shall not deviate from the line delineated on the maps or plans so deposited with the clerks of the peace as hereinbefore mentioned, with or without the consent of the owners or occupiers of the lands or any of them, to a greater distance than 100 yards; nor in passing through any city or town to a greater distance than ten yards from the line so delineated upon the said plans; nor shall any deviation to be made by the said company extend into the lands or property of any person whose name is not mentioned in the said book of reference, unless the name of such person shall have been omitted by mistake, and unless the fact that such omission proceeded from mistake shall have been certified in manner hereinbefore provided for in cases of unintentional errors in the said book of reference: provided always, that the said company shall have power to deviate to the extent hereinbefore mentioned, and to make such deviation in the section as may be necessary in consequence thereof.

Sect. 235. No proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by certiorari, &c.

Sect. 242. And whereas the probable expense of making the said railway and the other works hereby authorized will amount to the sum of £1,500,000, and the sum of £750,000 and upwards, or one-half thereof, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for; be it therefore enacted, that the whole of the said sum of £1,500,000 shall be subscribed for in the like manner, before any of the powers given by this act in relation to the compulsory taking of land for the purposes of the said railway shall be put in force.

Sect. 243. Provided, that a certificate under the hand and seal of any justice of the peace for either of the respective counties of Somerset and Devon, or for the city and county of the city of Bristol, or the city and county of the city of Exeter, that the whole of the said sum of £1,500,000 hath been subscribed as aforesaid, (and which certificate such justice is hereby authorized and required to grant on application made to him by the said company, and on production of the subscription deed of or relating to the said company), shall for all purposes whatsoever be conclusive evidence that the whole of the sum of £1,500,000 has been subscribed.

Sect. 257. Unless the said company shall, within the space of two years to be computed from the passing of this act, agree for, or cause to be valued and paid for as in this act is mentioned, the lands which they are by this act empowered to take or use, or otherwise so much thereof as shall be by them deemed necessary and proper for the purposes of making the said railway or other works hereby authorized, then and from thenceforth the powers which are hereby granted to them for taking or

question is, whether [334] it is not enough to state in the inquisition all that is required by the section relating to the inquisition; and whether, if there have been a non-compliance with the act by the non-payment of the capital, that should not have come by way of answer from the plaintiff.] It may also be answered, that at all events the statement is mere matter of form,—merely a sort of preface to shew that the sheriff is acting within his jurisdiction; and if so, the want of it is cured by s. 235. The cases furnish no authority for the plaintiff on this point. In *Lier v. Bagshaw* (7 T. R. 363), there was an order (of trustees of a turnpike road for diverting a road) as well as an inquisition; and these were quashed, because, on the proceedings taken altogether, there appeared to be no jurisdiction. In *Rex v. Mayor of Liverpool* (4 Burr. 2244), the notice required before the proceeding by inquisition, was not in fact given. [Parke, B. There is in that case the opinion of Lord Mansfield, that the notice ought to have appeared upon the inquisition: but in fact there was no notice there.] In *Rex v. Trustees of Norwich v. Watton Roads* (5 Adol. & Ell. 563; 1 N. & P. 32), the Court appeared to think the inquisition bad, because it did not set out that the parties had been served with notices to treat, although there was no decision on the point. Here, however, the inquisition does set out that fact. The case of *Reg. v. South Holland Drainage Committee* (8 Adol. & Ell. 429) admits of the same answer. There the Court refused a certiorari to bring up the inquisition, on the ground that the party had waived the notice rendered necessary by the act of Parliament; and all that was said as to the necessity of its appearing on the face of the inquisition is therefore extrajudicial. Again, in the case of *Reg. v. Trustees of Swansea Harbour* (id. 439), the point was not decided, the Court holding that such an objection could not be insisted on by the trustees, whose [335] duty it was to give the notice: and the judgment of Littledale, J., would rather go to shew that the statement was unnecessary altogether. [Parke, B. I see the sheriff is to give a judgment; therefore every thing necessary to give him jurisdiction should appear on the inquisition and judgment, or some part of it.] It does so. It is not a judgment to bind any right, or give any title; it is only a judgment on the inquisition, which is merely as to value. This is but a step in the proceedings; as such, it is perfect on the face of it, inasmuch as it shews that the matters rendered necessary preliminaries by the 25th section, had been done.

Secondly, with regard to the question as to the deviation, which depends upon the construction of the 57th and 59th sections of the act. S. 57 limits the breadth of the lands to be taken for the line of the railway, except in those places where a greater breadth shall be judged necessary for carriages to wait, load or unload, &c., &c., and

using such lands shall cease and be utterly void, (save and except with the consent in writing of the owners and occupiers thereof respectively).

1 Vict. c. xxvi. Sect. 1. All the powers, authorities, provisions, &c. &c., clauses, matters, and things contained in the said recited act (6 & 7 Will. 4, c. xxxvi.) (except such parts thereof respectively as are by this act repealed, altered, or otherwise provided for) shall extend and be construed to extend to this act, and to the several works and things hereby authorized or required to be made and done, and shall operate and be in force in respect to the purposes and objects of this act, and of the said recited act as altered and amended by this act, as fully and effectually to all intents and purposes whatsoever, as if the same powers, authorities, provisions &c., were repeated and re-enacted in this act.

Sect. 2. [Recites and repeals so much of the 47th section of the 6 & 7 Will. 4, as is above set forth.]

Sect. 12. The time by the said recited act limited for the taking or using of lands for the purpose of the said undertaking thereby authorized, shall be and the same is hereby revived, and extended and enlarged for the further term of three years, to be computed from the expiration of the time in such act mentioned.

Sect. 14. Upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury in manner in the said recited act mentioned, for the purchase of any lands, &c. &c., or if any party entitled unto or to convey such lands shall not be known, &c., or shall refuse, neglect, or be unable from any cause to convey the same, then upon payment of such money into the Bank of England as in the said recited act directed, &c., it shall be lawful for the said Company immediately to enter upon such lands, &c. &c. [proceeding to re-enact s. 47 of the former act, with an additional proviso].

except with consent of the owners, to twenty-two yards. Then s. 59 enacts, that "no deviation from the line laid down in the plan" to be deposited with the clerk of the peace, shall extend, within certain points mentioned, to a greater distance than ten yards "on either side of such line:" and that the Company, in making the railway and other works authorized by the act, shall not deviate from the line delineated on the plan, with or without consent, to a greater distance than 100 yards. The effect of that clause is merely to substitute the deviated line for the original line, with the same powers, with respect to the making of cuttings, embankments, &c., as belonged, by s. 8, to the original line. The admeasurement of the 100 yards is to be from "the line delineated on the plan," i.e. the line of passage of the railway itself: there is nothing on the plan to shew the cuttings or embankments. Measuring from that point, the substituted line is within the 100 yards. The Company have power to make such deviation in the section as may be necessary in consequence [336] of the deviation of the line: it is clear, therefore, that it is not to be a mere surface measurement. There is no deviation—no change de viâ—by merely extending the cuttings.

Thirdly, the objection that some other land has been taken for the deviation which is not within the act, cannot avail the plaintiff. [Parke, B. The answer is, that you have agreed with the owner. What have the rest of the world to do with it? You cannot take compulsorily land not mentioned in the plan; but that does not prevent you from taking by agreement lands not mentioned, if the deviation be within the 100 yards.]

Fourthly, it is objected that the powers of the 6 & 7 Will. 4 had ceased, and were not properly revived at the time when this land was taken. The first section of the 1 Vict. c. xxvi., incorporates into it all the powers, authorities, clauses, &c., of the former act, as fully as if they were repeated and re-enacted therein. Then s. 14 enacts, that on payment or tender of such sums of money as shall have been agreed upon, or awarded by a jury, for the purchase of lands, or, if (inter alia) the parties shall refuse, neglect, or be unable to convey the same, then upon payment of such money into the Bank of England, as in the recited act directed, it shall be lawful for the Company to enter upon the lands. Here, at the time when the first act expired, nothing remained to be done but the payment of the money into the Bank, which was done, after the passing of the second act, in the manner directed by the first act, and was therefore well done under the provisions of s. 14.

Erle, Crowder, and Fitzherbert, contra. First, as to the question of deviation, which is one of very great importance. Hitherto all persons have supposed that they would have notice before their lands were taken for the purposes of the railway, but by the construction the Court [337] is called upon by the other side to adopt, it may happen that although the deviation of the actual line of the railway is but ninety-nine yards, the lands of a person 100 yards further off may be taken for a cutting. [Parke, B. If they be mentioned in the plan and books of reference; there is no compulsory power except over them.] The plaintiff contends that the deviation in s. 59 means a deviation in taking lands as well as in making the line of railway. The "lands to be taken for the line" of the railway, in s. 57, clearly mean the lands to be taken for cuttings, &c., as well as for the railroad itself. It is to be of the breadth of twenty-two yards only when on a perfect plane, but a greater breadth is allowed in the case of embankments, cuttings, &c. &c. The line, therefore, here means the twenty-two yards or greater necessary breadth. Then s. 59 provides, that no deviation from the line laid down on the plan, between certain points, shall extend to a greater distance than ten yards on either side of such line. There, again, the line means the twenty-two yards, from the side of which the measurement is to be. It then goes on to enact, that the Company, in making the railway and other works authorized by the act, shall not deviate from the line delineated on the plan above 100 yards; nor shall any deviation "extend into the lands" of any person not mentioned in the book of reference, unless omitted by mistake. Here the language corresponds with the expression in s. 57, as to the "lands to be taken for the line," and shews that the deviation means the whole extent to which the lands are to be taken. The object of all these clauses is to protect the landowners, and they ought to be so construed as to effectuate that object. Suppose a party has a field within the 100 yards, and therefore his name and that of the field is mentioned in the book of reference, but he has also other land several fields off, can the Company take that for cuttings? Such is the consequence of the construction contended for on the other [338] side. It is

submitted, however, that the proper construction is, in measuring the 100 yards, to place the deviated as well as the parliamentary line on perfectly level ground, and to exclude from consideration all discretionary additions. The inconvenience of the contrary construction will be more apparent in the case of a town, where only ten yards' deviation is allowed, but forty or fifty might be required for cuttings.

Secondly, it is admitted that the inquisition must shew jurisdiction; but it is said that the jurisdiction is to be assumed as to matters required by other sections of the statute, until it be negatived. [Parke, B. There are cases to shew that an excuse mentioned in a proviso need not be noticed in a conviction. Here s. 242 is in the nature of a proviso, cutting down all the compulsory powers previously given.] It is not in the form of a proviso; it is rather a preliminary to all the compulsory clauses.

Thirdly, as to the operation of the two acts of Parliament taken together. There was a chasm between the acts, from the 19th of May to the 11th of June, during which period all the compulsory powers were gone. The inquisition was held while the first act was in force: but something yet remained to be done before the defendants could acquire title; viz. the payment into the Bank of England under s. 47, which is to be upon a refusal or neglect to convey. The first act expired before the application was made for that purpose: the question is, did the subsequent act revive it for this purpose? S. 1 merely incorporates the clauses of the former act, as if re-enacted from that time; s. 2 repeals that part of s. 47, which gave the title on payment of the money, and s. 14 re-enacts it with an additional proviso; but it cannot be said to revive it as to past transactions. The payment into the Bank is to be made "in the manner in the recited act mentioned," but not under the old act. Then s. 12 revives and extends the time for taking or using lands, for the further [339] term of three years from the expiration of the time mentioned in the 6 & 7 Will. 4; but it has no words giving a continuing validity to proceedings had under the former act. [Parke, B. Sect. 14 may be read so as to embrace all valuations under former inquisitions: the words "shall have been agreed upon or awarded," were probably introduced for that very purpose. Why should the Company go through the expensive form of a new inquisition?] The effect of the repeal of an act of Parliament is completely to obliterate it, as if it had never passed, except as to transactions completely carried into effect; *Key v. Goodwin* (6 Bing. 576), *Surtees v. Ellison* (9 B. & C. 750; 2 Man. & R. 586). Then, are those words in the 14th section sufficient to revive that which has become wholly nugatory and void? Moreover, the subsequent words are, "if any party shall refuse, neglect," &c., not "shall have refused or neglected." Here the order which was the foundation of the payment was not obtained until the 12th of June, there was therefore no neglect or refusal under the new act.

The last point, as to the effect of passing through Kniveton's land, is included within the first, if the construction of the act contended for by the plaintiff be the correct one.

PARKE, B. It seems to me that this rule ought to be discharged. The first question which has been made in this case is, whether the inquisition was sufficient.

Now it must be admitted, according to the authorities on this subject, that inasmuch as there is to be an extraordinary jurisdiction exercised by the sheriff, in giving judgment as to the amount of compensation, every thing that was made preliminary by the act of Parliament ought to be set out on the face of the inquisition. The question is, whether all that the act makes necessary is set out on the [340] face of the inquisition, at the foot of which is the sheriff's judgment. It seems to me that it is. All that the act requires in the first instance, is to be found in the 25th section; and it appears to me that every thing which that section makes necessary has been duly set out on the face of the inquisition. The only question is, whether what is made necessary by the 242nd section ought to have been set out: and it seems to me that that section, although it is not in the terms of a proviso, is in substance a defeasance of all the powers given by the act of Parliament to enable the Company to take compulsory possession of lands, and that this, so coming by way of defeasance, would be an answer, and ought to come from the other side, and need not be set out on the face of the inquisition and judgment. It is perfectly well settled, that every thing that comes in reality by way of proviso and defeasance, need not be inserted in a conviction, but must come by way of defence. In this case we think it was incumbent on Mr. Payne, in order to do away with the effect of the inquisition, and to

prevent the Company from acting on it, to have shewn on his part that the £1,500,000 had not been subscribed.

The next and important question in this case is, whether the Company were authorized to make a deviation in the direction in which the deviation in question was made. It appears on the evidence on the cause, that the new railroad was within 100 yards of what would have been the centre of the rails of the old parliamentary railroad, but that the cuttings went considerably beyond the 100 yards. The question is, whether the Company were authorized to make these cuttings beyond the 100 yards; and it appears to me clearly that they were.

In order to decide that question, we must refer to the different sections in the act of Parliament which give the Company the power of making the railroad, and the power of deviating. [His Lordship read the 5th section of the 6 & 7 Will. 4, c. xxxvi.] If the Act of Parliament had [341] stood there, and there had been no permission given to make any deviation, and there had been no restriction as to the width of the railway, the Company would have been bound to make the railroad precisely in the mode pointed out in the parliamentary plan, of a convenient and reasonable width. But the 57th section then restricts the width which they are not to exceed, but they may have any width they please within those limits. [His Lordship read s. 57.] That would have empowered the Company to make a railroad twenty-two yards in width, if they pleased; and, in applying the parliamentary line to the road, they must have taken it along the centre of the twenty-two yards, and having fixed the line in which it was to go, they might have a railroad of the width of twenty-two yards on the plane, and then would be authorized to make, beyond that space, embankments and cuttings reasonable and necessary according to the nature of the soil, and toll-houses, warehouses, wharfs, and places for the carriages to stand or turn.

Now comes the 59th section, on which this question turns. [His Lordship read that section.] It appears to me that the true construction of that clause is, that the Company may make a railroad in a new line, which new line shall be on a line to be laid down, not exceeding 100 yards from the old line. I feel no doubt or difficulty about it; and any other construction would lead to very great inconvenience. It is the same as if they were authorized to alter the parliamentary plan in that way, and to make a new road in the altered direction. The proper mode of comparing the old line and the new line, would be this: supposing you laid down on the surface of the ground a thin piece of string or tape, the thinner the better, exactly in the line originally authorized by the act of Parliament, (which would be, I take it, in the centre of the twenty-two yards), you may then lay down a new tape, at a distance not exceeding 100 yards [342] from the old tape, and may make the substituted railroad in that direction: that being so, you have all the powers in respect to the new line as you had with respect to the old line; you may make all the cuttings or embankments reasonable and proper, and all the erections and buildings necessary for this new line, just as if the new line had been inserted in the parliamentary plan, at a distance of 100 yards from the former. It follows from this, that the measurement is to be a horizontal measurement from the one to the other, that is, it is to be according to the base.

It is said, however, that this is a great hardship on the proprietors of lands, for they have no notice of the intention of the legislature to give such powers to the Company. But the proprietors of lands are bound to construe the act according to its true meaning; if then this be the true construction of the act, they are required to take notice of that true construction. It is said, this would be a great hardship on persons whose names are not inserted in the book of reference, and would enable the Company to make slopes, and erect their works, out of the proper places entered in the book. But it appears to me that that by no means follows from the position we have laid down, but that it would be incompetent to the Company, in making their new line, to trespass at all on the lands of persons, without their consent, whose names were not contained in the books of reference; because they are to exercise, with respect to the new line, all the powers they had as to the old line; that is, they may make, with respect to the new line, all proper works and conveniences "in, under, and over the lands delineated in the plan, and described in the books of reference." Therefore, they cannot make, without the consent of the owners, any works except upon lands which are specified in the books of reference, and delineated on the plan. It seems to me, therefore, that if any other construction than this were to [343] be put upon the act of Parliament, it would be productive of great uncertainty and inconvenience;

because it is impossible to tell, before they have cut the railroad, and have got it at the proper level, what will be the degree of slope that will be required for it; that must depend entirely on the nature of the strata through which the railroad is made: and if the powers of the Company were to depend on what might turn out to be the length of the slope required, it would be impossible to work with a certainty of being within the powers given by the act of Parliament. It appears to me, therefore, that the principal objection in this case is disposed of.

Then there is another objection, that the railroad was made over the lands of a Mr. Kniveton, whose name is not mentioned in the books of reference, nor in the plan, with reference to this particular property. It seems to me that that is no objection. The 59th section provides, that the deviation shall not be made through any land not mentioned in the books of reference; and if this deviation, that is, the new line which the Company are authorized to make, have trespassed on Mr. Kniveton's lands, it would be unauthorized by the act of Parliament, and that, probably, whether with or without the consent of Mr. Kniveton; because, for the benefit of all persons, land-owners and all others interested in the railroad, it is provided that it shall not deviate beyond the 100 yards, with or without the consent of any one. But the line of deviation in the new railroad does not go upon his land, though some of the slopes necessary to make that line extend into it. With respect to that, Mr. Kniveton alone has to complain; and if he give his consent, it is no objection on the part of any other person interested in the railroad.

That disposes of all the objections in the case, except the last. Now the last objection is, that the inquisition was taken under the old act of Parliament, which expired, [344] in consequence of the operation of the 257th section, on the 19th of May, 1838.

In this case, the inquisition was held within the two years, but the payment into the Bank of England did not take place until after the expiration of that period. At that time there is no doubt that, under the act of the 6 & 7 Will. 4, the Company had no power to enter upon the lands in question. The question then is, to what extent are the powers of that act revived by the statute of 1 Vict. c. xxvi.? The first clause, which incorporates the provisions of the old act with respect to the works to be done under the new act, does not appear to me to bear upon this question: but I think, on the proper construction of the 14th section, power is given to the Company to act upon the findings of the jury, on inquisitions taken under the former act. It appears to me to have been the intention of the legislature to give effect to all the inquisitions that had been taken under the old act. [His Lordship read s. 14.] Now it seems to me that that clause enables the Company to proceed on an old inquisition, acting, as to all future steps, in the manner directed by the 14th section; and they could not have paid the money into the Bank of England, unless there had been a refusal or neglect to make out a title, according to the provisions of the former act, and according to the provisions of this 14th section. It becomes, therefore, a short question of fact, whether there was in this case, on the part of Mr. Payne, any neglect to make out a good title to such lands to the satisfaction of the Company. Now the facts are, that this act of Parliament came into operation on the 11th of June, and that upon the 12th of June, an application was made to the Court of Exchequer for an order to pay in the money; and on the 21st of June, the money was paid in. Now the question is, whether there was in this case reasonable evidence to go to the jury; if there was, all the points in the case being referred to us, we are to decide as [345] if we were in the place of the jury. The Company had to shew that there was neglect between the 11th of June and the 21st, and not between the 11th and 12th, when the order was obtained by the Company provisionally, in order thereafter to pay the money; if they pay the money within two months after the neglect or refusal—if there has been a sufficient neglect or refusal to make out a title—they are entitled to proceed under this act of Parliament. The question therefore is, not whether there was a sufficient time between the 11th and 12th of June, when the order was obtained, but between the 11th and the 21st of June, when the money was paid into Court, to see if Mr. Payne had been guilty of neglect in not making out his title. Can there be the least doubt of that? It is clear Mr. Payne meant to keep the Company at arm's length, and do nothing. The neglect to make out a title for ten days, after he knew what had taken place, was amply sufficient to justify the Company in paying the money into Court. It seems to me, therefore, that on

this last objection also, the defendants are entitled to succeed, and consequently that the rule ought to be discharged.

ALDERSON, B. I am of the same opinion. It appears to me that the defendants are entitled, on all the points in the case, to retain their verdict.

With respect to the deviation, which seems to be the principal point on which the opinion of the Court was sought to be obtained, as a guide for the construction of acts of Parliament of this kind in future, it appears to me, I own, to be a very simple question. In the parliamentary plan a line is laid down, and a certain deviation from that line is permitted to take place. The parliamentary plan is to be the guide for persons taking it in their hands, to know in what direction the railroad is to go across the face of the country. What is "the line" laid down in the parliamentary plan? What [346] line across the face of the country does it represent? It appears to me that it represents the medium filum viæ of the railway which is to be thereafter made; and the deviation which is to be allowed is to be a deviation between the medium filum viæ of the railway, as described by the parliamentary plan, and the medium filum viæ of the railway which is ultimately to be laid down; and if between these two corresponding points an interval of not more than 100 yards exists, measured in a horizontal level, the deviation does not exceed that which is allowed by the act of Parliament to be made. That appears to me to be a correct definition of the deviation allowed by the 59th section of the act; and if that be so, according to the evidence in this case, the distance between the two lines does not exceed the limit which the act of Parliament has provided.

But it is suggested to us that the word "deviation" cannot have this sense, and cannot mean the interval between the two media fila viæ, by reason of the words in the same clause, which provide that "the deviation shall not extend into" lands not mentioned in the books of reference. I perfectly agree that the deviation cannot extend into lands not mentioned in the books of reference; and inasmuch as this is a parliamentary bargain between the public (including the railway proprietors) on the one side, and individuals on the other. I agree that it must be faithfully and correctly performed, and there can be no deviation at all into lands not mentioned or defined by the act of Parliament; for, although the parties themselves might permit the Company to go over some of their lands, yet other people have an interest not to allow it. But this provision, as it appears to me, does not extend to more than the line of railway—it does not extend to slopes and embankments. The railway itself can go only to a certain distance from the original line, and when it does not exceed that distance, it can be of no importance to the parties through whose lands it [347] passes, whether the lands of other people be taken for slopes or embankments, provided they be taken with their consent; they cannot be taken without. It therefore appears to me, if the line of deviation does not go into lands not contained in the books of reference, it is competent for the Company to proceed with their slopes and embankments in other lands, provided they have the consent of the parties to whom those lands belong, and not without.

I am of opinion, therefore, that this first objection fails: with respect to the others, I shall not say much about them, as they appear to have been already fully gone into by my Brother Parke. The last objection, as to the operation of the two acts of Parliament, cannot prevail. There can be no doubt that the provisions of the 14th section were framed for the express purpose of having reference to antecedent inquiries, which had been taken under the former act. Then all the rest is a question for the jury; and when we look at all the circumstances of this case, can we doubt that the jury, properly directed, would have found that this party had refused or was unable to complete his title to the satisfaction of the Company? in which case the Company have a right to pay the money into the Bank, and give themselves a good title.

GURNEY, B. I entirely concur with my learned Brothers in every respect as to which they have given judgment, and I should only be repeating in worse language that which they have said, were I to say more.

ROLFE, B. I did not hear the first part of the argument; what I did hear induces me to come to the same opinion as the rest of the Court.

Rule discharged.

[348] IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

PICKARD v. THE ATTORNEY-GENERAL. Exch. Chamber. 1840.—A testator devised real estate to W. T. for life, with remainder to his first and other sons in tail, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainders over; and gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates, by deed or will to appoint to any woman or women they should marry, by way of jointure, rent charges not exceeding £750 per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. W. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with £750 per annum by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—Held, on error brought on the judgment of the Court of Exchequer, that G. P. was chargeable with legacy duty after the rate of £10 per cent. on the value of the rent-charge of £750 per annum, affirming the judgment of the Court below.

[S. C. 9 L. J. Ex. 329. Applied, *Attorney-General v. Lord Henniker*, 1852, 7 Ex. 341: affirmed, 8 Ex. 257. Followed, *Sweeting v. Sweeting*, 1853, 1 Drew. 331; 22 L. J. Ch. 441. Referred to, *Attorney-General v. Marquis of Hertford*, 1845, 14 M. & W. 294.]

A writ of error having been brought on the judgment of the Court of Exchequer in this case (3 M. & W. 552), it was now argued by

Erle, for the plaintiff in error; and by Waddington, for the defendant in error: but the arguments being substantially the same as those which were urged in the Court below, it has been thought unnecessary to detail them at length.

The judgment of the Court was delivered by

LORD DENMAN, C. J. We are all agreed in this case that the judgment given in the Court below is correct, and must be affirmed. The case states the bequest by the will of Mr. Trenehard to the Rev. George Pickard, of an estate for life, with a proviso that it should be lawful for the several persons who for the time being should, by virtue of any of the limitations thereinbefore contained, be in the actual possession, or entitled to the rents, issues, and profits, during life, by deed or will, to grant an annual sum [349] or annuity to his wife, not exceeding in the whole the sums therein-after mentioned. Then it appears that Thomas Pickard became possessed as tenant for life; and that by his will, he made a charge in favour of the lady therein mentioned by way of annuity; that annuity has been estimated at a sum, upon which the Crown is entitled to the highest duty, if the legacy is liable to charge. Now it appears to me, in the first place, that the mere statement of that state of things is enough to shew that this is a legacy left by the will of John Trenehard. By that will, he creates the power of granting an annuity; that annuity is afterwards granted, whether by will or deed is immaterial, and it is the operation of the will creating the annuity that is to be considered. The 4th section of the statute 45 Geo. 3, provides, in clear terms, "that every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act,"—referring, at that moment, to the will that should execute the power, and not the will that created it; but that is only the mode of stating what constitutes a legacy, and in this case it is clearly a legacy under the one will or the other. It is a legacy under the later will in fact, but in operation of law it is a legacy under the other will; and the question is, in what character it is to pay the duty? I am of opinion that it derives its legal character out of the original will, and not [350] the engrafted will.

Then a proviso follows:—"That nothing herein contained shall be construed to extend to the charging with the duties by this act granted, any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement, or deed or deeds." Now the meaning of that proviso appears to me quite consistent with the view we are taking of this case; where the charge is not by will, but by deed, then the act has said that it shall not be considered as a legacy; it is a gift by a marriage settlement. That is quite consistent with the general principle, that where the interest grows out of the will creating the power, it shall be referred to that will, and not to the will afterwards made in pursuance of the power. I admit we must go the length of saying, that if the power is executed by deed, the charge is liable to the duty, as well as where it is executed, and the annuity given, by a will; and not shrinking from that consequence, it seems to me that we are bound by the principle disclosed in this proviso, to refer the liability to duty to the question what is, in legal operation, the instrument by which the charge is made; and, upon that, there is no doubt whatever in my mind, that the charge is made by the original will, and not by that which is accidentally a will, and not a deed, by which the original intention is carried into effect. For these reasons, we are of opinion that the judgment of the Court below is correct, and must be affirmed.

Judgment affirmed.

[351] RHODES v. SMETHURST. Exch. Chamber. 1840.—It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted.

[S. C. 9 L. J. Ex. 330; 4 Jur. 702.]

A writ of error having been brought from the judgment of the Court of Exchequer (4 M. & W. 42) in this case, it was argued in Michaelmas Vacation by Sir W. W. Follett for the plaintiff. The arguments were in substance the same as those urged by him in the Court below; the main position contended for on behalf of the plaintiff being, not that the case fell within the words or the equity of the 7th section of the 21 Jac. 1, c. 16, or within the 4 Anne, c. 16, s. 18; but that the 3rd section of the statute of James did not apply at all to a case where there was not a continuing right to bring the action during the six years. Besides the cases cited in the Court below, the following were referred to: *Chandler v. Pilett* (2 Saund. 120), *Matthews v. Philips* (2 Salk. 424), *Middleton v. Forbes* (Willes, 259, note (c)).

At the conclusion of the argument for the plaintiff, the Court intimated to Whitehurst, who appeared for the defendant, that they would hear him on a future day, if they considered it necessary to do so. And now, without calling upon the defendant,

LORD DENMAN, C. J., gave judgment. This was an action upon a promissory note for £2500 made by the intestate James Hobson, payable to the plaintiff on demand, with the usual money counts.

To the count on the note the defendant pleaded, *inter alia*, the Statute of Limitations.

The plaintiff replied, that the cause of action accrued within six years before the death of James Hobson, and shewed further, that, in consequence of litigation in the Ecclesiastical Courts, no administration to his effects was granted till the 18th of June, 1835, and that the plaintiff [352] commenced his action within a reasonable time afterwards, viz. on the 12th of September, 1835; and averred, that the periods which elapsed between the accruing of the cause of action and the death of James Hobson, and between the grant of administration to the defendant and the commencement of the suit, did not together amount to six years.

The defendant rejoined, that the causes of action did not accrue within six years before the death of James Hobson.

A verdict having passed for the plaintiff, the Court of Exchequer gave judgment, notwithstanding the verdict, for the defendant.

A writ of error having been brought in this Court, we have heard the case argued on behalf of the plaintiff.

The question was said to turn upon the 3rd section of the stat. 21 Jac. 1, c. 16, by which it is enacted, "that all actions of trespass quare clausum fregit, &c., all actions of account and upon the case, &c., shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case (other than for slander) within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after." And it was contended by the plaintiff's counsel, that the six years mentioned in the statute could not be considered as having elapsed, unless there had been a continuing cause of action capable of being enforced; in other words, a plaintiff capable of suing and a defendant liable to be sued, during the whole of the six years.

It was admitted, that with reference to the disabilities mentioned in the 7th section of the statute, if the time of limitation had once begun to run, it would continue to run on, notwithstanding any subsequent disability; but it was maintained that with reference to the 3rd section of the statute the case was different.

[353] It was not alleged that any decision of our Courts of law could be produced in support of the proposition contended for; but cases were cited to shew that, in reference to various clauses of the statute, the Courts had adopted an equitable rather than a literal construction of the act. *Chandler v. Vilett* (2 Saund. 120) was referred to, which decided that an action of assumpsit was within the meaning of the proviso in the 7th section of the statute, though not specifically mentioned. *Matthews v. Philips* (2 Salk. 424), *Wilcox v. Huggins* (Fitzgib. 171, 289), *Middleton v. Forbes* (Willes, 259, note (c)), were cited. This class of cases are stated, in Willes 29, to have been adjudged upon the equity of that clause of the statute of James (sect. 4) which gives a year after judgments or outlawries reversed, for the bringing of a new action. In these cases actions had been commenced within the six years, and abated by matters subsequent, and in such cases a new action has been allowed to be brought within a reasonable time after the determination of the first.

The case of *Douglas v. Forrest* (4 Bing. 686) was also cited. In that case the debtor resided and died abroad. His death occurred in 1817. Probate was not taken out till 1824, and within six years after the creditor brought his action, and the question was, whether he was entitled to maintain it within the equity of the proviso in the 19th section of the 4th Anne, c. 16, by which, in the case of debtors residing abroad, the right to sue is reserved to the creditor, provided he sues within the limited period after the debtor's return from abroad. The Court held the action maintainable, notwithstanding this lapse of time, and although the debtor never returned from abroad.

None of these cases were decisions upon the section now in question—they are but illustrations of a principle which [354] does not admit of controversy, that Judges will expound a case within the mischief and cause of an act, to be within the statute by equity, if it be not within the words: Com. Dig. tit. Parl. R. 13, Co. Lit. 24 b.: but the question still remains to be decided in each particular case, what the intent of the act is, and whether the proposed case, though not within the words, is yet within the meaning and reason of the act.

In addition to the cases at law, three cases from courts of equity were cited: *Jolliffe v. Pitt* (2 Vern. 694), *Webster v. Webster* (10 Ves. 93), *Perry v. Jenkins* (1 Myl. & Cr. 118).

In the case of *Jolliffe v. Pitt*, the decision does not appear; it is only said that the Chancellor inclined to be of opinion that the Statute of Limitations was not to take effect.

In *Webster v. Webster*, a bill was filed by the executor of a creditor against the executor of the debtor. The debtor died in 1786, the creditor in 1792. The bill was not proved till 1802. The bill prayed for an account and payment. The defendant put in a plea of the Statute of Limitations. It is said that the Chancellor objected, that, as there was no representation till 1802, there was no person who could be sued, and therefore the statute could not be pleaded.

No decision, however, was come to on the point, and ultimately the plea was, under the circumstances of the case, allowed.

In *Perry v. Jenkins*, the question arose on a bill of revivor. The original bill was filed by Griffith Jenkins against Lewis Jenkins in 1818. In 1819 Griffith Jenkins died, leaving Ann Jenkins his widow. In 1827, Lewis Jenkins, the original defendant, died. In 1830, Ann, the widow, married one Perry; subsequent to this marriage, administration was taken out by Mrs. Perry to the estate [355] of the original plaintiff, Griffith Jenkins, and in 1835, the bill of revivor was brought against the real and personal representatives of Lewis Jenkins, the original defendant.

To this bill a plea of the Statute of Limitations having been put in, it was overruled, on the ground that the Statute of Limitations did not begin to run till administration was taken out. The right to revive the bill never had existed in the deceased Griffith Jenkins: it was a right first accruing to his personal representative; and on that ground the case of *Murray v. The East India Company* (5 B. & Ald. 204) was said to be a conclusive authority against the plea.

It appears from this examination, that the cases in equity do not (any more than those at law) furnish any authority for the proposition contended for by the plaintiff in this case.

If from the cases we turn to the statute, we see nothing in the words of the clause in question which points to the necessity of a continuing cause of action, capable of being enforced during the whole period of six years. The words are, that the action shall be brought within three years after the end of the then session of Parliament, or within six years next after the cause of such action or suit, and not after. These words, in their natural sense, import what is more precisely expressed in the 7th section of the same statute, by the words "the time of any such cause of action given or accrued, fallen or to come."

It was said in argument, that no laches can be imputed to the plaintiff for not suing during that portion of time during which there was no person whom he could sue, and therefore that period of time ought to be excluded from calculation, by an equitable extension of the terms of the act.

This argument might be entitled to some weight, if the clause in question had had for its object the remedying of some inconvenience under which plaintiffs suffered, in [356] which case it might be extended by construction to reach a case not within the words, but within the mischief intended to be remedied. But the object of this act is quite different; it was passed for the benefit of defendants, to exempt them from being called to account in respect of transactions long gone by, which it might not be easy to explain at a distance of time. This object would be liable to be, in many cases, defeated, if we were to adopt the construction contended for by the plaintiff; the time of limitation might be indefinitely prolonged, and we should be extending a statute by equity, not to forward, but to defeat, the remedy which the act had in view.

The case of *Pridmore v. Webber* (1 Lev. 31), in which the statute was held to run, though the Courts of law were shut in consequence of the rebellion, shews that this clause of the act is to be construed strictly against plaintiffs: and the act of 1 Will. & M. c. 4, by which it was enacted, that from the 10th of December until the 12th of March, 1688, shall not be accounted any part of the time within which any person, by virtue of the Statute of Limitations, must bring his action, as in accordance with this view of the law.

We think, therefore, that the observations of Lord Kenyon, in the case of *Doe d. Durrant v. Jones* (4 T. R. 300), with reference to the statute of fines, furnish the proper rule for the construction of the statute of James, and for the 3rd equally with the 7th section of that act:—"I never heard it doubted," said Lord Kenyon, "till the discussion of this case, whether, when any of the statutes of limitation had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am clearly of opinion, on the words of the statute of fines, on the uniform construction of all the [357] statutes of limitation down to the present moment, and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed."

Our opinion therefore is, that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

MEMORANDA.

In this vacation, George James Turner, Esq., of Lincoln's Inn; Robert Baynes Armstrong, Esq., and David Dundas, Esq., of the Inner Temple; and Richard Bethell, Esq., of the Middle Temple; were appointed her Majesty's Counsel.

In the same vacation, James Manning, Esq., of Lincoln's Inn; John Halecomb, Esq., William Fry Channell, Esq., and William Shee, Esq., of the Inner Temple; and Digby Cayley Wrangham, Esq., of Gray's Inn; were called to the degree of the coif, and gave rings with the motto, "Honos nomenque manebunt."

Serjeants Adams, Andrews, Storks, Ludlow, Bompas, Goulburn, and Talfourd, received patents of precedency, conferring upon them the same rank which they held under the warrant of King William the Fourth, held by the Privy Council to be void.

End of Hilary Term.

[358] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, EASTER TERM, 3 VICTORIE.

CORNFOOT v. SIR F. G. FOWKE, BART. Exch. of Pleas. 1840.—Assumpsit for the non-performance of an agreement to take a ready-furnished house. Plea, that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him; on which issue was joined. It appeared at the trial, that the plaintiff had employed one C. to let the house in question, and the defendant being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not:—Held, (Lord Abinger, C. B., dissentiente), that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea.

[S. C. 9 L. J. Ex. 297; 4 Jur. 919. Discussed, *Fuller v. Wilson*, 1842, 3 Q. B. 58; 2 G. & D. 460; *National Exchange Company v. Drew*, 1855, 2 Macq. H. L. 103; *Whelton v. Hardisty*, 1857, 8 El. & Bl. 232: affirmed, 8 El. & Bl. 285: Explained, *Barwick v. English Joint Stock Bank*, 1867, L. R. 2 Ex. 262; *Jolliffe v. Baker*, 1883, 11 Q. B. D. 255; *Reg. v. Butt*, 1884, 5 L. T. 608. Adopted, *Markay v. Commercial Bank of New Brunswick*, 1874, L. R. 5 P. C. 410; *In re Shackleton*; *Ex parte Whittaker*, 1875, L. R. 10 Ch. Ap. 447, n.; *Ludgates v. Love*, 1881, 44 L. T. 694.]

This was an action upon a written agreement, dated the 12th of November, 1838, made between the plaintiff and the defendant, whereby the defendant agreed to take a ready-furnished house of the plaintiff, for the term of two years, at the rent of £375 per annum, but which the defendant had refused to perform.

[359] Plea, that the plaintiff caused and procured the defendant to enter into the said agreement, and that the defendant was induced to enter into the said agreement, through and by means of the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him. Verification.

The replication traversed the plea, upon which issue was joined.

At the trial before Lord Abinger, C. B., at the Middlesexittings, after last Trinity Term, the following facts appeared in evidence. The defendant, being in search of a town residence for the purpose of educating his children, applied to Mr. F. B. Clarke, No. 116, Crawford-street, to know if he had a ready-furnished house to let in that neighbourhood. Mr. F. B. Clarke mentioned several houses, which, on looking at them, the defendant thought would not suit him. Subsequently to this,

on the 29th October, 1838, Mr. F. B. Clarke wrote to inform him of the house in question, belonging to the plaintiff, stating that the rent required was 400 guineas, but that he thought 350 guineas might be taken, but certainly not less.

Upon the receipt of this letter, the defendant went with two of his sons and a friend, to look at the house in question, No. 16, York-place, Baker-street, and there saw Mr. Clarke, the father of F. B. Clarke, who had been employed by the plaintiff to let the house in question, and to whom persons making inquiries about the house had been referred. On seeing him, the defendant said that he had seen Mr. Clarke, of Crawford-street, about taking the house. Mr. Clarke replied, that that Mr. Clarke was his son, but that he himself had the letting of the house. The defendant then said, "Pray, sir, is there anything objectionable about the house?" to which Mr. Clarke replied, "Nothing whatever;" upon which the defendant said, "Then I do not think I shall object to give 350 [360] guineas for the house:" to which Mr. Clarke replied, that his son had made a mistake, that the rent was 450 guineas, and not 350. The defendant thereupon declined to give that rent, and left the house. Afterwards, however, in consequence of some further negotiation, the rent was reduced to £375, and the defendant agreed to take the house on those terms, and the agreement, for the breach of which the action was brought, was drawn up by Mr. Clarke, and signed by the defendant and afterwards by the plaintiff. On the 13th of November, the day after signing the agreement, the defendant discovered that the adjoining house to the plaintiff's, (which was a corner house), situate in Davies-street, was a brothel of the worst description, of which there was ample evidence given at the trial, and in consequence of it persons in the immediate neighbourhood of it could not let their lodgings, and were obliged to leave their houses. It was also proved that the plaintiff was fully aware of it, and had consulted some of the neighbours as to the best mode of putting down the nuisance. The defendant, on the 14th November, through his attorneys, Messrs. Egan & Waterman, gave notice of his determination not to take possession of the house, because, to his great astonishment, he had discovered that the next house to it was a house of ill fame. The defendant's family, it appeared, consisted of two sons and two daughters, the eldest daughter being sixteen or seventeen years of age.

At the trial, the defendant began, and having proved the above facts, Thesiger, for the plaintiff, objected that the question put to Mr. Clarke, the agent, by the defendant, whether there was any objection about the house, must be considered as applying to objections within the house, or to the house itself, but not to objections arising from something outside and apart from the house; which, he contended, the agent who was merely authorized to let the house, had no authority from his principal to answer. The learned [361] Judge overruled the objection, but left it to the jury to say whether the nuisance was such as formed a solid objection to the house; if so, and if they thought that when the defendant used the expression "about the house," Mr. Clarke could not have understood him in any other sense than that of an objection to the house, they ought to find their verdict for the defendant: and he stated his opinion to be, that although an agent could not bind his principal beyond the scope of his authority, it did not follow that the principal could enforce a contract procured by the false representation of his agent, and that the representation made by the agent must have the same effect as if made by the plaintiff himself. The jury answered both questions in favour of the defendant, and gave their verdict accordingly.

Thesiger, in Easter Term last, obtained a rule to shew cause why there should not be a new trial on the ground of misdirection.

Kelly, Channell, and Willcock, in Michaelmas Term, shewed cause. The plea was proved, and the learned Judge was right in directing the jury to find a verdict for the defendant. The agent having been employed by the plaintiff to let the house, had necessarily authority to answer all inquiries respecting it. It will be said that the agent had only authority to answer inquiries as to matters within the house; but there cannot be any distinction between inquiries about the house, and inquiries as to matters within the house. The agent must have authority to answer all inquiries necessary for the purpose of letting it. The principal cannot take the benefit of the contract by acknowledging the authority of the agent to let the house, and at the same time disaffirm it by denying his authority to answer a question respecting it. When the agent was asked if there was anything objectionable about the house, he had authority [362] to answer that question; and that being an act done by him

within the scope of his authority, it was the same as if it had been done by the principal himself: and the principal well knew of the existence of the nuisance. The agent and the principal must be considered as one person, and identified together, where the agent is acting within the scope of his authority. [Parke, B. The difficulty here is, that under this plea you are to make out fraud in the plaintiff or his agent; but it is not shewn that the agent knew of the existence of this objection to the house, and the plaintiff did not make the representation, or know of its having been made. If you could make out that the plaintiff knew that Clarke was ignorant of it, and had employed him on purpose that he might make that answer, then it might have been a fraud in the plaintiff.] It is submitted that the knowledge of the principal is the knowledge of the agent, and vice versa; if so, it is the same as if the representations were made by the plaintiff himself. In *Fitzherbert v. Mather* (1 T. R. 16), it was so held; and Ashurst, J., says, "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that the principal knows whatever the agent knows." And Buller, J., says, "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer." In *Doe v. Martin* (4 T. R. 39), the doctrine that the knowledge of the agent is the knowledge of the principal, is fully recognised; and Lord Kenyon there says (p. 66), "The maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in courts of law and equity." [Parke, B. That was the fraud of the agent, and it cannot be disputed that that would vitiate the transaction.] Then the converse of the proposition is also true, and the knowledge of the principal [363] is the knowledge of the agent: *Mayhew v. Eames* (3 B. & C. 601). There an agent, employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank notes to a common carrier, to be forwarded to his principals in London, which parcel was lost. The carriers had given notice that they would not be accountable for parcels containing bank notes. The agent had no knowledge of such notice, but the principals had: and it was held that it was their duty to have instructed their agent not to send bank notes by that carrier, and that the latter was not responsible. So here, the plaintiff ought to have communicated this fact to the agent whom he employed to let the house, and if he did not, he is equally bound. And in *Schneider v. Heath* (3 Camp. 508), where a ship was sold, "to be taken with all faults," it was held, that the vendor could not avail himself of that stipulation, if he knew of secret defects in her, and used means for preventing the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. Mansfield, C. J., says, "It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if it turns out to be false." So, in the recent case of *Willis v. The Bank of England* (4 Adol. & Ell. 21; 5 Nev. & M. 478), Lord Denman, in delivering the judgment of the Court, says, "The general rule of law is, that notice to the principal is notice to all his agents;" and if so, the knowledge of the principal is the knowledge of the agent. In *Gladstone v. King* (1 Mau. & S. 35), which was an action on a policy a ship, Lord Ellenborough recognises the principle of law, that what is known to the agent is impliedly known to the principal. In *Grant v. Munt* (Coop. Chan. Cases, 173), a compensation for dry rot in a house was decreed upon the representation of the vendor's wife to the purchaser as to the state of the repairs; the [364] purchaser relying upon such representations, and stating to the vendor that he did not employ a surveyor for that reason. So in *Edwards v. M'Leay* (Coop. Chan. Cases, 308), where the defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, it afterwards appeared that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or been threatened, it was held that a bill lay to set aside the conveyance, and for a return of the purchase-money and all expenses. The judgment was put on the ground that the suppressed facts, if disclosed, would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. Now here, if the fact of the existence of a brothel in the adjoining house had been known, it would most undoubtedly have affected the price at which it would let: and the principal was bound to inform his agent of a circumstance which would so affect it, and if he does not, then he is guilty of fraud. The plea was therefore fully established.

Thesiger and W. H. Watson, contra. The learned Judge was incorrect in stating to the jury, that the agent must be presumed to have the knowledge of the principal, and that the representations of the agent must be treated as those of the principal. There is a great difference between the representations of an agent and the representations of the principal; because the former is only authorized to act within the scope of his authority. Now here, the mere fact of Clarke having authority to let the house did not enable him to bind his principal by any representation he might choose to make about the neighbourhood of the house. All that he was authorized to do was to answer inquiries as to the nature, qualities, and conveniences of the house itself. He had no authority to make any representations as to extrinsic circumstances respecting the neighbourhood. Suppose this brothel had been four or [365] five doors off, or suppose the house had been a gaming-house, could it be said that the agent's making this answer would be a misrepresentation for which the principal would be liable? Surely not. By employing a house agent, he does not give him authority to make such representations as, if made by the principal himself, would be binding upon him. But, assuming that Clarke had authority, then comes the important question, whether, there being no evidence to shew that Clarke was aware of the objection to the house, though the plaintiff did know of it, and there being no evidence that the plaintiff knew at the time of signing the agreement that Clarke had made such representation, the plea of fraud and covin is not established. The principal did not know of the representation having been made before he signed the contract, and the agent was not aware of the existence of the nuisance. There is no authority for saying that, under the circumstances of this case, the knowledge of the principal is the knowledge of the agent, so as to bind the principal, and render him liable for a fraudulent representation. It has been said that the principal is bound to communicate his knowledge to the agent; but that is an argument drawn from cases of insurance, which are distinguishable. In those cases, the underwriter has no knowledge whatever, except what is communicated to him by the assured; and therefore, if a principal employs an agent to effect an insurance for him, he is bound to communicate to him all that he knows respecting the subject-matter to be insured. But was the plaintiff here bound, at all events, to communicate the fact of the existence of this brothel to his agent? A party has a right to sell an article with all faults; and, in such case, he is only guilty of fraud when he takes pains to conceal some defect. In cases of insurance, the contract is made entirely on the faith that every thing which the party knows is communicated to the underwriter; but here it cannot be said that [366] this contract was entered into on the faith of this representation; the defendant might have ascertained, by inquiry in the neighbourhood, whether any such objection as this existed. In *Doe v. Martin*, there was fraud on the part of the agent: but here Clarke was an innocent party, and bona fide believed what he said to be true. In *Schneider v. Heath*, there was a concealment of secret defects in the ship, which the agents conducting the sale must have known at the time. Now, in this case, as there is no evidence to shew that Clarke knew of this objection, and as the contract contains nothing of this representation, the plaintiff cannot be affected by it. This is not such a deceit as would go to invalidate the contract. In *Grant v. Munt*, the defect was a latent one, which the purchaser himself could not have discovered; and there the wife knew that the house had the dry rot, and made the false representation. So, in *Edwards v. M'Leay*, there was a latent defect, and the representation was made by the seller, with a knowledge of the defect, and the decision was put upon the ground of its being in the knowledge of the seller. But whether this was a representation by the plaintiff or his agent, yet inasmuch as it was a matter which the defendant, if he had made proper inquiries, might have discovered, he is not entitled to shut his eyes to the fact, and enter into a contract, and then say that he has been deceived by a false representation. The question is, whether this is such a fraud as would entitle the defendant to maintain an action for deceit, as in *Dobell v. Stephens* (3 B. & C. 623), where the party kept the house, and brought an action for the false representation; and that is the test; for if the party could not maintain an action of deceit, the contract may be enforced against him. In *Daves v. King* (1 Stark. N. P. C. 75), it was held by Lord Ellenborough, in an action against a vendor for a deceitful representation, that the plaintiff must prove that deceit was [367] used by the defendant for the purpose of throwing the plaintiff off his guard, and preventing him from being watchful. But *Pickering v. Dowson* (4 Taunt. 779) is

strongly in point. It was there held, that if a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for deceit lies against the vendor, on the ground that the article sold is not answerable to that description, whether the vendor knew of the defects or not. There Gibbs, J., says (p. 786),—"I hold, that if a man brings me a horse, and makes any representation whatever of his quality or soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations, and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case. In this case, if there had been any fraud, I agree it would not have been done away by the contract; but, in this case, there is no evidence of any fraud at all." Now it is quite clear from that case, that a mere misrepresentation is not equivalent to fraud. In *Kain v. Old* (2 B. & C. 627), Abbott, C. J. says,—"Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." So in *Geddes v. Pennington* (5 Dow, 164), where a horse was sold under a warranty of soundness, but with a misrepresentation as to the place from which he was brought, it was held, that if the horse answered the warranty at the time of the sale, the misrepresentation as to the place from which he came [368] would not invalidate the contract. Then, is there in this case any fraud on the part of the plaintiff or his agent? It is submitted that there is none whatever. All that it amounts to is a mere omission to communicate the fact to his agent; but it was not necessary for him to communicate the fact to the agent, unless he was also bound to communicate it to the purchaser. There is no fraud in the agent in asserting that to be true which he did not know to be false, but believed to be true, for which an action could be maintained. *Hayeraft v. Creasey* (2 East, 91) is an authority to shew that an action for a false representation cannot be sustained if such representation be made by the defendant bona fide, and with a belief of the truth of it; because the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiff by means thereof. In that case, Lawrence, J., says,—"I have always understood the doctrine laid down in *Pasley v. Freeman* (3 T. R. 51) to be, that, without fraud, there was no cause of action." In order to support such an action, there must be a statement of a falsehood known by the person making it to be one. And to support this plea there ought to have been shewn such fraud and covin, for which an action of fraudulent representation and deceit might have been maintained. They referred also to the judgment of Lord Denman, C. J., in *Levy v. Langridge* (4 M. & W. 338).

Cur. adv. vult.

The Judges, differing in opinion, now delivered their judgments seriatim.

ROLFE, B. This was an action for breach of a contract, under which the defendant agreed to become tenant to the plaintiff of a house in York-place, at a yearly rent of £375. The defendant pleaded that he had been induced to enter into the contract by the fraud and covin of the plaintiff; and on this plea issue was joined.

[369] It appeared on the trial, that the plaintiff, being the owner of the house in question, employed an agent of the name of Clarke to let it; and the defendant being in treaty with Clarke for hiring it, asked him if there was any objection to the house, to which Clarke answered that there was not. On the faith of that representation the defendant entered into the contract. After he had done so, he discovered that the adjoining house was a brothel, and on that ground he declined to fulfil the contract, alleging that Clarke's statement of there being no objection to the house was a fraudulent misrepresentation, and that but for such statement he would not have entered into the contract. The jury found for the defendant, and the counsel for the plaintiff afterwards obtained this rule nisi to set aside the verdict, and for a new trial, on the ground that Clarke was not proved to have had authority to make such a statement, or to have known of the nuisance in question though the plaintiff himself must have been aware of its existence. The point for our decision is, whether it was properly left to the jury, in the absence of proof of express authority, to treat the defendant as not being liable in this action, on the ground that the representation of Clarke was

a representation by an agent made in the ordinary course of business, and therefore binding on the principal. It was not shewn at the trial what was the precise extent of the authority given to Clarke, but I will assume that he had all the authority usually confided to house agents, and in the absence of express proof he cannot be assumed to have had more. If an agent so authorized should enter into an agreement to let the house of his principal, making it part of the contract that the house was free from any particular nuisance, as, for instance, the immediate neighbourhood of a brothel, it is obvious the principal could only enforce the contract, or recover damages for the breach of it, by shewing that he was able and willing to do what his agent had contracted [370] to do, that is, to let to the intended tenant the house free from the particular nuisance. No question as to the extent of the agent's authority could in such a case arise. The landlord, insisting on his agent's contract, must take it in solido, with all its qualifications and provisions. If, instead of an action at the suit of the landlord, the intended tenant should sue the intended landlord for the breach of such a contract, on the ground that the agent had agreed to let a house free from the nuisance of a brothel then the question argued in this case, as to the authority of a house-agent to make such a contract binding on his principal, would arise. But the present is not a question as to the power of an agent to bind his principal by contract, but as to his power to affect him by a representation collateral to the contract. Now, in order to do this, it is essential, according to what was laid down by Gibbs, C. J., in *Pickering v. Dowson* (4 Taunt. 786), to bring home fraud to the principal; and that was certainly not done in this case, where all the facts are consistent with the hypothesis, that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself, or even with the stronger supposition that he expressly desired Clarke not to make any representation at all on the subject. If the plaintiff, knowing of the nuisance, expressly authorized Clarke to state that it did not exist, or to make any statement of similar import; or if he purposely employed an agent, ignorant of the truth, in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, in either of these cases he would be guilty of a fraud, and the truth of the plea would then, I think, have been established. But on the general ground of the authority of an agent to bind his principal in matters within [371] the scope of his authority, on which the case was left to the jury, I think that as no express authority was proved to have been given by the plaintiff, authorizing Clarke to make the representation in question, the fraud stated by the plea is not made out, and consequently the rule for a new trial ought to be made absolute.

ALDERSON, B. In this case the parties have entered into an agreement which is in writing, and to the terms of which nothing can be added, and from them nothing subtracted.

The agent makes a representation at the time of the negotiation, which is contrary to the fact. If that were a fraudulent representation, and in consequence of that representation the bargain was made, the defendant will not be liable, by reason of the fraud, and this is the point raised by these pleadings.

But here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud.

The jury have, however, found that the true facts were known to the principal, though not communicated by him to the agent; and it is said this knowledge, on the part of the principal, is sufficient to establish the fraud.

If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit. But this fact also fails. It may perhaps be admitted, that such a statement, if made part of the original written contract, would be within the scope of the general agency here shewn to exist. But the contract is in writing, and this is no part of it. And I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any:—the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor ever directed the agent to make it; and the agent, be-[372]-cause, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer bona fide.

It is said that this will open a door to fraud, by enabling parties in the situation of this principal, themselves conscious of objections to their premises, to appoint agents,

who unconsciously may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shewn, it would be a fraud on the part of the principal with such a motive to appoint such an agent; and the third party is not (except from his own imprudence) in any real danger, for he may always protect himself by making the representation a part of the contract, in which case its falsehood, whether fraudulent or not, will be a good defence to him. For these reasons, I think there should be a new trial.

PARKE, B. In this case I concur in opinion with my learned Brothers who have preceded me, that there should be a new trial.

It is an action on an agreement by the defendant, to take the plaintiff's house, ready furnished, for a term. The defendant pleads, that the agreement was void, on the ground of fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him. That plea the defendant is to prove.

The alleged fraud consists in an untrue representation made by a house-agent, employed by the plaintiff, in answer to a question by the defendant. The question was, whether there was any objection to the house; the answer, that there was none; and it appeared that the next door was a brothel, and that the plaintiff knew it before, but the agent did not. My Lord Chief Baron thought the plaintiff was bound by the agent's representation, and left the question to the jury, whether that representation was intended to relate to intrinsic objections only, or applied to extrinsic objections also. The jury found that it was meant and understood to refer to both, and to the mode in which that question was left to the jury, or their finding upon it, no objection is made.

But it is said, and I think justly said, that it is not enough to support the plea, that the representation is untrue; it must be proved to have been fraudulently made. As this representation is not embodied in the contract itself, the contract cannot be affected, unless it be a fraudulent representation, and that is the principle on which the plea is founded.

Now the simple facts, that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud: each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition, that if each be innocent, the act of either or both can be a fraud. No case could be found in which such a principle is laid down, as was admitted in the course of the argument. It must be conceded, that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held, that in an action of deceit, for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable: *Hern v. Nichols* (1 Salk. 289). But, in the present case, the agent acted without any fraudulent intent; and therefore his act alone neither renders the plaintiff liable to an action nor vitiates the contract. It must also be admitted that if the plaintiff not merely knew of the nuisance, but purposely [374] employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would, doubtless be a fraud. But whether the facts in the case would warrant an inference that such a fraud was committed, it is unnecessary to inquire, as, if they would, this question should have been submitted to the jury.

My opinion, therefore, is, that the case has not been properly disposed of, and there ought to be a new trial.

Much discussion took place on the argument of the rule, as to the extent of the authority delegated to the agent—whether it was to make representations as to the intrinsic qualities of the house, or to extrinsic circumstances. The view of the case which I have taken, makes it unnecessary to enter into that question in order to dispose of this rule; and upon my Lord's report, I am unable to collect exactly what the authority of the house-agent was. It certainly was not to make any contract, for that was clearly to be executed by both principals: and whether he had authority to

make any representations as to the state and condition of the property, does not appear to be clear; and I abstain from entering into that question at all, inasmuch as my opinion proceeds on this, that such representations, whether within the scope of his authority or not, do not affect a regular contract, unless they be fraudulent representations.

LORD ABINGER, C. B. This was an action on a contract for letting a ready-furnished house for two years, at the rent of £375, by the plaintiff to the defendant. The [375] breach alleged was, that the defendant refused to occupy the house or pay the rent. The plea was, that the defendant had been induced to enter into the contract by the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him.

The defendant's counsel began. It appeared in evidence that Sir Frederick Fowke, the defendant, had had some correspondence with the son of Mr. Clarke, the agent of the plaintiff, to whom inquirers after the house had been referred by the plaintiff. In this correspondence the rent was stated at 350 guineas. The defendant came to town with one of his sons, and, accompanied by a friend, went to the house in York-place, Baker-street, where they found Mr. Clarke in the dining-room. The defendant and his son were both well pleased with the house, and thinking it rather cheap at 350 guineas, Mr. Clarke was pressed by the defendant to state, whether there was any objection about the house. Mr. Clarke assured the defendant that there was no objection whatever. The treaty went off on the rent being stated at 450 guineas, Clarke alleging that his son had made a mistake when he wrote that it was 350. Afterwards, in consequence of some further negotiation, opened by whom did not appear, but probably by Mr. Clarke, the rent was reduced to £375, and the defendant agreed to take the house, whereupon the contract in question was drawn up by Mr. Clarke, and signed by the defendant and afterwards by the plaintiff. Shortly after, the defendant discovered by accident, that in Davies-street, next door to the house in question, which was a corner house, a brothel of the most odious description was kept. There was full evidence of the grossness of the nuisance, that persons in the neighbourhood could not let their lodgings, and had been obliged to abandon their own houses; that the plaintiff was fully apprized of it, that he had consulted with some of the neighbours as to the best way of putting it down, and proposed that he would [376] himself send in some servant who might be a witness. The defendant's family consisted of two sons grown up, and two daughters, the eldest sixteen. It was out of the question to suppose that he could live in the house, and he gave notice in writing that he declined it.

This being the case of the defendant, Mr. Thesiger, for the plaintiff, called no witness, but submitted that there were two points: one for the jury, whether the nuisance was of such a nature as to be a substantial objection to the house; the other for the Judge, which was, that the question put to Mr. Clarke by the defendant, whether there was any objection about the house, must be considered as meaning to inquire as to objections within the house, which he admitted it was the province of the agent to answer; but not as to the objections arising from some matter outside of the house, which he contended the agent could not have the authority of his principal to answer, inasmuch as it opened a vast field of inquiry, and might be pushed to any assignable distance, within which it might be supposed the house might be affected by a nuisance.

I told the jury that I saw no law in the case; that if they thought the nuisance was a solid objection to the house, which I left to them, then the only question they had to decide was, whether, when the defendant put the question in which he used the expression about the house, Mr. Clarke could have understood him in any other sense than that of an objection to the house; and if they thought that to be the meaning of the question, and that there was a solid objection to the house, they should find for the defendant; and I stated, that although an agent could not bind his principal beyond the scope of his authority, it did not follow that the principal could impose upon a third party a contract procured by the false representation of his agent, and that for the purpose of that cause the representation made by Mr. Clarke must have the same effect as if made by the plaintiff. The jury gave their verdict on [377] both the questions I had left to them, without hesitation, for the defendant.

Upon a motion for a new trial, the same distinction was pressed upon the Court, between an objection in the house and an objection about the house, and as I under-

stood, it was admitted by the counsel, that had there been a good objection within the house, the contract would have been void. But it appeared to the other members of the Court that, this question arising upon a plea of fraud and covin, I was wrong in my opinion, that the representation made by the agent had the same effect as if made by the principal. For it was said, and is now said, that there was no fraud in the agent, because it did not appear that he knew of the objection; and none in the principal, because he did not make the representation. Upon which the rule was granted.

I have bestowed some consideration on this subject since, and am sorry to find myself obliged to differ from my Brethren on a matter that appears to me, but for their opinion, too plain to admit of a doubt. In the first place, it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude. Every action for the breach of a promise, for deceit, for not complying with a warranty, or for a false representation, is founded upon a legal fraud, which is charged as such in the declaration, although there be no moral guilt in the defendant. The warranty of a fact which does not exist, or the representation of a material fact contrary to the truth, are both said, in the language of the law, to be fraudulent, although the party making them suppose them to be correct. This point, if it could be doubted, is fully established by the case of *Williamson v. Allison* (2 East, 446). That was a declaration in tort for breach of a warranty, that twenty-four dozen bottles of claret were in a fit and proper [378] state to be exported to India, whereas they were at the time—and the defendant well knew they were—in a very unfit and improper state. At the trial no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made afterwards for a new trial, on the ground that the scienter, having been alleged, ought to have been proved. But the Court, after full discussion, and a reference to cases cited in the argument, were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore need not be proved. Now if the action had been for a false representation made by the seller of a material fact, by reason of which the plaintiff was induced to buy, although the seller might have supposed the fact to be true, the same reasoning or the same rule would apply; the difference between a warranty and a representation is nothing more than this, that where there is a written contract, the warranty forms a part of the contract, but the representation is collateral to the contract, and may be made verbally, though the contract may be in writing: but if it be of a fact without which the other party would not have entered into the contract at all, or at least on the same terms, it is equally effectual, if untrue, to avoid the contract, or to give an action for damages on the ground of fraud. This is often illustrated by actions, which have been very common of late, by the purchasers of public-houses, who have been induced to buy or to give a greater price for the goodwill of the house, by a representation of the extent of its business; and if that representation turns out to be false, even though the party making it supposed it to be true, and whether that party were the principal or the agent, it has never been doubted that the contract is void, and that the buyer may recover back his money in an action for money had and received to his use. In the case of *Hodson v. Williamson* (1 W. Black. 463), Mr. Justice Yates lays it [379] down as a general proposition, that "the concealment of material circumstances vitiates all contracts, upon the principles of natural law." If this be true, can it be doubted that the false representation of a material circumstance also vitiates a contract? These principles are familiar to every person conversant with the law of insurance. But a policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. When it is said to be a contract uberrimæ fidei, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract, in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now nothing is more certain than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud. But though I consider this case as coming fully within the meaning of a legal fraud, even if the agent is presumed to be ignorant of the falsehood of his misrepresentation, I am very far from conceding that it is a case void of all moral turpitude.

The verdict of the jury entitles me to consider the question put by the defendant

exactly the same as if it had been put in this form: "Is there no brothel, or smith's forge, or farrier's shop, or other nuisance so near the house as to make it objectionable," to which the agent replies, "I assure you there is none."

In the case of *Pawson v. Watson* (Cowp. 785), Lord Mansfield lays it down, generally, that in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false. This maxim is neither negatived nor qualified by the [380] doctrine laid down in that class of cases derived from *Pasley v. Freeman*. The plaintiffs in those cases sought to charge a party with damages for stating that which he believed to be true, though he did not know it to be so, in answer to inquiries made by the plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the dramatis personæ in the construction of any contract. It does not follow from the principle established in these cases, that if in any one of them the defendant had been the agent employed by the purchaser of the goods to buy them for him, and even without the authority of his principal, had made false representations of his circumstances, to induce the seller to make a contract to sell his goods on credit, the seller would have been bound to deliver them.

Mr. Clarke, the agent, at least for letting the house, has in this case induced the defendant to enter into a contract by a false representation by no means free from moral turpitude, even upon the presumption that he was wholly ignorant of the matter. That the truth was known to the plaintiff is admitted; that he had an interest to conceal it, cannot be denied; nor can it be denied that it was concealed from the defendant. Whether his concealment was consistent with good faith and free from moral turpitude, may be determined by a reference to the case put by Cicero in the third book of his *Treatise de Officiis*, which I the rather mention, because the house, the sale of which he puts hypothetically, by way of example, was liable to an objection that bears some analogy to the present:—

"Vendat ædes vir bonus propter aliqua vitia, quæ ipse nōrit, cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiata, ruinosæ: sed hoc præter dominum nemo sciat: quæro, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, [381] num id injustè an improbe fecerit?" He then gives the arguments on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. "Neque enim id est eclare, quidquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire." Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment, for he says—"Hoc autem eelandi genus quale sit, et ejus hominis, quis non videt? certe non aperti, non simplicis, non ingenui, non justî, non boni viri; versuti potius, obseuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri." Now, the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a sufficient degree of fraud, even morally speaking, to sustain the defendant's plea, that he was induced by fraud, covin, and false representation to sign the contract. If, instead of a brothel next door to the house, some person had died of the plague in one of the chambers the week before it was let, the case would be exactly similar to that put by Cicero of the ædes pestilentes. According to the concession of Mr. Thesiger, that objection arising within the house, the contract, under the circumstances of this case, would be void. But according to the argument of my learned Brethren, this intrinsic objection would have made no difference; the agent not being acquainted with the fact, and the principal being no party to the representation. But it appears to me that nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorized by him or not to make such representation.

Put the ordinary case of a servant employed to sell a horse, but expressly forbid to warrant him sound. Is it contended that the buyer, induced by the warranty to [382] give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? This would be to say, that though the principal is not bound by the false representation of an agent, yet he is entitled to take advantage of that false representation, for the

purpose of obtaining a contract beneficial to himself, which he could not have obtained without it. I own that it never had occurred to me to doubt, upon principle or upon the authority of decided cases, that the knowledge of the principal was the knowledge of the agent, and the knowledge of the agent the knowledge of the principal. In the case of *Seaman v. Fonereau* (2 Stra. 1183), the plaintiff, living abroad, wrote a letter dated 27th of June, 1740, to order his agent to effect an insurance upon a vessel; the agent received the letter the 25th of August, and effected the policy the same day; but on the 23rd of August the agent received a letter, mentioning that on the 12th the ship in question had been lost sight of all at once; that the captain had before said she was leaky, and there was a hard gale on the 13th; the ship in fact was not then lost, but was captured by the enemy on the 19th of August. It was held, however, that the policy was void, because the agent did not communicate the intelligence he had received, of which his principal knew nothing. This principle was pushed even further in the case of *Fitzherbert v. Mather* (1 T. R. 12), where an agent having written a letter of advice on which a policy was effected, received intelligence the next day in time to have written by the post, that the ship was lost, but omitted to write. The policy not having been effected until after the second day's post had arrived, was held to be void. These are cases to shew the effect of knowledge by the agent only, but the cases are so numerous where policies have been declared void by reason of the know-[383]-ledge of the principal not communicated to the agent, that it is needless to cite them; no principle being better established, at least in the law of insurance, than that the knowledge of the principal is the knowledge of the agent. That it prevails also in other cases, may be shewn by the authority of *Mayhew v. Eames* (3 B. & Cr. 601); there the agent, who sent goods by a carrier, did not know that the carrier had limited his responsibility by a notice, but the principal did know it, and the Court held that the knowledge of the principal was the knowledge of the agent, in favour of the carrier. The same principle was recognised in the cases of *Wallis v. The Bank of England* (4 Adol. & Ell. 39; 5 Nev. & M. 478), and *Schneider v. Heath*, a cause in which I was one of the counsel. It is shortly reported in 3rd Camp. 506. That was a case of the sale of a ship under a particular, which represented the hull to be nearly as good as when launched, but the vessel and stores were to be taken with all faults as they then lay. The bottom of the vessel was worm-eaten and the keel broken, and she was quite unseaworthy. The captain, when the ship was advertised for sale, had set her afloat, so that neither the person who framed the particular, nor the buyer, could discover these defects. An action was brought for money had and received, to recover back the deposit by the purchaser. The person who prepared the particular of sale proved that he had inserted the description of the vessel without having examined her, nor was he aware that it was untrue. Mansfield, C. J., says—"I think the particular is evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent [384] tells us, he framed this particular without knowing anything of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false." This case appears to me exactly in point, and I cannot but persuade myself that I am supported in my opinion by the great authority of Sir James Mansfield. These cases were all cited in the argument. I must own, however, that the principle found in them appears to me so familiar with the daily practice of the Courts and of the world, that I should not have thought it necessary to refer to cases, but for the very grave doubt thrown upon it. Where the owner of a house or of a farm employs an agent to negotiate and settle the terms of a contract for letting the one or the other, more especially when he has referred to that agent for particulars, can it be doubted that the party treating with that agent is entitled to consider him as the proper source of all information that it may be material to him to possess with a view to making his contract? Or that for the purpose of such contract, any representation, material to the subject of inquiry, must be considered as if made by the principal? Put the case, that Mr. Clarke the agent had been fully apprized of this objection to the house, but that in the multiplicity of his engagements he had sent a clerk to represent him, and that

the clerk, in ignorance, had made the representation in question: would the argument have been urged in that case, that there was no fraud in the clerk because he was ignorant, and none in the master because he did not make the representation? But what other relation exists between master and servant, as far as third persons are concerned, but that of principal and agent? If the clerk of a merchant or tradesman offer goods for sale to a customer, with a misrepresentation very material to their value, which representation his master knows to be false, [385] but the clerk supposed to be true, whereupon the customer agrees to give double the real value of the goods, is the customer bound to take and pay for the goods, because the clerk only represented a fact which he did not know to be false? or is not the contract, for the purpose of trying its validity against the purchaser, to be dealt with in the same way as if the master had made the representation? *Qui facit per alium facit per se*. And what would be the condition of men, if, in every case of a treaty made with an agent, the party was under the necessity of submitting to suffer by the misrepresentations of that agent about the subject-matter, because he had not first ascertained the extent of the agent's powers?

In transactions that are of a very unusual character, and where power is rarely granted to an agent to bind his principal, except within very strict limits, it may be a very necessary caution in the party dealing with the agent to know first the extent of his authority; but in so ordinary a transaction as that of letting a ready-furnished house, where the principal refers to a house-agent for particulars, and leaves it to him to procure a tenant—who would think of suspending the treaty, in order to write to the landlord in the country to make inquiries, lest the agent might not have full power or information to answer them? Nevertheless the argument for the plaintiff is mainly founded upon a conjecture, that the agent might possibly have had no authority to make a representation of this kind, upon which it is contended that it must not be presumed that he had such an authority without proof, and that if he had no such authority he could not bind his principal.

I grapple with this argument, first, by denying the propriety of the conjecture upon which it is founded. I maintain that a man who employs his agent to let his house or farm, or who refers inquirers to an agent for particulars upon any subject, must be presumed, if the con-[386]trary be not proved, to have given that agent full authority to communicate all information that is connected with the subject, and that it may be important to the inquirer to know. But I also deny the conclusion, as far as it applies to this case. Let us simplify the case, by assuming that the agent was expressly prohibited from giving any information, except as to the amount of rent demanded, and strictly charged to refer the inquirers to the principal for all other matters; nevertheless the agent, without knowing anything of the facts, thinks fit to answer to inquiries upon every subject upon which it may be material to the tenant to be truly informed; to make such false representations as induce the tenant, without hesitation, to agree to take the house at the rent proposed: whereas no man in his senses would have taken the house at such a rent, or perhaps at any rent, had the facts been truly represented. Now, if the tenant should afterwards bring an action of deceit for a false representation, I will not stop to inquire whether the landlord would be liable, upon his proving that he expressly prohibited his agent from answering any question; but I will say that if, in such an action, he might defend himself upon the ground of the want of authority in his agent, it by no means follows that he could insist upon enforcing the contract against the tenant who renounced it. In other words, as I have before said, it does not follow, that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract, obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say, that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority.

Upon these grounds, which I own seem to me very clear, I am of opinion, that for the purpose of this plea the repre-[387]sentation of the agent is that of the principal; and the falsehood of that representation to the knowledge of the principal, and the concealment of a material fact to the defendant, are sufficient to sustain the plea.

I would just add, that, in the case of *Pickering v. Dawson*, which has been referred to, there was no fraud, and no representation. The sellers had bought the ship upon a

representation which they shewed to the buyer, not as their representation, but as the one made to them, and which they had no reason to doubt; and they at the same time gave to the buyer the fullest opportunity of examining the ship, of the state of which they knew nothing.

Rule absolute for a new trial.

HARRISON v. PAYNTER. Exch. of Pleas. 1840.—In the year 1837 two writs of *fi. fa.*, one at the suit of S. for £1034, the other at the suit of C. for £530, were issued against the West Cork Mining Company, and lodged with the sheriff of Surrey, who seized goods of the company to a large amount. Proceedings in Chancery were then instituted by the company, and injunctions granted to restrain the sheriff from selling the goods, but he nevertheless sold them, and they realized £1370, which he paid into his banker's hands to the account of the sheriff. On the 6th of June, 1839, (the proceedings in Chancery being still pending), the plaintiff issued a *fi. fa.* against the company, directed to the defendant, the sheriff for that year, and gave him notice of the former levy. On the 8th of August the proceedings in Chancery terminated; the result of which was, that the debts of S. and C. were reduced to £545, which reduced amount was paid over to them by the sheriff, and the residue, £825, paid over to the company, and the sheriff returned *nulla bona* to the plaintiff's execution. The same person acted as under-sheriff in the years 1837, 1838, and 1839:—Held, in an action for a false return, that the present defendant was not liable, inasmuch as the former writs were wholly executed by the seizure and sale of the goods by the sheriff in 1837, and therefore ought not to be transferred to the present defendant under 3 & 4 Will. 4, c. 99, s. 7, as writs “not wholly executed;” and that he was not rendered liable by having employed the same under-sheriff.—Held, also, that the balance of the proceeds of the goods after satisfying the two former executions, constituted a debt from the sheriff who levied in 1837 to the company, and as such could not be taken in execution under 1 & 2 Vict. c. 110, s. 12.

[S. C. 8 Dowl. P. C. 349; 9 L. J. Ex. 169; 4 Jur. 488.]

Case against the sheriff of Surrey for a false return of *nulla bona* to an alias *testatum fi. fa.*, issued at the suit of the plaintiff against the West Cork Mining Company.

The defendant pleaded, first, not guilty; secondly, that there were no goods, chattels, or effects, of the said company within his the said sheriff's bailiwick, whereof he [388] could have levied, &c.; thirdly, that the sheriff had not any notice as in the declaration alleged, of there being any such goods, &c., within his bailiwick, whereof he could have levied: on which pleas issues were taken.

At the trial before Lord Abinger, C. B., at the London Sittings after last Hilary Term, the following facts appeared in evidence. In the year 1837 two writs of *fi. fa.*, one at the suit of a person named Solarte, for £1034, and the other at the suit of Elkington for £530, were issued against the West Cork Mining Company, and lodged with Alcock, the then Sheriff of Surrey, who seized under them goods belonging to the company to the amount of between £1300 and £1400. Proceedings in Chancery were then instituted by the company against the plaintiffs in those actions, and injunctions were obtained to restrain the sheriff from selling the goods, which were served upon him in July 1837. The sheriff, however, in defiance of the injunctions, sold the goods in October 1837, and they realized £1370, which having been received by the under-sheriff, was by him paid into the hands of his banker, with whom he kept an account in the name of the sheriff. On the 6th of June, 1839, (the proceedings in Chancery being still pending), the present plaintiff issued the alias *testatum fi. fa.* against the company for 249l. 18s., directed to the defendant, who had come into office in that year, and on the 17th of June served him with notice of the two former levies, and of the money remaining in the late sheriff's hands, and requiring him to make a levy out of it, and not to pay it over to the company. On the 8th of August following, the proceedings in Chancery terminated; the result of which was, that the debt of Solarte was reduced to £530, and that of Elkington to £15, which amount was paid over to them by the sheriff, and their debts satisfied, and the residue of £825 was paid over to the West Cork Mining Company under an indemnity. The

sheriff returned nulla bona to the plaintiff's execution. [389] It appeared that the same under-sheriff had acted for the different sheriffs during the years 1837, 1838, and 1839. It was objected at the trial, that the plaintiff's remedy was against the late sheriff; and Lord Abinger, C. B., being of that opinion, the jury, under his direction, found a verdict for the defendant on the first and second issues, and for the plaintiff on the third, as to the notice: the learned Judge giving the plaintiff leave to move to enter a verdict on the two former issues for the amount of his execution, if the Court should be of opinion that the present defendant was liable.

Kelly now moved accordingly. The present sheriff is liable at the suit of the plaintiff. The writs issued at the suit of Solarte and Elkington were unexecuted writs down to the time of the plaintiff's execution, and as such, ought to have been transferred to the succeeding sheriff, under the provisions of 3 & 4 Will. 4, c. 99, s. 7; and the Court will presume that that has been done which the law requires to be done. The defendant had, therefore, notice of the money having been levied under those executions, and the surplus, after satisfying them, was money available in his hands for the payment of the plaintiff's claim; and having paid it over to the company, he is liable in this action for a false return. A writ of execution is "not wholly executed," until the money levied is paid over to the plaintiff in the action. The under-sheriff held the money to satisfy the former executions; and though the writs were not actually transferred, in consequence of the defendant having employed the same under-sheriff, yet it must be considered the same as if they were actually transferred from the old sheriff to the new, and then the under-sheriff ceased to hold the money for the former sheriff, and held it for the present one. [Parke, B. Suppose the writs were not wholly executed, and that the under-sheriff ought to have transferred the money to the account of [390] the new sheriff, but omitted to do so, can you maintain an action against the present sheriff under these circumstances?] It is submitted, that these being writs "not wholly executed," were transferred by operation of law; and if they were so, then the under-sheriff would hold the money to satisfy those writs in the hands of the new sheriff; and by operation of law, the money would become the money of the new sheriff for that purpose. But independently of that question, and even supposing that the money is to be considered as money remaining in the hands of the late sheriff, the surplus, after satisfying the former executions, was money belonging to the West Cork Mining Company, which might have been seized by the present sheriff under 1 & 2 Viet. c. 110, s. 12, which enables the sheriff to seize and take any money or bank notes belonging to the person against whose estate a *fi. fa.* shall be sued out. [Alderson, B. The word "money" there means specific gold and silver coin or bank notes, not a debt. Before the late act, bank notes and cash could not be taken in execution. Parke, B. Under that statute you cannot seize a debt. This was not a security for a debt, nor a security for money in the funds, but a mere debt.] If that be so, the other point is important, as it has now become a general practice for sheriffs to appoint the under-sheriff who was in office the preceding year.

LORD ABINGER, C. B. The practice of appointing the same under-sheriff to act for succeeding sheriffs has been found so convenient that it has been established by act of Parliament (3 & 4 Will. 4, c. 42, s. 20), that the sheriffs of each county shall appoint deputies or agents who shall be resident or have an office in London, and it has been found so convenient for succeeding sheriffs to appoint the same agent, that I should be very sorry that that circumstance should be [391] made a ground for charging the new sheriff with the liabilities of the old one. I thought at the trial, and I still think, that the money received by the former sheriff on the sale of the goods, cannot be considered as money in the hands of the new sheriff, inasmuch as there was no transfer of the accounts relating to this matter from the one to the other.

PARKE, B. It is perfectly clear to me that the plaintiff is not entitled to a rule in this case. The facts are these. Writs of execution are issued, directed to the late sheriff, who seizes under them more than sufficient to satisfy the claims of the execution creditors. The goods are sold, and the proceeds are subsequently applied in discharge of those claims, and the residue paid over by the under-sheriff to the defendants in those actions. Under these circumstances, the present defendant having in the meantime become sheriff, it is contended that these writs ought to have been transferred from the old sheriff to the new, by virtue of the 3 & 4 Will. 4, c. 99, s. 7,

which provides, that every sheriff shall, at the expiration of his office, make out and deliver to the new sheriff an account of all prisoners in his custody, and of all writs in his hands not wholly executed by him, and shall turn over and transfer to the care and custody of the incoming sheriff all such prisoners, writs, &c. Now I think these writs ought not to have been so transferred, because they were wholly executed; nothing remained to be done by the sheriff who had seized the goods and sold them, but to hand over the money to the plaintiffs in those executions: and when under such circumstances the new sheriff came into office, the writs ought not to be transferred to him. The money, the proceeds of the sale, remained in the hands of the banker of the former sheriff, and never came into the hands of the present sheriff, so that there was no property liable to the present execution. If, however, the balance had been paid [332] over to the present sheriff, then would come the question, whether, under process of execution directed to the present sheriff, he could seize a debt due from the former sheriff to the defendant in the action. Now although bonds, bills, and notes, and other securities for money, may be taken in execution under 1 & 2 Vict. c. 110, s. 12, it has been settled, that mere debts cannot be seized: and this being a debt due from the former sheriff to the company, it is not subject to execution. With respect to the fact of the same person having acted as under-sheriff to both sheriffs, that makes no difference in point of law, as he is then employed and acting in a separate capacity, and the only effect of that would be, that notice to him would be the same as notice to a distinct agent of the former sheriff.

ALDERSON, B. These two writs were wholly executed by the former sheriff by the seizure and sale of the goods. Upon that sale taking place, and producing, as it appears, after the Chancellor's order, more than enough to satisfy the claims of the execution creditors, the proceeds belonged partly to the execution debtor, and partly to the execution creditors. There was therefore a debt due from Alcock, the former sheriff, to each of those parties, and the question is, whether, under such circumstances, the present sheriff can be liable: and it seems to me that he cannot.

ROLFE, B., concurred.

Rule refused.

[393] *HIRST v. HORN AND ANOTHER*. Exch. of Pleas. 1840.—A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession within the 4 Geo. 2, c. 28, s. 1, to render the tenant liable for holding over after the determination of the notice.—Where on the receipt of a notice to quit to two joint tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land:"—Held, that this statement was not admissible to shew that a holding over after the expiration of the notice, was not wilful on the part of the latter.—Quære, whether a joint tenant is necessarily liable for the wilful holding over of his co-tenant?

Debt for the double value of lands wrongfully held over by the defendants, as tenants to the plaintiff. Plea, not guilty. At the trial before Coleridge, J., at the last York Assizes, it appeared that the farm in question, which was about eight miles from Huddersfield, had originally been the property of the father of the two defendants, Henry and John Horn, who had sold it to the plaintiff. Henry Horn, who was an organist at Huddersfield, took the farm from the plaintiff, and it was occupied for several years, until 1836, by the defendant John Horn, Henry paying the rent, and taking receipts whereby the rent was stated to be payable on the 1st January and 1st July. On the 1st January, 1837, the plaintiff gave a notice to quit the farm, addressed to both brothers, in which he required them to quit on the 1st day of July then next, or on such other day as their holding should expire next after the expiration of half a year from the receipt of that notice. It was objected that this was not a sufficient notice to satisfy the stat. 4 Geo. 2, c. 28, s. 1; but the objection was overruled. It was alleged on the part of the defendants, that, according to the custom of the country in that part of Yorkshire, the times of holding were from Candlemas and May-day, and evidence was given for the purpose of shewing this, but they failed to prove that it applied to this farm. The defendant's counsel proposed also to call the plaintiff's attorney, to shew that Henry Horn stated to him, on the receipt of the notice, that he had nothing to do with the occupation of the land,

and therefore he could not be liable in this action; but the learned Judge rejected the evidence, holding that he was liable in law for the wilful holding over of his co-tenant, and under his Lordship's directions, a verdict was found for the plaintiff, damages £90.

[394] Dundas now moved for a new trial, on the ground of misdirection. The first question is, whether the notice to quit was a sufficient demand of possession to satisfy the statute. It would, no doubt, be sufficient for the purposes of an ejectment, but in order to impose upon the tenant the penalties of this statute, it ought to be absolute and determinate in its terms, and to leave no doubt as to the period at which the tenancy is to expire. In *Wilkinson v. Collen* (5 Burr. 2694), a notice to quit was held to be a sufficient demand within the statute; but there it was to quit at a day certain. At that time, too, the statute was considered a remedial one, but it is now regarded as penal: *Lloyd v. Rosbee* (2 Campb. 453). Here no specific time is pointed out from which its penal operation is to commence.

Secondly, in order to render the defendants liable in this action, there must have been a wilful and perverse holding over, and although the holdings from Candlemas and May-day were not proved to apply, yet, if the defendants had a fair doubt as to the period when their tenancy expired, which would be increased by the uncertain terms of the notice, it could not be said to be a wilful holding over after the 1st of July: *Wright v. Smith* (5 Esp. 203).

Thirdly, the evidence of the plaintiff's attorney, as to the statement made to him by Henry Horn, was wrongly rejected. It would have shewn that he had no intention of wilfully holding over. Suppose a lessee for years assigned, and the assignee held over, would the lessee be liable for double value? It has been held that an executor who has not entered, is not liable for use and occupation by reason of the entry of his co-executor: *Nation v. Toser* (1 C. M. & R. 172). [Lord Abinger, C. B. Executors are not partners.] This is a penal action, and a party is not liable merely because he is the partner of the tenant actually holding over. [Parke, B. The custom did not apply to your tenancy, and there-[395]-fore you had no right to entertain any fair doubt as to the termination of your holding.]

LORD ABINGER, C. B. I think, according to the strict rules of law, it would be wrong to grant a rule in this case. What a man says for himself can be no evidence for him: if any act had been done, it would be different. I think, therefore, the learned Judge was right in rejecting the evidence of the defendant's statement. Then there was no evidence to shew that the terms of the original tenancy were altered: the rent was paid until 1836 by Henry Horn, and there was no evidence to shew a release of his interest. As to the notice, if a man holds over under a supposition that he has a right, that is a different case; but here we must assume that it was clear the defendants had none, and that the tenancy began on the 1st of July. This is the ordinary form of notice, which has been adopted in order to prevent the tenant from turning round and setting up a different commencement of the tenancy; and we must suppose the tenant knew the time of its expiration as well as the landlord, and that the custom did not apply.

PARKE, B. I am of the same opinion. It is clear this was a good notice to quit, in order to determine a tenancy from year to year; it is a form which has long been adopted, in order to prevent the effect of any mistake in the statement of the time when the tenancy expires; and it is equally a sufficient demand of possession; all that can be said on that point is, that if there be a real doubt as to the period of the expiration of the tenancy, an argument may be drawn from the uncertainty of the notice, to shew that the holding over was not wilful. If there were a reasonable doubt, and the defendant bona fide acted on it, that would be a fair question to be left to the jury. But here the only mode of raising any doubt was by a reference to the cus-[396]-tom of the country; but that clearly did not apply, nor raise any fair claim to hold over on the ground of right. There was, therefore, no misdirection, nor was the verdict wrong. With regard to the rejection of the evidence, if there had been a notice from Henry Horn that he was ready to give up the farm, I should have thought that it was a fair question to be considered, whether one defendant might be liable, and the other not: but this was only a statement that he had nothing to do with the land.

ALDERSON, B. I am of the same opinion. I do not, as at present advised, entirely accede to the doctrine that one tenant is necessarily bound by the wilful

holding over of his co-tenant; but here the evidence was not sufficient to raise that point.

ROLFE, B. I entirely concur. All that the defendant Henry Horn meant to say was, not that he did not intend to hold over in future, but—"take notice I am not liable for any by-gone rent, because I have had nothing to do with the occupation of the land." That was making evidence for himself.

Rule refused.

BALL v. STANLEY. Exch. of Pleas. 1840.—A Judge at chambers, by consent of the parties in a cause, ordered, that on payment of the debt and costs, the costs down, and the debt in six months, all further proceedings in the cause should be stayed. The defendant paid the costs down in pursuance of the order:—Held, that the plaintiff could not, within the six months, obtain an order to arrest the defendant, under the 1 & 2 Vict. c. 110, s. 3.

[S. C. 8 Dowl. P. C. 344; 9 L. J. Ex. 161; 4 Jur. 561.]

In this case the proceedings had been stayed by the following order of Parke, B., dated the 8th of August, 1839:—"Upon hearing the attorneys or agents on both sides, and by consent, I do order, that, upon payment of £300, the debt due from the defendant to the plaintiff for which this action is brought, together with costs, to be taxed and paid as follows,—the costs down, and the debt in six [397] months, all further proceedings in this cause be stayed. And I do further order, that unless the said debt and costs be paid as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the amount." The costs were paid down in pursuance of this order. On the 24th of January, 1840, the same learned Judge, on an affidavit stating the deponent's belief that the defendant was about to leave the country for the purpose of avoiding the payment under the above order, made an order under the 1 & 2 Vict. c. 110, s. 3, that the plaintiff should be at liberty, within four days, to issue one or more writ or writs of *capias* into one or more different counties, as the case might require, against the defendant, indorsed to hold him to bail for the sum of £300, pursuant to the statute; the defendant being at liberty to move the Court to set aside that order. A writ of *capias* accordingly issued, upon which the plaintiff was arrested.

In Michaelmas Term, E. V. Williams obtained a rule nisi to rescind the order, and set aside the writ: against which

Humfrey now shewed cause. The question is, whether under the circumstances the order for the defendant's arrest was warranted by the act of Parliament. The issuing of a *capias* under that act is not at all an ordinary proceeding in the cause. [Alderson, B. Must not the affidavit to obtain it be entitled in the cause? The plaintiff cannot have a *capias* at all until after the cause has been commenced.] No doubt there is a cause depending; but this is not a proceeding in the cause towards judgment. It is altogether collateral—a kind of excrescence on the cause—a remedy whereby the plaintiff may be assisted if necessary. A proceeding in the cause must mean something ordinarily and necessarily done in the progress of the cause; but the cause would be equally perfect without this. Suppose the arrest were after verdict, when the law stays the proceed-[398]-ings until the following term: that would surely be no proceeding in the cause. The words of the act favour this construction—it calls the order "a special order."

E. V. Williams, *contra*. This was a bargain to this effect:—I, the defendant, will not dispute the debt, provided I have six months to pay it in.^(a) He performs his part of the bargain. Can the plaintiff, in violation of the terms of it, arrest him within the six months? If not a direct proceeding in the cause, it is a collateral proceeding in the cause, obtained on affidavits entitled in the cause, and is the parent of divers proceedings which are clearly taken in the cause—the putting in bail, or depositing money in lieu thereof, &c. [He was then stopped by the Court.]

PARKE, B. When this matter was first before me at chambers, I was strongly

(a) It was stated that the defendant had, since this rule was obtained, and within the six months, paid the debt.

inclined to think that the term "further proceedings," in the previous order, meant only the ordinary proceedings with a view to a final judgment; and under that impression I granted the order for holding the defendant to bail. The point was ably argued by Mr. Williams on moving for the present rule, and I am now satisfied that my first impression was wrong, and that this is clearly a collateral proceeding in the cause, although not a necessary proceeding towards obtaining final judgment. It is in effect the same thing as if the defendant originally had, for good consideration, six months' credit for the debt; and the effect of the order is to tie up the plaintiff's hands, and prevent his using any remedy against the defendant, until after the expiration of the six months. I ought not, therefore, to have granted this order. The result will be, that in future, when these bargains are made, and it is intended to reserve to the plaintiff the right [399] of proceeding against the defendant in the event of his being about to leave the country, a stipulation must be introduced into the rule or order by which time is given, to entitle the plaintiff to arrest the defendant if necessary: if he gives time generally, the effect of it is to stay all proceedings in the meantime. The rule must therefore be absolute: the consequence will be, that the defendant will have the costs of putting in bail, but no action is to be brought.

ALDERSON, B. My first impression was adverse to Mr. Williams, but he convinced me that this is a proceeding in the cause: it changes the nature of the cause from one commenced by a suit of summons, to one founded on a writ of capias. Though not a necessary proceeding to accelerate or retard final judgment, it is yet a proceeding whereby the nature of the cause is changed. All the affidavits must be entitled in the cause.

GURNEY, B., concurred.

Rule absolute accordingly.

LEWIS v. GOMPERTZ. Exch. of Pleas. 1840.—The following letter was held to be a good notice of dishonour of a bill of exchange;—"6, Bernard Street, Russell Square.—Mr. G.—The bill of exchange for £250, drawn by S. R. on and accepted by C. S., and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me as above, of which I hereby give you notice."

[S. C. 9 L. J. Ex. 182; 4 Jur. 393. Approved, *Walton v. Muskell*, 1844, 13 M. & W. 452; 2 D. & L. 410.]

Assumpsit by indorsee against indorser of a bill of exchange for £250, dated 18th of September, 1839, drawn by S. Rendall upon and accepted by Charles Stretton, payable three months after date to the order of the drawer, indorsed by Rendall to the defendant, and by the defendant to the plaintiff. Plea, that the defendant had issued due notice of the non-payment of the said bill of exchange, on which issue was joined.

At the trial before Gurney, B., at the Middlesex Sit-[400]-tings in this term, it appeared that on Monday, the 23rd day of December, the bill having become due on Saturday, the 21st, when it was duly presented for acceptance and dishonoured, the plaintiff wrote and sent to the defendant the following letter:—

"6, Bernard Street, Russell Square,

"Mr. Gompertz.

"December 23, 1839.

"Sir,—The bill of exchange for £250, drawn by S. Rendall, and accepted by Charles Stretton, and bearing your indorsement, has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me, as above, of which I hereby give you notice.—I am, Sir, &c.,

"C. LEWIS."

It was objected for the defendant, that this was not a sufficient notice of dishonour inasmuch as it did not distinctly inform the defendant that the holder looked to him for payment. The learned Judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, if the Court should be of that opinion.

Kelly now moved accordingly. There are two requisites to a valid notice of dis-

honour: first, it must shew, either by express words or by necessary implication, that the bill has become due and been presented for payment, and that payment has been refused by the acceptor; secondly, that the party to whom the notice is addressed is considered liable, and looked to for payment. The first of these propositions has been settled by the decision of the House of Lords in *Solarte v. Palmer* (2 C. & Fin. 93; 1 Bing. N. C. 194; 1 Scott, 1). In accordance with that decision, the Court of Queen's Bench held, in *Strange v. [401] Price* (2 Per. & D. 278), that the following notice was insufficient:—"Messrs. S. & Co. inform Mr. P. that Mr. J. B.'s acceptance for 87l. 5s. is not paid. As indorser, Mr. P. is called upon to pay the money, which will be expected immediately." Patteson, J., there observed, "There is nothing on the face of this notice to shew that the bill was due, and therefore I feel it difficult to distinguish it from *Solarte v. Palmer*." [Parke, B. This notice states that the bill is over-due.] But it does not shew when it became due, or that it was presented when due. [Parke, B. It is stated to have been dishonoured: now "dishonour" is a technical word, and implies that the bill has been duly presented.] Suppose it were presented the day after it became due, and refused; it could not, in such case, be said that the acceptor does not dishonour the bill. [Parke, B. In *Hedger v. Stearnson* (2 M. & W. 799), the notice of dishonour was in these words:—"I am desired by Mr. H. to give you notice that a promissory note, dated August 10, 1835, made by S. T. for 99l. 18s., payable to your order, two months after date thereof, became due yesterday, and has been returned unpaid. I have to request you will please to remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post." We had in that case to determine between the conflicting decisions of the Court of Common Pleas in *Boulton v. Welsh* (3 Bing. N. C. 688; 4 Scott, 425), and of the Court of Queen's Bench, in *Grugon v. Smith* (6 Adol. & Ell. 499; 2 N. & P. 303), and we adhered to the latter.] That case, and the others referred to, were all cited in a case of *Messenger v. Southey*, which was argued in the present term in the Common Pleas, and in which the Court have taken time to consider the question.^(e) In that case the notice was (addressed to the drawer in London),—[402] "Sir, this is to inform you, that the bill I took of you, 15l. 2s. 6d., is not took up, and 4s. 6d. expense, and the money I must pay immediately. My son will be in London on Friday morning." But further, the cases of *Tindal v. Brown* (1 T. R. 167), *Solarte v. Palmer* (7 Bing. 530), and *Strange v. Price*, clearly establish that the notice must also intimate to the party to whom it is addressed, that the holder looks to him for payment. This notice does not convey any such information.

PARKE, B. I am of opinion that this notice is sufficient. I entirely adhere to what I am reported, and I believe correctly, to have said in the case of *Hedger v. Stearnson*, in which this matter was much considered by us. In that case I intimated a doubt whether, although we were bound by the decision of the House of Lords in *Solarte v. Palmer*, we were bound by all the reasoning or language of the learned Judges in giving their opinion; and therefore, that I should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, "by express terms or necessary implication, that the bill was presented and dishonoured;" that it seemed to me enough, if it appeared by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him. I added, However supposing, that we are bound by the precise expression of Tindal, C. J., in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the words 'necessary implication;' for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor:" and I referred to a definition given by Lord Eldon, in *Wilkinson v. M'Adam* (1 Ves. & B. 466), of the term "necessary implication;" that it means "not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed." In that case we came to the conclusion, that the decision of the Court of Common Pleas, in *Boulton v. Welsh*, was wrong. Understanding, then, the term "necessary implication" with this latitude, and taking the rule to be, that the three facts required to be conveyed in every notice of dishonour must be conveyed to the mind of the person to whom it is addressed in a written or verbal notice, either expressly, or so connected with each other as to

(e) The Court have since decided that the notice was insufficient. 1 Scott's New Reports, 180.

leave no reasonable doubt upon his mind as to their meaning,—viz. first, that the bill was presented when due; secondly, that it was dishonoured; and thirdly, that the party addressed is to be held liable for the payment of it: I think that any mercantile man, who read this document, could not fail to come to the conclusion that those three requisites had been complied with. First, the bill itself is correctly described, and though not by its precise date, yet we cannot suppose the existence of another bill, drawn and accepted by the same parties and for the same amount; and if there were but one bill, the defendant must have known at what time it would fall due. In fact, this bill fell due on the 21st of December, the day before the notice was given; so that this notice, that it had been presented and dishonoured, was given in sufficient time. Then come the words—“bearing your indorsement, has been presented for payment, and returned dishonoured.” Now, as I observed in *Hedger v. Stevenson*, the word “returned” has obtained among merchants a known and peculiar meaning, implying that the bill to which it relates has been duly presented, and dishonoured: so that we must understand, not only that there had been a presentment in this case, but a presentment when due. This is confirmed by the following words, “and now lies over-due,” which import that the bill was not paid when at maturity. The only point upon which I entertained any doubt was, whether [404] it is to be collected by necessary inference from this letter, that the writer of it means to hold the defendant liable for the amount of the bill. But when he says, “it now lies over-due and unpaid with me as above,” i.e. at 6 Bernard Street, Russell Square, what person would draw from these words any inference, but that the plaintiff gives him the notice in order that he may come to 6 Bernard Street, to take up the bill? I think, therefore, that according to my construction of the words “necessary implication,” there is here a necessary implication of all the three things necessary to constitute a good notice. And I should be sorry to put an over strict construction upon a document of this nature, otherwise no merchant or other person bound to give notice of the dishonour of a bill would ever be safe, unless an attorney were always at his side, not only to draw a form of notice, but also to adapt it to each case of the dishonour of each individual bill, which would throw the most serious impediments in the way of mercantile transactions. I am of opinion, therefore, that this notice is sufficient, and that no rule ought to be granted.

ALDERSON, B. I am of the same opinion. I adhere to what was said by this Court in *Hedger v. Stevenson*.

GURNEY, B. I am of the same opinion. I have no doubt whatever that this notice conveyed all the necessary information.

ROLFE, B., concurred.

Rule refused.

[405] ATTORNEY-GENERAL v. LE REVERT. Exch. of Pleas. 1840.—An information alleged the seizure of a certain vessel, being a foreign vessel, for being found within a league of the coast of the United Kingdom, “the said vessel having had on board certain spirits, the said spirits not being in casks or packages containing twenty gallons each at the least respectively, contrary to the form of the statute in that case made and provided; whereby, and by force of the statutes in that case made and provided, the said vessel &c. became and was forfeited.” By the 3 & 4 Will. 4, c. 53, s. 2, it is provided, that vessels found within a league of the coast of the United Kingdom, having on board any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited. The 6 & 7 Will. 4, c. 60, s. 4, enacts, “that the said restrictions shall not extend to any such spirits in casks of not less than twenty gallons.” The 58th section of the 3 & 4 Will. 4, c. 52, renders certain goods subject to restrictions on importation, and amongst them specifies, “spirits, not being perfumed or medicinal spirits:”—Held, first, that the information was not bad by reason of the introduction of the words “each” and “respectively,” although those words were not in the statute; secondly, that, as the 6 & 7 Will. 4, c. 60, s. 4, repealed sect. 2 of the 4 Will. 4, c. 53, only as related to the number of gallons, the information was not bad for alleging the offence to have been committed against the form of the statute; thirdly, that the information was not bad for alleging the forfeiture to have accrued by force of the statutes, since the words, “whereby, and by force

of the statutes," &c., might be rejected as surplusage; fourthly, that, as the information was not framed on the 3 & 4 Will. 4, c. 52, s. 58, it was not necessary to state that the spirits seized were not "perfumed or medicinal spirits."

[S. C. 9 L. J. Ex. 163.]

This was an information founded on the stats. 3 & 4 Will. 4, c. 53, s. 2, and 6 & 7 Will. 4, c. 60, ss. 4 & 11. The first count of the formation charged, that George Davies, being an officer of customs, did, between the 1st day of January, 1838, and the day of exhibiting this information, to wit, on the 4th day of April, 1839, to wit, at Ratcliff, in the county of Middlesex, seize and arrest to the use of her said Majesty, as forfeited, a certain vessel, to wit, a vessel called the "Diane," with her tackle, apparel, and furniture thereto belonging, of the goods and chattels of certain persons to the said Attorney-General at present unknown: for that the said vessel, being a foreign vessel, was between the times aforesaid, to wit, on the said 4th day of April, 1839, found on the high seas, within one league of the coast of the United Kingdom, that is to say, within one league of the coast of the county of Dorset, to wit, at Ratcliff aforesaid, in the said county of Middlesex, "the said vessel so found as aforesaid then and there having on board certain spirits, the said spirits not being in casks or packages containing twenty gallons each at the least respectively, contrary to the form of the statute in that case made and provided, whereby and by force of the statutes in that case made and provided, the said vessel, together with her tackle, apparel, and furniture, became [406] and was forfeited." The information contained five other counts, which were nearly similar to this, and were open to the same objections. At the trial before Parke, B., at the Middlesex Sitzings after last term, a verdict was found for the Crown.

F. V. Lee now moved in arrest of judgment. This information is founded on the 3 & 4 Will. 4, c. 53, s. 2, which provides, that if vessels of the description therein mentioned shall be found within a certain distance of the coast of the United Kingdom, having on board, or having had on board, any spirits not being in a cask or package containing forty gallons at the least, the spirits, together with the casks containing the same, and also the vessel, shall be forfeited. Then, by the 4th section of 6 & 7 Will. 4, c. 60, after reciting that, by the last-mentioned act, all spirits, not being perfumed or medicinal spirits, or rum of or from the British possessions, are required to be imported into the United Kingdom in casks containing not less than forty gallons, it is enacted, that the said restriction shall not extend to any such spirits in casks of not less than twenty gallons. Under these circumstances, it is submitted, that as the restriction with respect to the number of gallons to be contained in each cask has been imposed by two statutes, the information is bad; as it ought to have concluded "against the form of the statutes in such case made and provided." The forfeiture is imposed by the former statute, but the prohibited quantity is diminished by the latter; and it was, therefore, necessary to aver the offence to be against the form of both statutes. There is another objection, consequent upon the former:—the information concludes, "whereby, and by force of the statutes," the vessel &c. became forfeited; whereas the forfeiture is only created by the former stat. 3 & 4 Will. 4, c. 53, to which alone the words apply. These objections are not cured by the 7 Geo. 4, c. 64, s. 20, which [407] enacts, that no judgment upon any indictment or information shall be reversed for insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or vice versa; since that applies only to an indictment or information for a felony or misdemeanour, and not to an information for an offence against the revenue laws.

There is also another objection. By the 3 & 4 Will. 4, c. 52, s. 58, provision is made in the schedule as to goods subject to certain restrictions on importation, and amongst the rest, "spirits, not being perfumed or medicinal spirits; viz. all spirits, unless in ships of seventy tons or upwards; rum of and from the British plantations, if in casks, unless in casks containing not less than twenty gallons; all other spirits, if in casks, unless in casks containing not less than forty gallons." The information ought therefore to have contained these words, "having had on board certain spirits, the said spirits not being perfumed or medicinal spirits or rum," so as to have excepted them out of the information. The 4th section of the 6 & 7 Will. 4, c. 60, is as follows:—"And whereas, by the said last-mentioned act, all spirits, not being perfumed or medicinal spirits, or rum of or from the British possessions, are required to be imported into the United Kingdom in casks containing not less than forty

gallons; be it enacted, that the said restriction shall not extend to any such spirits in casks of not less than twenty gallons." [Parke, B. You say the information ought to have negatived their being perfumed or medicinal spirits. That is on the supposition that the information is for an offence against the 6 & 7 Will. 4, c. 60.] Again, the information is bad for not following the words of the statute, which it has not done, but interpolated words not to be found in the clause on which it is framed. In the 3 & 4 Will. 4, c. 53, s. 2, the words are, "any spirits not being in a cask or package containing forty gallons at the least." In the information the [408] words are, "not being in casks or packages containing twenty gallons each at the least respectively:" so that it makes the offence to consist, not in the size of the cask, but in the quantity of spirit contained in it, which gives a totally different reading to the act. [Lord Abinger, C. B. "Not being in casks containing twenty gallons each at the least respectively,"—that is with reference to the capacity of each cask respectively, and such is also the meaning of the act. There appears to me no interpolation, the effect is the same.] The question is, whether, in the collocation of the words of the act, in the information, the effect is not to transpose them, so as to convert that which in the act refers to the size of the cask, into the actual contents of the cask. [Alderson, B. It appears to me simply the manner of carrying out the sense of the act of Parliament. It is merely a translation of the words of the act, and it appears to me to be a very correct one.]

Per Curiam. There is no weight in the last objection; but we will refer to the information and the acts of Parliament, and consider whether a rule ought to be granted on the other points.

On a subsequent day,

LORD ABINGER, C. B., said—In the case of *The Attorney-General v. Le Revert*, which was moved by Mr. Lee, we have referred to the information, and the acts of Parliament on which it was framed. The act of Parliament on which, as it was contended by the Crown, the information was founded, was the 3 & 4 Will. 4, c. 53. The first objection was, that the offence was stated to have been "against the form of the statute," and that then it was said, "whereby and by virtue of the statutes in that behalf made &c.;" that there was an inconsistency here, and that in fact the information was for an offence against two statutes. On looking [409] at the information, it appears to us clearly that it is founded altogether on the 3 & 4 Will. 4, c. 53. By that statute it is enacted, "that any boat or vessel which shall be found or discovered to have been within one league of the coast, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited." This case was one in which the package in which the spirits were imported contained less than twenty gallons; and it appeared that there was a subsequent statute of the 6 & 7 Will. 4, c. 60, which repealed the former statute as to all packages in the particular case mentioned, of between twenty and forty gallons; but it left the law precisely as it was before as to all spirits imported in casks containing less than twenty gallons; and of course, as the spirits in this case were in casks containing less than twenty gallons, they were in casks containing less than forty; therefore the information is so far right.

The next objection was, that the information contains the words "by force of the statutes." But those words, "by force of the statutes," are mere surplusage. It is not necessary to allege that it was by force of any statute that the forfeiture accrued; the former allegation is quite sufficient. The case is distinctly brought within the statute 3 & 4 Will. 4, c. 53, and the addition of the words referred to is quite unnecessary, and they may be expunged.

Then another objection made was, that the information did not negative the words of the 4th section of the 6 & 7 Will. 4, c. 60, "all spirits not being perfumed or medicinal spirits, or rum of or from the British possessions." It is said that it ought to have been alleged that they were not "perfumed or medicinal spirits or rum of or from the British possessions." It is sufficient to say, that this is met by the answer to the first objection, that this information is not founded on the statute 6 & 7 Will. 4, [410] c. 60, but on 3 & 4 Will. 4, c. 53, and therefore that the introduction of the exception is not called for. For these reasons, we think there is no ground for granting a rule.

Rule refused.

REED v. THOYTS, ESQ. Exch. of Pleas. 1840.—Case against a sheriff. The first count was framed upon 8 Anne, c. 14, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice; and stated that the defendant took the goods of T., the tenant of the plaintiff, under a fi. fa. issued against T. at the suit of B. This was not traversed by the pleas, and no other execution appeared:—Held, that the connexion of the party, who was shewn to have seized the goods, with the defendant, sufficiently appeared, without producing any warrant from the defendant to that party.—The second count was in trover for seizing the same goods. The plaintiff put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due. The tenant had remained in possession as before. The jury found the bill of sale fraudulent:—Held, that although the bill of sale might still be valid against the plaintiff as a party to it, though void as to other creditors, the plaintiff was not prevented from recovering on the first count, that being distinct from the second.

[S. C. 9 L. J. Ex. 316.]

Case against the late sheriff of Berkshire. The first count was framed upon the 8 Anne, c. 14, s. 1, and stated that on the 12th of June, 1839, and for the space of a year then last past, one John Taylor held, used, occupied, and enjoyed a certain messuage and tenements, with the appurtenances, situate in the said county of Berks, as tenant thereof to the plaintiff, at and under a certain rent or sum of money therefore then payable by the said John Taylor to the plaintiff for the same: and that, on the day and year aforesaid, a large sum of money, to wit, the sum of £10, for and on account of the rent so payable by the said John Taylor to the plaintiff for the said messuage and tenements, for one year of the said tenancy which ended at and upon that day, became and was due and payable, and continually from thence hitherto had been and still was in arrear and unpaid; and thereupon, on the 18th day of June in the year aforesaid, the defendant, then being sheriff of the said county, by virtue and under pretence of a certain writ of our Lady the Queen, called a fi. fa., before then issued against the said John Taylor, at the suit of Charles James Barnes, out of the Court of our [411] said Lady the Queen before the Barons of her Exchequer at Westminster, and directed to the said sheriff of the county of Berks, took the goods and chattels of the said John Taylor, then being in the said messuage and tenements, with the appurtenances, so in the tenure and occupation of the said John Taylor as aforesaid, of great value, to wit, of the amount of the said arrears of rent so due and owing from the said John Taylor to the plaintiff, that is to say, the amount or sum of £40. And that, after the taking of the said goods and chattels in the said messuage and tenement as aforesaid, and before the removal of the same therefrom, and also before any sale of the said goods and chattels, or any part thereof, under pretence of the said writ, that is to say, on the day and year last aforesaid, the plaintiff gave notice to the defendant, so being such sheriff as aforesaid, of the aforesaid rent being due and in arrear to the plaintiff from the said John Taylor as aforesaid, and then requested the defendant, as such sheriff, that the plaintiff might be paid his said rent so due in arrear and unpaid as aforesaid, before the said goods and chattels or any part thereof should be removed from or out of the said messuage and tenement, with the appurtenances: yet the defendant, so then being sheriff of the said county of Berks, well knowing the premises, but disregarding the duty of his said office and the statute in such case made and provided, and contriving &c. to deceive and defraud the plaintiff, and deprive him of the said arrears of the said rent so due to him as aforesaid, and of his remedy for the recovery thereof, under colour and pretence of the said writ, on the day and year last aforesaid, wrongfully, injuriously, and deceitfully removed and carried away the said goods and chattels so taken as aforesaid from and out of the said messuage and tenement, with the appurtenances, without paying or satisfying the plaintiff the said arrears of the said rent so due and owing and in arrear to him as aforesaid, or any part thereof, contrary to the form of the [412] statute in that case made and provided. And the plaintiff saith, that he hath not at any time been paid or satisfied the said arrears of the said rent, or any part thereof, but the same and every part thereof was still due, in arrear, and unpaid from the said John Taylor to the plaintiff, whereby the plaintiff had been and was deprived of the

benefit of a distress for the recovery and satisfaction of the said arrears of the said rent, and was in great danger of losing the same.

There was a second count in trover, alleging the goods to be the property of the plaintiff.

Pleas, 1st, not guilty; 2ndly, to the first count, that the plaintiff did not, after the taking of the said goods, &c., in the said messuage and tenement by the defendant as in the first count mentioned, or at any time before the removal of the same, give notice thereof to the defendant; nor had the plaintiff, at any time before the removal of the said goods &c., from the said messuage &c., in the first count mentioned, any notice or knowledge whatsoever of the said rent, or any part thereof, or of any rent whatsoever, being due and in arrear from the said John Taylor to the plaintiff, in manner and form as in the first count alleged; 3rdly, to the first count, that at the time of the removal of the said goods of the said John Taylor by the defendant, the rent in that count mentioned was not due and payable, and then in arrear and unpaid by the said Taylor to the plaintiff, in manner &c., as in that count alleged; lastly, to the second count, that the plaintiff was not at the said time when, &c., possessed of the goods in that count mentioned. Issues thereon.

At the trial before Patteson, J., at the last Berkshire Assizes, Taylor, the plaintiff's tenant mentioned in the pleadings, being called as a witness for the plaintiff, the defendant's counsel objected that he was incompetent, on the ground that, if the plaintiff obtained a verdict, Taylor would get rid of his claim for rent; and *Thurgood v. Richardson* (7 Bing. 428) was referred to. The learned Judge thought that that case did not apply, and held, that as the record stated the issuing a fi. fa. by Barnes, it shewed money due to him from Taylor, who would remain liable accordingly, though the plaintiff should obtain a verdict against the sheriff. The plaintiff, however, released the witness, who proved, that on the 18th of June, 1839, one M'Graw took away his goods from the house he rented from the plaintiff, after having been told by the witness, that they were not his, but the plaintiff's under a bill of sale, and that £10 was due to the plaintiff for rent. He also swore that his goods were only seized under that one execution. The defendant's counsel here again objected, that even if he was stopped by the pleadings from denying that he took Taylor's goods at the suit of Barnes, it was neither admitted nor shewn that M'Graw was the person who so took them for the defendant, and that there was nothing in the notice given by Taylor to M'Graw, or any declaration by M'Graw thereupon, to shew any connexion between him and the defendant, who had denied all wrongful seizure by the plea of not guilty. The learned Judge, however, overruled the objection, on the ground that as the execution by Barnes was admitted on the pleadings, and no other execution appeared, M'Graw must be taken to have seized for Taylor's debt to Barnes. This would make his declaration evidence against the sheriff, and connect him with the sheriff so as to render the latter liable for his act: and *Barsham v. Bullock* (2 P. & D. 241), was referred to.

Taylor further proved, that he entered the premises on the 12th of June, 1838, and not on the 24th; and that on the 23rd of February, 1839, he owed the plaintiff £66 for beer, and gave him a bill of sale of all his effects as a security, but was suffered to remain in possession as before. The bill of sale was produced for the plaintiff: notice had been given to the defendant to produce the fi. fa., but it [414] was not produced, nor was any evidence given of it, or of any warrant issued upon it by the defendant to M'Graw. The goods seized were proved to be worth above £10.

At the close of the plaintiff's case, the defendant's counsel contended that the second count, if sustained, was destructive of the first; the first alleging that the plaintiff, through the taking of his tenant's goods by the defendant, had lost the power of distraining them for the year's rent secured to him by stat. 8 Anne, c. 14, s. 1; whereas, in order to recover on the second count, the goods must have belonged to the plaintiff under the bill of sale at the time they were seized by M'Graw; that the bill of sale bound the plaintiff as a party to it; that as the year's rent was not due at the time the bill of sale was given, the goods could not have passed under it for rent (see *Hoskins v. Knight*, 1 M. & Selw. 245): the rent not being due, as they contended, until the 24th of June, 1839. The learned Judge, in summing up, told the jury that though the plaintiff had adopted two inconsistent statements of his claim, he was entitled to succeed upon either, if one was established independently

of the other: that, on the 23rd of February, 1839, no rent being due to him, he received from Taylor a bill of sale of his goods as a security for his debt for beer, but that after the seizure at the suit of Barnes, he seemed to have thought the continued possession of the goods by Taylor down to that event, on the 18th of June, might affect the bill of sale; and therefore rested his claim on the first count, treating the goods as Taylor's still:—that taking the goods to be the plaintiff's, as laid in the second count, there was no evidence to shew that the defendant took those goods, for nothing connected M'Graw with the defendant; so that in that case he was entitled to the verdict on that count:—that on the first count the plaintiff was entitled to a verdict for the amount of rent due, if [415] the jury found the goods to belong to Taylor; for the bill of sale might be void as against the execution creditor, this not being one of the many cases where continued possession by the vendor was consistent with any part of the bill of sale. He then left it to the jury to say, whether a tenancy by Taylor at a rent of £10 a year began on the 12th or the 24th of June, 1838, in order to determine whether a year's rent was due on the day M'Graw seized, viz. on the 18th of June, 1839. The jury returned a verdict for the plaintiff on the first count, damages £10; and for the defendant on the other count, finding that the bill of sale was fraudulent and void.

Ludlow, Serjt., now moved for a new trial. First, the evidence of what was said by Taylor to M'Graw, as to the goods not being his, and of rent being due from him to the plaintiff, was improperly admitted; for even if upon the pleadings the defendant, as sheriff, was admitted to have seized the goods of Taylor, the tenant, he was not admitted to have so seized by the hands of M'Graw, nor was any connexion between them shewn by the production of any warrant from the defendant, or by M'Graw's being proved to be his bailiff at all; while the pleas deny any wrongful act by the defendant. [Parke, B. *Barsham v. Bullock* (2 P. & D. 241) is precisely in point. That was an action of debt for a penalty against the sheriff, for taking the plaintiff, whom he had arrested, to a public drinking-house without his consent. The defendant pleaded that he did not, without the plaintiff's consent, cause him to be conveyed to the drinking-house. At the trial, it was proved that the same officer who arrested the plaintiff also took him to the drinking-house without his consent; and it was held that as the plea admitted that the defendant arrested the plaintiff, and the evidence shewed that the same officer who made the [416] arrest took the plaintiff to the drinking-house, it was not necessary to produce the warrant to connect the defendant with the act complained of. In this case the connexion is shewn by the proof that M'Graw seized the goods in point of fact, coupled with the admission on the record that the defendant, as sheriff, seized the goods of Taylor, it not appearing that there was any other execution.] Then, secondly, the learned Judge misdirected the jury as to the effect of the bill of sale, which, although it might be void as against creditors, was valid against the plaintiff as a party to it. (a) The issues here are inconsistent, the first depending on the goods being the goods of Taylor, and the second on their being the plaintiff's. The plaintiff, by proving the bill of sale in support of the second count, shews that the goods laid in the first as belonging to Taylor his tenant, were not the goods of that tenant, but his own; and consequently, that the seizure by the defendant did not deprive the plaintiff of that remedy by distress, which is the gist of the first count.

LORD ABINGER, C. B. The pleadings put the defendant out of Court as to the first count, because they admit that these were the goods of Taylor.

PARKE, B. The bill of sale was invalid as against the execution, though binding as between the parties. Now the question here is on the execution. The counts are distinct; so that the point contended for as to the bill of sale does not apply to the first count at all. To support that count, it must be shewn by the plaintiff that the defendant seized goods which were liable to satisfy rent due at the time. Now as the defendant has obtained a verdict on the second count, it must be admitted that there is an end of that [417] count. Then as to the first, if the goods were Taylor's, as is admitted by the pleadings, the sheriff had no right to take them without leaving sufficient to satisfy the plaintiff's rent due to him at the time of the seizure. But even had the taking of the goods of Taylor been put in issue, the result on the first

(a) See *Robinson v. McDonnell*, 2 B. & Ald. 134; *Doe v. Roberts*, id. 367; 1 Daniell's Exch. Rep. 143; 3 Ves. & B. 42; *Steel v. Brown*, 1 Taunt. 381.

count would not have been different, for Taylor's bill of sale had no operation as against the execution of Barnes. The summing up of the learned Judge was perfectly correct.

ALDERSON, B. The verdict was right. The bill of sale being found to be fraudulent and void as against the execution, it follows that the goods were in fact Taylor's, as laid in the first count. Then, though the bill of sale might be valid as against the plaintiff, that point is not material, for the pleadings admit that the goods which were seized were Taylor's, while M'Graw is shewn to have seized them.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.(a)

[418] HUMPHREYS v. JONES. Exch. of Pleas. 1840.—An order nisi before a Judge at chambers makes itself absolute unless cause be shewn: and if no one appears, the proper course is for the opposite party to go in to the Judge and get it discharged, otherwise it becomes absolute.

[S. C. 8 Dowl. P. C. 408; 9 L. J. Ex. 168; 4 Jur. 582.]

Assumpsit for goods sold and delivered. The declaration was delivered on the 19th of February, with the particulars of demand indorsed thereon, which stated that the action was brought to recover the sum of 32l. 10s. for timber sold and delivered. On the 20th of February, the defendant took out a summons requiring the plaintiff's attorney or agent to attend at the Judge's chambers on the following day, at three o'clock in the afternoon, to shew cause why further and better particulars should not be delivered, and why in the meantime the proceedings in the cause should not be stayed. This summons was served on the same day upon the plaintiff's attorneys who indorsed upon it their consent to an order nisi, and the following order, bearing date on Saturday, the 22nd of February, was drawn up by the defendant's attorney:—

"Upon hearing the attorneys or agents on both sides, and by consent, I do order, that unless cause be shewn to the contrary at my chambers on Monday next, at eleven o'clock in the forenoon, the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent a further and better account in writing, with dates and items, of the particulars of the plaintiff's demand, for which this action is brought, and that in the meantime all further proceedings in this cause be stayed.

"J. PARKE."

This order was duly served on the plaintiff's attorneys, on the day of the date thereof. On the following Monday (the 24th February) the plaintiff's attorneys attended at the Judge's chambers, pursuant to the order, for the purpose of getting it discharged, and repeatedly called out the name of the defendant's attorney; but as no one appeared, they left the chambers without taking any further step at that time, and on the 26th they sent notice to the defend-[419]-ant's attorney that they would attend the order on the following day, at eleven o'clock in the forenoon. In reply to that notice, the defendant's attorney sent a letter, stating that as they (the plaintiff's attorneys) did not attend the Judge's chambers to shew cause on the 24th, (as to which fact the affidavits were contradictory), the order had become absolute. No answer was made to this, but on the 11th of March interlocutory judgment was signed, and notice of executing a writ of inquiry given. The plaintiff's attorneys had never been served with any order absolute, nor had any such order ever been drawn up.

Theobald having obtained a rule calling upon the plaintiff to shew cause why the interlocutory judgment, and all subsequent proceedings, should not be set aside with costs—

Barstow shewed cause. The order for particulars was an order nisi, which ought to have been turned into an order absolute, and served forthwith: *Kenney v. Hutchinson* (6 M. & W. 134); that not having been done, the judgment is regular. [Alderson, B. A rule nisi makes itself absolute.] The affidavits are at variance as to the plaintiff's

(a) See *Hill v. Wright*, 2 Esp. 669; *Goldsmid v. Raphael*, 3 Scott, 285.

attornies having attended at the Judge's chambers, but they swear that they did, and repeatedly called out the name of the defendant's attorney, who did not appear to support the order, and they therefore left the chambers, thinking the order was abandoned.

PARKE, B. I was not aware that we made orders nisi at chambers; but it appears it has been adopted from the practice of the Court in granting rules nisi. A rule nisi makes itself absolute unless cause be shewn. The proper mode in cases of this kind, when the party obtaining the [420] order does not attend, is for the other party to go in to the Judge and say that he is ready to shew cause, and apply to have the order discharged. The practice should be analogous to the practice in Court.

The rest of the Court concurred.

Rule absolute for setting aside the judgment without costs.

BRANSON v. MOSS. Exch. of Pleas. 1840.—The keeper of a lunatic having refused to allow the lunatic to be served with a writ of summons, the Court granted a rule for a distringas, to be served in the first instance upon the friends of the lunatic, and if they could not be found, upon the keeper.

[S. C. 9 L. J. Ex. 189.]

In this case Fortescue moved for leave to issue a distringas against the defendant, who was a lunatic. It appeared that the defendant was confined in a lunatic asylum, and that his keeper, on being applied to, had refused to allow him to be served with the writ of summons. He relied upon *Starkie v. Skilbeck* (6 Dowl. 52).

PARKE, B. You may take your rule for a distringas, to be served upon the friends of the lunatic in the first instance, and if they cannot be found, then upon his keeper.

Rule granted.(b)

RICHARDS v. FRANKUM. Exch. of Pleas. 1840.—The plea of non detinet merely puts in issue the fact of detention. If the defence be that the plaintiff was not possessed of the goods, or that the defendant was justified in detaining them, such a defence ought to be specially pleaded.

[S. C. 8 Dowl. P. C. 346; 9 L. Ex. 162, 231; 4 Jur. 562, 682.]

This was an action of detinue for a promissory note. The defendant pleaded, first, non detinet; secondly, that the plaintiff was not possessed of the note; thirdly, that [421] before the commencement of the suit, the plaintiff, for a good and valuable consideration, assigned and delivered the said promissory note to one John Granger, to be by him held as and for his own note; and that the said John Granger, before the commencement of this suit, delivered the said note to the defendant, to be by him held for and on the behalf and for the use and benefit of the said John Granger; and that the defendant, as the servant and by the command of the said John Granger, detained and still detains the said promissory note, as he lawfully might for the causes aforesaid.

The replication traversed the assignment and delivery of the note by the plaintiff to Granger, and the delivery by him to the defendant.

At the trial before Gurney, B., at the last assizes for the county of Oxford, the jury found a verdict for the defendant on the second and third issues; the learned Judge giving the defendant leave to move to enter a verdict on the issue on the plea of non detinet also, if the Court should be of opinion that the matters of defence so found in his favour were evidence in support of that issue.

Ludlow, Serjt., now moved accordingly. The jury, by finding on the second and third issues for the defendant, have found that the promissory note was not the property of the plaintiff, and so established the plea of non detinet, which puts in issue the wrongful holding and detaining of the note by the defendant. It is evident from the use of the words, "which he unjustly detains," in the original writ and declaration, that the unjust detention is the gravamen of the complaint, and that is

(b) See *Humphreys v. Griffiths*, ante, p. 89.

therefore put in issue by the plea of non detinet, notwithstanding the new rules. Whatever may be the effect of the new rules as to pleading specially matter of excuse, the unjust detention is the gravamen of the charge in the [422] declaration; and as that is a material allegation in it, and is traversed by the plea, and the finding of the jury on the other issues establishes that there was no unjust detention, the verdict ought therefore to be entered for the defendant.

LORD ABINGER, C. B. There is no ground whatever for this motion. It is true that a party who brings an action of detinue, brings it for unjust detention of his property: but where the detention is justified, the matter must be set out on the record. The only issue on non detinet is upon the fact of the detainer. If the party has a lawful excuse for the detainer, he must plead it.

PARKE, B. There is no ground for this application. Under the plea of non detinet, a defendant might, at common law, prove that the goods were not the property of the plaintiff; but if he had a lawful excuse for the detention, as if the goods were pawned or pledged to him for money which was not repaid, he was bound to plead it: Co. Lit. 283 a. Lord Coke there says, "In detinue, the defendant pleadeth non detinet; he cannot give in evidence that the goods were pawned to him for money, and that he is not paid, but he must plead it; but he may give in evidence a gift from the plaintiff, for that proveth that he detaineth not the plaintiff's goods." But it is perfectly clear, that since the new rules, the defendant cannot give in evidence, under the plea of non detinet, that the goods were not the property of the plaintiff: so that in any view of the case, the matters proved in support of the second and third pleas were not evidence under the first. If the object be to shew that the chattel is not the property of the plaintiff, that cannot be done under such a plea since the new rules. If the object be to shew that the detention was lawful, and the party had a good excuse for detaining the property, then, according to the authority [423] of Lord Coke, such a defence ought to be pleaded, even at common law. Under the plea of non detinet, the fact of detention is alone in issue.

ALDERSON, B. In an action of trover, the plea of not guilty puts in issue the mere fact of the conversion, and so under the issue of non detinet, the fact of the detention is alone in issue.

ROLFE, B. concurred.

Rule refused.

GATERS, Executor of Elizabeth Robinson, Deceased v. MADELEY. Exch. of Pleas. 1840.—The interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime.

[S. C. 9 L. J. Ex. 173; 4 Jur. 724. Followed, *Fleet v. Perrius*, 1869, L. R. 4 Q. B. 500.]

Assumpsit on a promissory note. The first count stated, that the defendant, in the lifetime of the said Elizabeth Robinson, to wit, on the 25th March, 1833, made his promissory note in writing, and delivered the same to the said Elizabeth Robinson, and thereby promised to pay to her the said Elizabeth Robinson on demand the sum of £20, and thereupon, in consideration of the premises, promised the said Elizabeth Robinson to pay her the said note according to the tenor and effect thereof. The second count stated, that in the lifetime of the said E. R., to wit, on &c., the defendant made his certain other promissory note in writing, and delivered the same to the said E. R., and thereby promised to pay the said E. R. £20 on demand; and afterwards, and after the death of the said E. R., to wit, on the 1st day of December, 1838, the defendant, in consideration of the premises, promised the plaintiff, as such executor as aforesaid, to pay him the said note according to the tenor and effect thereof.

Plea, that the promissory note in the first count mentioned, and the promissory note in the second count mentioned, were one and the same; and that the said promissory [424] note in those counts mentioned, was made and delivered by the defendant to the said Elizabeth Robinson as in those counts is mentioned, whilst she the said Elizabeth Robinson was covert, and the wife of one John Robinson, since deceased; and that the consideration for the making of the said note by the defendant

was money advanced by the said Elizabeth Robinson, whilst she was the wife of the said John Robinson, to the defendant, and that the said Elizabeth Robinson, in her lifetime, was not executrix or administratrix, neither is the plaintiff the executor or administrator, of the said John Robinson; and the defendant further saith, that he is still liable to be sued by the personal representative of the said John Robinson, deceased, for the amount of the said promissory note.

Replication, that after the making of the said promissory note, and the delivery thereof to the said Elizabeth Robinson, and during her lifetime, to wit, on the 1st of January, 1834, the said John Robinson died, without having in his lifetime done any act to reduce the said promissory note into possession, or to prevent or defeat the right of survivorship of the said E. Robinson in the same promissory note, in the event of the said John Robinson dying in the lifetime of the said E. Robinson, leaving the said E. Robinson him surviving; and the plaintiff further saith, that the said E. Robinson afterwards, to wit, on the 1st of June, 1836, died possessed of the said promissory note, and having a good and valid title to receive from the defendant the said sum of money therein mentioned. And the said plaintiff still holds the said note as such executor of the said E. Robinson as aforesaid.

Special demurrer, and joinder in demurrer.

The following were the points marked on the demurrer-book, on which the defendant contended that he was entitled to judgment on the demurrer to the replication:—because, as the promissory note was made in favour of and for money paid by the wife during her coverture, all legal interest therein vested absolutely in her husband; and at [425] his death his personal representative ought to have sued upon it, and that it could and did not in any manner vest in the wife, although surviving her husband; and therefore that the plaintiff, as her personal representative, has no interest in the note, and cannot maintain any action upon it.

The plaintiff's points were, that the note did not under these circumstances vest absolutely in the husband, but was a chose in action given to the wife, which the husband might have reduced into possession by dissenting from his wife's taking any interest therein, and suing upon it in his own name, or that he might have assented to the apparent interest of the wife, and sued in their joint names; that the note was not vested absolutely in the husband until some act was done by him to reduce it into possession; that it therefore survived to the wife, on his death without any such act having been done.

Mansel, in support of the demurrer. The interest in the note in question did not pass to the wife by survivorship, but vested in the husband's representatives. It was a personal chattel, which vested absolutely in the husband. In *M'Neillage v. Holloway* (1 B. & Ald. 221), it was held that the husband might sue alone on a promissory note given to his wife before her marriage; and there Lord Ellenborough says, "It is laid down in Coke upon Littleton (p. 351 b.) and Com. Dig. (Baron & Feme, E. 3), that all chattels personal which the wife has in possession in her own right, are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognised. The words 'chattels personal' are sufficiently large to cover a negotiable instrument of this sort." [Parke, B. That doctrine must be considered as qualified by the judgment of the Court in *Richards v. Richards* (2 B. & Ad. 453).] Promissory notes and bills of exchange are personal chattels within the meaning of the Bankrupt Act. [Parke, [426] B. That proves too much; debts are also goods and chattels within the meaning of that act. If a promissory note be a chattel simple, which vests absolutely in the husband, how could it have been laid down that the husband and wife might sue upon it in their joint names, as in *Philliskirk v. Pluckwell* (2 M. & Selw. 393)?] In *Burrough v. Moss* (10 B. & Cr. 558), it was held that the husband might sue in his own name only on a note given to the wife before marriage; and that a debt due to the maker from the wife, *dum sola*, could not be set off. Here the plea states, that the consideration for making the note was money advanced by the wife during the coverture, and it must be presumed to have been the money of the husband, and therefore the action would accrue to the husband alone. In *Holloway v. Lightbourne*, (c) Lord Hardwicke says, "Where a bond or promissory note is given to a married woman, it has been held that the interest in such bond or note

(c) MSS. note to *Nash v. Nash*, 2 Madd. 135; 2 Eq. Cas. Abr. 1, pl. 5; and see Williams on Executors, 607—609, where the cases on this subject are collected.

immediately vests in the husband, and that he may maintain an action upon it in his own name."

PARKE, B. There can be no doubt that this is a bad plea. This is an action on a promissory note—an instrument on which no one can sue unless he was originally a party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has indeed been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange; yet still it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a feme covert, the husband may elect to let his wife have the benefit of it, or if he thinks proper he may take it himself; and if in this [427] case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and in that case the remedy on it survives to the wife, or, he may, according to the decision in *Philliskirk v. Pluckwell* (2 M. & Selw. 393), adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her. The only doubt in this case arose from the observation of Lord Ellenborough in *McNeillage v. Holloway*, that a promissory note may be treated as a personal chattel in possession. Now in that respect, I think there was a mistake, and an incorrect expression used: but it was unnecessary for his Lordship to lay down such a doctrine, in order to decide the case then before him. In fact, the decision in the subsequent case of *Richards v. Richards* (2 B. & Adol. 447) has qualified that position. In that case the Court of King's Bench said that a promissory note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession. The case of *Nash v. Nash* (2 Mad. 133) is also an authority in favour of the position, that it survives to the wife; and although that case was decided before *McNeillage v. Holloway*, it does not appear to have been cited in the latter case. I am of opinion that the note must be considered as having survived to the wife, and her executor was therefore the proper person to sue. The fact stated in the plea makes no difference, as the right of action on the instrument depends on the form of it, and not upon the consideration for which it was given: but [428] it may be observed, that it is not stated in the plea that the money advanced was the husband's. Whether the executor of the husband, where the money advanced was his, could compel an account from the executor of the wife, who recovered on the note, by a bill in equity, is another matter, with which, in a Court of law, we have nothing to do, and which could make no difference in this case, as it would not vary the right of action on the note. Our judgment must, therefore, be for the plaintiff.

The rest of the Court concurred.

Judgment for the plaintiff.

THE COMPANY OF PROPRIETORS OF NORTHAM BRIDGE AND ROADS v. THE LONDON AND SOUTHAMPTON RAILWAY COMPANY. Exch. of Pleas. 1840. By a local act, 4 & 5 Will. 4, s. lxxi. (the London and Southampton Railway Act), it is enacted, that in all cases where the railway shall cross any turnpike road, such turnpike road shall be raised or sunk by and at the expense of the Company, so as the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road:—Held, that a road on which toll-gates are by law erected, and tolls taken thereat, is a turnpike road, within the meaning of that act.

[S. C. 1 Railw. Cas. 665; 9 L. J. Ex. 165; 1 Jur. 892; in Equity, 1 Railw. Cas. 653; 9 L. J. Ch. 277. Adopted, *Reg. v. French*, 1879, 4 Q. B. D. 515; *West Riding Justices v. Reg.*, 1883, 8 A. C. 790. Referred to, *Northam Bridge Company v. Reg.*, 1886, 55 L. T. 759.]

Special case. By stat. 36 Geo. 3, c. 94, s. 1, (local and personal), intituled "An Act for building a Bridge over the river Itchin, at or near Northam, within the liberties of the town and county of the town of Southampton, and for making a road

from the said town to the said bridge, and from thence to communicate with the road leading from West End to Botley, in the county of Southampton," certain persons are incorporated by the name of the Company of Proprietors of Northam Bridge and Roads.

By sect. 2, the Company is empowered to make, build, and keep in repair a bridge at, near, or from Northam, within the liberties of the town and county of the town of Southampton, over and across the river Itchin to the opposite shore, in the parish of South Stoneham, in the county of Southampton, with a proper ascent or approach to the said bridge at each end thereof, and fit and proper for the [429] passage of travellers, cattle, and carriages, and toll-houses, &c. The said bridge to be a public bridge, and all persons, horses, cattle, and carriages to have free liberty to pass over the same, on the payment of the respective tolls allowed by the act.

By sect. 7, neither the bridge nor any tolls to be taken under the act are rateable.

By sect. 9, the Company is empowered to make one proper and commodious road, with a footway by the side thereof, from the town of Southampton or from some part of the Southampton Road to Northam, and so to the end or foot of the said bridge; and also one other proper and commodious road from the end or foot of the said bridge, on the opposite shore, into the parishes of South Stoneham, Saint Mary Extra, and Botley, in the said county, to communicate with and open into the turnpike-road leading from West End to Botley, in the said county of Southampton, each of such roads to be of the width of forty feet; on each of which two roads they are empowered to erect toll-houses and toll-gates, and for these purposes to take lands. The said two roads to be kept in repair at the cost of the Company.

Sections 10 to 17 regulate the mode of purchase of the lands required for the said roads &c., and contain compensation clauses.

By sect. 23, the property of the bridge and roads is vested in the Company.

Section 24 empowers the Company to raise £10,000 among themselves for making the bridge and roads, and in case that sum should be insufficient, they are further empowered by sect. 28 to raise among themselves the additional sum of £8000.

Sections 25, 26, and 29 relate to the division of the capital into shares, and the transfer thereof.

Section 30 empowers the Company to borrow £8000 on mortgage, and regulates assignments of the property [430] of the bridge, roads, and tolls by way of mortgage, and also the transfer of such assignments.

Section 31 gives priority to payment of interest on mortgages over interest on dividends payable to proprietors.

Sections 32 to 45 contain the clauses then usually inserted in acts creating joint stock companies, for the government of such companies and their officers, and for the making of bye-laws.

Section 46 gives a table of tolls, and vests the said tolls in the Company.

Section 53 enacts, "That the roads hereby directed to be made shall be deemed and taken to be turnpike-roads, within the intent and meaning of the 13 Geo. 3, c. 84, (a General Turnpike Act), and of the several acts made for the purpose of explaining, amending, or repealing the same or some part thereof, and that all and every clause and provision contained in the said act of the 13 Geo. 3, subject to the provisions of the said other acts, (except where the same are otherwise altered by this act), shall be in full force with regard to the roads included in this act, as fully and effectually to all intents and purposes, as if this act had been made and passed previous to the said act of the 13 Geo. 3.

By 38 Geo. 3, c. 64, s. 6, (local and personal), the width of the two roads is altered from forty to thirty feet each. Both of the said recited acts are for an unlimited period, and neither act appoints trustees or commissioners for the care and management of the said two roads, but vests the same in the Company.

The said Company of proprietors, under the said acts of the 36 & 38 Geo. 3, proceeded to erect the said bridge and to make the said roads, and the same have been opened for public use since the year 1800, and certain tolls have been taken in pursuance of the provisions of the said act of the 36 Geo. 3, c. 94, s. 46.

[431] By 3 Geo. 4, c. 126, s. 1, the act of the 13 Geo. 3, c. 84, and also various other acts of Parliament were repealed, and other provisions for the regulations of turnpike-roads were substituted in lieu thereof.

By sect. 4 it is enacted, "that from and after the 1st day of January, 1823, all

the enactments, provisions, matters, and things, in this act contained, shall extend and be deemed, construed, and taken to extend to all acts of Parliament now in force, and to all acts which shall hereafter be passed, for making, widening, turning, amending, repairing, or maintaining any turnpike road or roads in that part of Great Britain called England, save and except where any other commencement is particularly directed by this act, and as to such enactments, provisions, matters, and things as shall be expressly referred to and varied, altered, or repealed by any such act or acts as shall be hereafter passed."

By 4 Geo. 4, c. 95, intituled "An Act to explain and amend an Act passed in the third year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England," it was by sect. 90 enacted as follows:—"And whereas doubts have arisen as to the roads to which the provisions of the said recited act (3 Geo. 4, c. 126) extend, be it therefore enacted, that nothing in the said recited act or this act contained, shall extend or be construed to extend to any road or roads not under the care and management of trustees or commissioners, or to any road or roads which shall be made, maintained, or supported under the provisions of any act or acts of Parliament passed for an unlimited period, notwithstanding tolls may be collected on such roads, or shall extend to affect, alter, or interfere with the qualifications of any commissioners or other persons having the care and management of any such last-mentioned roads, or with any tolls [432] taken or weights carried thereon, or in any other manner therewith."

By sect. 91, certain other roads, one of which is the road from London to Holyhead, by the 92nd section the turnpike road called the Commercial Road, and by the 93rd, so much of the turnpike road from Carlisle to Glasgow as lies in the county of Cumberland, are exempted from its operation.

By the 4 & 5 Will. 4, c. lxxxviii., (local and personal), intituled "An Act for making a Railway from London to Southampton," certain persons were incorporated and empowered to make the said railway.

Sect. 71 regulates the crossing by the railway of public highways not being turnpike roads, wherever they are crossed at the level of such highways.

Sect. 72 enacts as follows:—"And be it further enacted, that in all cases where the said railway shall cross any turnpike road, such turnpike road shall be raised or sunk by and at the expense of the said company, so as that the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road, by means of a bridge of such height and width, and with such an ascent or descent, as are by this act in that behalf provided." Those provisions are made by the 74th and 75th sections of this act.

By the 1 Vict. c. lxxi., intituled "An Act to alter the line of the London and Southampton Railway, and to amend the act relating thereto," the line of the London and Southampton Railway is intended to cross one of the two roads made and constructed under the first-mentioned act of the 36 Geo. 3, c. 94, viz. the road from the town of Southampton to Northam Bridge; and the said London and Southampton Railway Company, in carrying their acts into execution, have proceeded to lay down their rails and to make their railway, so as to cross the said road upon a [433] level, and have refused either to raise or lower the said road, or to cause the said railway to pass over the said road, or to cause the said road to pass under the said railway.

All the said recited acts are to be considered as forming part of this case, and their recitals, enactments, and provisions may be referred to by either party accordingly.

The question for the opinion of the Court is, whether the said road made under the 36 Geo. 3, c. 94, is a turnpike road within the meaning of the 4 & 5 Will. 4, c. lxxxviii., s. 72.(a)

D. Pollock, for the plaintiffs. The Northam Bridge Road is a turnpike road within the meaning of the 72nd section of the London and Southampton Railway Act.

(a) The question had been before the Vice-Chancellor, on a motion for an injunction to restrain the Southampton Railway Company from crossing the Northam Bridge Road on a level, when his Honour expressed an opinion that the Northam Bridge Road was not a turnpike road, and refused the injunction, but gave the plaintiffs liberty to take the opinion of a court of law upon the question.

In Dr. Webster's Dictionary,^(b) a turnpike road is thus defined:—"A road on which turnpikes or toll-gates are established by law, and which are made and kept in repair by the toll collected from travellers or passengers who use the road." If that definition be correct,—and it is submitted that it is,—then this is a turnpike road; for it is a road authorized by act of Parliament, by which tolls are legally taken from passengers using it. The roads to be made in pursuance of the Northam Bridge Act are also, by the 53rd section of that act, described as turnpike roads. It enacts that the roads thereby directed to be made shall be deemed and taken to be turnpike roads, [434] within the meaning of the then General Turnpike Act, 13 Geo. 3, c. 84, as fully and effectually, to all intents and purposes, as if that act had been previously made; and it is not at all affected in this respect by the repeal of that act by 3 Geo. 4, c. 126. In the clauses, also, of the 36 Geo. 3, which authorize the taking of tolls, ss. 46 & 48, the word "turnpikes" is again used. If this case had arisen before the repeal of the 13 Geo. 3, c. 84, no doubt could have been entertained that this was a turnpike road. But it may be said that the 4 Geo. 4, c. 95, s. 90, (which recites that doubts had arisen as to what roads the provisions of the General Turnpike Act, 3 Geo. 4, extended to, and by which it is enacted that nothing in those acts should extend to any road not under the management of trustees or commissioners), has made an alteration in this respect, and has taken these roads out of the operation of the General Turnpike Acts. The 9 Geo. 4, c. 77, s. 19, however, after reciting the former General Turnpike Acts, appears to repeal all the exceptions in those acts, and places all local acts, such as the present, within its meaning:—"all the powers, &c., contained in this act shall extend to every local turnpike act, and shall be applied and put in execution as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of such local turnpike act, and were made part thereof." The effect of that clause is to re-enact the 53rd section of the Northam Bridge Act. The language of the 72nd section of this railway act is general, "that in all cases where the said railway shall cross any turnpike road," &c.; it extends to every species of road which can be called a turnpike road. The object of inserting these clauses, relating to turnpike roads, was for the public protection, and the Court will give them the largest possible construction, in order to further that object. It may be said, indeed, that this is a private speculation, and that the interest in these roads [435] is vested in the proprietors; but that can make no difference as affecting the question whether this is a turnpike road or not. In *Rex v. The Trustees of Great Dover Street Road* (5 Ad. & Ell. 692; 1 N. & P. 157), it was held, that, although the trustees of that road were shareholders and owners of the soil, and the surplus of the tolls was to be applied in paying the interest and principal of the shareholders, the road was a turnpike road within the provisions of the General Turnpike Act, and that the trustees were not liable to be rated in respect of it. Roads, however, may be turnpike roads without being within the operation of the general turnpike acts, as is exemplified by the exception of the Holyhead and other roads out of the operation of the General Turnpike Acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95. [Parke, B. Is there any clause in the Northam Bridge Act which obliges these proprietors to keep the roads in repair?] Yes; the 9th section provides that the roads shall be made, "and at all times afterwards maintained and repaired, at the proper costs and charges of the said company of proprietors, by and out of the tolls by this act granted."

M. D. Hill, *contrâ*. The definition of a turnpike road, given in Dr. Webster's Dictionary, is too wide, for that would include a railroad. The object of the Northam Bridge Act was to empower the company to erect a bridge over the river Itchin, and the roads were only accessory to it. The shares are, by sect. 25, vested in the subscribers, who are to be entitled to receive a distribution of the profits to arise therefrom, which are not limited. The provision in the 9th section, as to the repairs, is *ex abundanti cautela*, as the Company would be obliged to keep the road in repair without such a provision, at common law. The right to take [436] toll, and the obligation to repair, do not make a road a turnpike road. In cases of toll thorough, there is a right to take toll, and a liability to repair the road, but that does not make it a turnpike road. The case of toll thorough is an apt illustration of this case. There is no distinction between the case of toll thorough, or this case, and that of a

(b) A Dictionary of the English Language, by Noah Webster, LL.D., New York, 1828. Reprinted by E. H. Barker, Thetford, Norfolk.

canal or a navigable river with locks to it, which the proprietors are bound to keep in repair. The true definition of a turnpike road is given by Lawrence, J., in *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal Navigation* (8 T. R. 350). He says, "Nor is this like the case of a turnpike; for there the tolls are paid for the benefit of the public, and not for the use of any individuals; and those tolls are not the subject of taxation within the statute of 43 Elizabeth." Now here these tolls are paid for the benefit of the company, and would, on that account, be liable to the payment of rates, if it were not for the special exemption contained in the 7th section of the act. But the general exemption from a liability to rates is not confined to turnpike roads only, but wherever the property is public property, the tolls are not rateable. The principle to be collected from the authorities is, that property is exempted from rateability in those cases only where the profits are applicable to public purposes: *Rex v. Inhabitants of Liverpool* (7 B. & C. 64; 9 D. & R. 780), *Reg. v. Mayor, &c. of Liverpool* (1 Per. & D. 334; 9 Ad. & Ell. 435). A turnpike road is a road on which a toll is collected for the benefit of the road, and not where it is to go into the pockets of private individuals, or to be applied to a private purpose. This road has none of the usual incidents of a turnpike road. Its non-rateability is indeed one incident: but, as has been already observed, if it were not for the special exemption in the act, the tolls of this road would be rateable. [437] Another incident of a turnpike road is, that the county magistrates have an ex officio jurisdiction as trustees and commissioners, which here they have not. Neither is this road subject to the usual exemptions from toll, in the cases mentioned in the 32nd section of the General Turnpike Act. This, in truth, is like a railway rather than a turnpike road; they are both made and maintained from private funds. None of the powers given for the government of turnpike roads apply to the present case; if this is held to be a turnpike road, it will be one not subject to the code of laws regulating turnpike roads. The 4th section of the 3 Geo. 4, c. 126, by which the provisions of that act were extended to local acts for making turnpike roads, was in effect repealed by the 90th section of 4 Geo. 4, c. 95, which provided, that the act should not extend to any road not under the management of trustees or commissioners, or to any road made or maintained under any act for an unlimited period, notwithstanding tolls may be collected. Then the 53rd section of this act does not amount to a statutory declaration that it shall be a turnpike road. It says the roads shall be "deemed and taken to be turnpike roads"—not absolutely, but "as fully and effectually as if that act had been made previous to the 13 Geo. 3." The legislature, at the time of the passing of the Northam Bridge Act, may have intended that the road, thought not a turnpike road, should be regulated in the same way as a turnpike road; but when it came to the passing of the 4 Geo. 4, c. 95, it had altered its views, and then directed that these private roads shall not be under the regulations of the General Turnpike Acts; no such words as "turnpike roads" are there used, but the words are "any road or roads" not under the management of commissioners, notwithstanding tolls may be collected "on such roads." The 19th section of the 9 Geo. 4, c. 77, has been referred to, but that applies to turnpike acts generally, and not to an act of this kind, which is in its nature private. The 90th section [438] of the 4 Geo. 4, c. 95, excludes this road from the operation of the General Turnpike Acts, and it is therefore not a turnpike road.

D. Pollock replied.

LORD ABINGER, C. B. If we had entertained any doubt in this case, we should have been desirous of taking time to consider; but we do not. Whether this is a turnpike road is not to be determined merely by reference to the 13 Geo. 3, c. 84, or any other act of Parliament. A turnpike road is a road across which turnpike gates are erected and tolls taken, and such roads existed previous to the passing of the 13 Geo. 3, c. 84, and independently of that statute altogether. A "turnpike road" means a road having toll-gates or bars on it, which were originally called "turns," and were first constructed about the middle of the last century. Certain individuals, with a view to the repair of particular roads, subscribed amongst themselves for that purpose, and erected gates upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions were presented to Parliament against them; and acts were in consequence passed for their regulation. This was the origin of turnpike roads. The distinctive mark of a turnpike road is, the right of turning back any one who refuses to pay toll. Let us see whether this

act of Parliament has given that power. The 9th section says, that it shall be lawful for the Company to make roads, and also to erect toll-houses, toll-gates, bars, and other conveniences for taking the tolls thereby granted; and that, as it seems to me, constitutes them turnpike roads. Then the 46th section provides what shall be the tolls which shall be taken; and that it shall be lawful for all persons, &c., chargeable with any of the tolls thereby granted, to pass for the same toll over the said bridge, and through all and every the turnpikes, toll-gates, and toll-[439]-bars to be erected by virtue of that act; which shews that the words "turnpikes," "toll-gates," and "toll-bars," are used synonymously. Here, then, we find toll-gates and a right to take toll established by act of Parliament, which consequently render this a turnpike road. The legislature also, by the 36 Geo. 3, c. 94, s. 53, declares that this shall be deemed and taken to be a turnpike road within the meaning of the 13 Geo. 3, c. 84, as fully and effectually as if it had been made and passed previous to that act: they therefore take it for granted that this would be a turnpike road if the act had been passed previously; and they provide that the provisions of the 13 Geo. 3 shall be applied as far as they are applicable. Then comes the statute 3 Geo. 4, c. 126, which repeals the 13 Geo. 3, c. 84, and enacts that the provisions of that act shall extend to all acts then in force, and which shall thereafter be passed for making or repairing any turnpike roads. That leaves this road as it stood before the passing of that act. The next statute on the subject was the 4 Geo. 4, c. 95: the 90th section of which recites that doubts had arisen to what roads the former act applied, and exempts from its operation roads like the present. But still the roads continue to be turnpike roads; for if not, why should the legislature have interfered at all, or have introduced this exception with respect to them? It appears to me, therefore, to be very clear that this is a turnpike road, that the public are entitled to the protection contemplated by the Railway Act, and that the railroad ought to be carried either over or under it.

PARKE, B. I am of the same opinion. The question turns on the construction to be put upon the 71st and 72nd sections of the 4 and 5 Will. 4, c. lxxxviii., which was passed for the purpose of establishing a railway from London to Southampton. The 71st section applies to a highway, and the 72nd section to a turnpike road traversed by the rail-[440]-way. [His lordship here read those sections.] In these enactments the legislature had in view the benefit of the public, and therefore compelled the Railroad Company, in the case of a turnpike road, where the traffic is greatest, to afford the public more accommodation, by carrying the railroad either above or under the road. The question then is, whether this road traversed by the railway is a turnpike road? I think it is. The ordinary meaning of the words "turnpike road" is, a road on which a turnpike is lawfully erected, and the public are bound to pay tolls. If a turnpike road meant a road subject to the General Turnpike Act, I should think, with the Vice-Chancellor, that this is not a turnpike road, because it is not so governed. It was regulated by the General Turnpike Act, 13 Geo. 3, c. 84; but has been exempted by the 90th section of 4 Geo. 4, c. 95, which declares that nothing in that act "shall extend or be construed to extend to any road or roads not under the care and management of trustees or commissioners." This road therefore falls within the provisions of that section. But still it is a turnpike road, because gates are lawfully erected upon it, and tolls lawfully paid; and that being so, the question of rateability is unimportant, and decides nothing on the subject. The Railway Company were bound to provide the public with greater protection than they have done, and to carry the railroad either over or under the road in question.

ALDERSON, B. If the different acts of Parliament are properly looked at, this question will be found to be free from doubt. The first point is—what is a turnpike road? Until a turnpike act passes, no individual has a right to levy tolls, because such an act would be an infringement of the royal prerogative. A party may accept a composition, but he cannot fix a specific toll. He may do so, indeed, by act of Parliament, and, by virtue of this authority, may stop persons and oblige them to pay tolls. In this way a turnpike road is created. Then if we look to [441] the 53rd section of the Northam Bridge and Road Act, we shall find it expressly enacted, that the road in question shall be taken to be a turnpike road within the meaning of the statute 13 Geo. 3, c. 84. By this 53rd section the road was rendered liable to all the provisions of the 13 Geo. 3, without the necessity of having that act expressly re-enacted in the local act; so that, at that time, it was subject to the regulations of

the 13 Geo. 3, with certain alterations and amendments. The statute 13 Geo. 3, c. 84, was afterwards repealed by the 3 Geo. 4, c. 126; the effect of which was, that the road still remained a turnpike road, although not subject to the provisions of the 13 Geo. 3, c. 84. The 4th section of 3 Geo. 4, c. 126, enacted, that the provisions of that act should extend to all turnpike roads. That placed the road in question under the control of the 3 Geo. 4, c. 126. Inconveniences, however, were found to result from this enactment, since many local roads of a permanent kind were, by the 4th section, exempted from the operation of the act. The 4 Geo. 4, c. 95, was then passed, the 90th section of which declared, in effect, that certain roads, notwithstanding tolls were collected upon them, should be exempted from the operation of the General Turnpike Acts. On the whole, I feel no doubt that this is a turnpike road; and as such, being much frequented, the public are entitled to the protection contemplated by this Railway Act.

ROLFE, B. I am of the same opinion. The question is, whether this is a turnpike road, within the meaning of the 72nd section of the Southampton Railway Act. The legislature, having given power to the Railway Company to make this railway for their own benefit, by the 72nd section, provide for the convenience of the public, where roads are intersected by it. There are two provisions in the act, one giving greater, the other less, convenience to the public. In the case of turnpike roads, where the public traffic is greatest, they have directed, that the railway [442] which traverses the road shall pass either over it or underneath it. The point then is, whether the road in question, so traversed by the railway, is a turnpike road or not. A turnpike road is one across which individuals are at liberty to erect gates and take tolls; and that a road is of that description, is considered a fair test of its requiring the additional security of a railway being carried over or under it. I do not consider it a turnpike road merely because it is so designated by the 53rd section of the Northam Road Act, but because there is attached to it a right to take tolls. That act did not make the road in question a turnpike road, but merely applied to it a turnpike code: it was the putting a turnpike gate across the road which made it a turnpike road. Whether the restrictions, prohibitions, and exemptions, imposed by the several turnpike acts, are in force as regards this road, it is unnecessary to decide it is enough to say, that the right to set up gates makes it strictly and literally a turnpike road. As such, it is a road of an important character, to which the provisions of the Railway Act ought to be applied. Our judgment will, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

VYSE v. WAKEFIELD. Exch. of Pleas. 1840.—The declaration stated, that, by indenture, the defendant covenanted that he would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to ensure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that Company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void:—Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—Held, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected.

[S. C. 8 Dowl. P. C. 377; 9 L. J. Ex. 274; 4 Jur. 509: affirmed, 7 M. & W. 126. Considered, *Makin v. Watkinson*, 1870, L. R. 6 Ex. 30.]

Covenant on an indenture, dated the 3rd of March, 1827, whereby the defendant, in consideration of £3100, bargained, sold, and assigned to the plaintiff certain dividends, interest, and annual produce, from time to time due and payable, or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her; to have, hold, receive, and take the dividends &c.

thereby assigned unto the plaintiff, his executors, &c., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her; and the defendant did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, amongst other things, that he the defendant should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent or agents of any such office or offices in the county where he the defendant might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him the defendant: and should not afterwards do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever, whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, amongst other things, appear. And the plaintiff says, that he the defendant, in part performance of his said covenant, did afterwards, to wit, on the 8th day of March, 1827, at the request of the plaintiffs, appear at an office for the insurance of lives within London, that is to say, the office of a certain company of persons, or office, established for the purpose, and carrying on the trade or business of and for the insurance of lives, under the name of, and called and [444] known by the name of, the Rock Life Assurance Company, and did then and there answer certain questions then asked and required of him, touching and concerning his age and state of health, and did then do all other necessary acts, in order to enable the plaintiff to insure the life of him the defendant in and with the said company or office, he the plaintiff then thinking proper and intending to insure the life of him the defendant in and with the said company or office, according to the course and practice of the said company or office; the answering such questions as aforesaid, and the said other matters in that behalf aforesaid, being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he the plaintiff did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office, by a certain policy or insurance, at and for the premium of 81l. 17s. 6d., payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and satisfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of £3000, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus to that policy, subject to and under the condition or proviso, amongst others, that, in case the defendant should go beyond the limits of Europe, the same should be null and void: and the plaintiff says, that [445] the said condition or proviso, at the time of making the said indenture, and from thence hitherto, was and is usual and reasonable; and that although he the plaintiff has performed and observed every thing in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid, in this, to wit, that he the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he the plaintiff had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant, had amounted to a large sum, to wit, £2000, and had become of great value to the plaintiff, to wit, the value of £2000, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of £3000, to wit, on the first day of June, 1838, he the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises, the said policy became and was null and void, &c., &c.

Special demurrer, assigning for cause, that the declaration does not contain any specific averment that the defendant, before he went beyond the limits of Europe, as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact, that the plaintiff had insured the life of the defendant, as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the policy had been effected, and that it was sub-[446]-ject to the condition or proviso stated in the declaration.

Peacock, in support of the demurrer, was stopped by the Court, who called upon

Cowling to support the declaration. The declaration is sufficient. It was not necessary to allege any notice to the defendant: for the declaration states that the defendant did, at the request of the plaintiff, appear at the Rock Life Assurance Office, and did answer certain questions put to him; and he might, therefore, have informed himself of the fact of the insurance having been effected, and of the terms and conditions of it. The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do; and here there is nothing in this covenant requiring him to give any notice. Therefore, unless the circumstances were such that the defendant had not any means of informing himself of it, no notice was necessary. This contract to insure is confined to insurance offices within the bills of mortality; and the defendant might readily have informed himself by inquiry of the fact of the insurance having been effected, and of the terms and conditions of it. In Com. Dig. tit. Condition, L. 9, many instances are given where parties are not bound to give notice, but the other parties must take notice at their peril. It is there said—"If a condition, covenant, or promise, be to do an act to a stranger, or upon performance of an act by a stranger, there needs no notice; for it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A. marries, there needs no notice when A. marries. So, if a condition, covenant, or promise, be to do upon the performance of any certain and particular act by the obligee himself, he ought to do it without notice by the obligee that the act is performed; [447] for he takes it upon him to do it at his peril: as if the condition be to pay so much when the obligee marries, there need not be notice of his marriage." Notice is not necessary, unless where the party expressly contracts to give notice, or where it must necessarily be implied that notice is to be given, because the obligor cannot know or ascertain, from the nature of the thing, whether the act has been done or not. In *Rex v. Holland* (5 T. R. 607), it was held, that where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts, as he is presumed from his situation to know them. In answer to the objection of want of notice, Wood says, in the argument,—"Notice here merely means knowledge; and when the matter is as much in the knowledge of the defendant, or more, than of any other person, the law presumes that he had knowledge:" for which he cites 16 Vinier's Abr. tit. Notice, p. 5, pl. 10, where it is said—"None is bound by the law to give notice to another of that which that other person may otherwise inform himself of:" and Lord Kenyon, in giving judgment, refers to that argument, and recognises it as shewing "the true grounds upon which notice is or is not required to be averred." So here, the defendant might have informed himself whether the insurance was effected or not, and was bound to do so at his peril; and the plaintiff not having undertaken by his contract to give the defendant notice that the assurance was effected, was not bound to do so. The defendant, by his covenant, undertakes to do nothing to vitiate an insurance effected with any person within the bills of mortality, without any stipulation whatever as to notice of the particular person with whom it should be effected. [Parke, B. If the covenant had spoken of an insurance [448] to be effected with A. B., there would be no necessity for notice; but if it were with any person that the plaintiff may choose, then it must surely be necessary that notice should be given. Is not notice equally necessary, when the covenant applies to an insurance in any one of the many public offices within the bills of mortality?] If five or six offices had been named, no notice would be necessary. If there are such a number of insurance offices in London as would render it unreasonable to expect the defendant to inquire of them all whether such an insurance had been effected, the defendant should have shewn that by his plea; not

having done so, the Court will not assume it to be the fact. In *Doe v. Whitehead* (8 Ad. & Ell. 571; 3 Nev. & Per. 557), which was an ejectment by landlord against tenant, on an alleged forfeiture by breach of a covenant to insure "in some office in or near London," it was held that the omission to insure must be proved by the plaintiff. There the same objection would have applied, as it would have been necessary for the landlord to make inquiry at every office in or near London. Lord Denman, C. J., says, "The proof may be difficult, where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law; and the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the Court cannot assist him." Here the district is limited; but if the number of offices within it are so inconvenient as to render inquiry difficult, the Court cannot calculate the balance of inconvenience. Suppose all the insurance offices were in one street, no notice would surely in such case be necessary. [Parke, B. Have you any authority for that, or in any case where there is any choice as to where the [449] insurance shall be effected?] The cases cited in Com. Dig., before referred to, are applicable in principle; but there is no case where the party's having a choice as to the office in which an insurance is to be effected, has been held to render notice necessary. In Viner's Abr., Condition (A. d.), pl. 15, it is said—"If A. sells to B. certain weys of barley, or other things, and B. assumes to pay for every wey as much as he sells a wey for to any other man; if he after sells to others certain weys for a certain sum, he shall not have an action on the case against B. upon his promise, till he hath given him notice for how much he sold the wey to others: for B. is not bound to pay it till notice, because it is uncertain and not known to him; and here he assumes in general, and not in particular, scilicet, to pay so much as J. S. shall pay for a wey, and so he does not assume to take notice at his peril;" "but," it is added in pl. 16, "if he had assumed to pay as much for every wey as he sold a wey for to J. S., if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril, without any notice given, otherwise he hath broke his promise." If, in the present case, the number of offices had been limited, it is quite clear that notice would not have been necessary, because the Court cannot measure the inconvenience arising from a greater or less number; and the same argument will apply where the district is limited. The defendant might have remedied the inconvenience, if any inconvenience exists, by providing for it in his contract.

Peacock, in support of the demurrer. The principle established by the cases is, that where the act is to be done by a stranger, no notice is necessary, because the fact is as much within the knowledge of the one party as the other: but where the act is to be done by the plaintiff himself, it is otherwise, and notice must be given: *Powle v. [450] Hagger* (Cro. Jac. 492). There the Court expressly drew the distinction between the case where the act is to be done by a stranger, and where it is to be done by the plaintiff himself. [Parke, B. In *Bradley v. Toder* (id. 228), and in *Fletcher v. Pynsett* (id. 102), where the promise was in consideration that the plaintiff would marry such a woman, the defendant would give him £100, it was held that notice of the marriage was not necessary.] In *Bradley v. Toder*, the Court at first held that the declaration was not good, because it was not alleged that the plaintiff gave notice of the marriage; and though the Court afterwards resolved that it was good, the reason given is, that it was a necessary intendment, that when, after the marriage, he requested payment of the money, notice of the marriage was given. But this is an act which lies entirely within the knowledge of the plaintiff, who effected the policy, and who alone could know the conditions annexed to it. All the cases turn upon the question, whether the defendant had the means of knowledge or not; and if he had not, or not equally with the plaintiff, then notice is requisite. [Lord Abinger, C. B. Suppose the defendant had promised to pay £1000 to any banker in London that the plaintiff chose to open an account with—must not the plaintiff give him notice of the bank in which he has opened an account? Parke, B. Suppose the covenant had been, that the defendant would perform the terms and conditions of any policy that the plaintiff had entered into with the Rock Life Assurance Company, he must in that case have made inquiry as to the terms upon which the policy was effected.] In ——— v. *Henning* (id. 432), it is said—"If the agreement be, that he shall pay so much as J. S. in particular paid, in that case quia constat de personâ, and he is indifferently [451]

named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice; but when the person is altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice." In this case the plaintiff had the option of selecting any one of the insurance offices, and he was not confined with respect to the time of effecting the insurance; and he ought, therefore, to have given notice. [Parke, B. Suppose it had been a promise to pay the plaintiff £100 if he should go to Rome or Naples?] There it would be his duty to give notice. When the event depends upon the performance of one of two acts which are in the plaintiff's option, he is bound to give notice, because it could only be known to the plaintiff when he had exercised his option. [Parke, B. In *Haverley v. Lughton* (1 Bulstr. 12), the plaintiff promised J. S., that if he borrowed of one Powell £100, he would repay that sum to him upon the same day and upon the same conditions that they between them should agree upon; and it was there held that notice was not necessary.] That case shews that where the person or the act is certain, no notice is necessary; but when the person or the act is uncertain, and the option is to be exercised by the plaintiff, then it is necessary.

LORD ABINGER, C. B. I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having [452] been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality, to ascertain whether such a policy had been effected, he would still be obliged to do something more; namely, to learn what were the particular conditions on which it was effected; because the covenant here is, not that the defendant shall not do anything to evade the covenants or conditions usually prescribed by insurance offices; but that he shall not violate any of the conditions, by which such insurance might be avoided or prejudiced; i.e. he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from the conditions in general use, might be annexed by a particular insurance office; and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them, to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless [453] he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

PARKE, B. My mind is not entirely free from doubt; but I am inclined, on the whole, to agree with the Lord Chief Baron. The defendant here is sued on a covenant by which he stipulates to do two things; namely to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that this is confined to an insurance to be effected at the particular office at which he should appear, the words "such insurance" in this covenant meaning simply an insurance on his life. The defendant is bound in the first instance to appear at an insurance office; and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the

stipulations which have been entered into by the policy. The question then is, whether an action can be maintained on this covenant, when notice of the effecting such insurance, or of its terms, is not averred in the declaration. The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case [454] of *Haule v. Hemmyng* (Viner's Abr. "Condition" (A. d.), pl. 15; Cro. Jac. 422), where a man promised to pay for certain weys of barley as much as he sold them for to any other man: there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B. or perhaps on the marriage of B. alone, (for there are some cases to that effect), or to pay such a sum to a certain person, or at such a rate as A. shall pay to B. In these cases, there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at some office in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the [455] defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to all actually existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice; and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature, that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified generally to the defendant that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature and the conditions with which it was coupled; but I think that he was, at least, entitled to notice of the fact of its existence.

[456] ALDERSON, B. I am of the same opinion; and my judgment is founded on the authority of *Haule v. Hemmyng*, as reported in Viner's Abr. "Condition" (A. d.), pl. 15. In this case, the defendant covenants that he will not do any act, deed, or thing, whereby any such insurance may be avoided or prejudiced. The insurance is to be effected at any time or times, or at any office or offices, within certain limits, and is not confined to the then existing offices. The plaintiff has the selection from

an indefinite number; and it seems to me, that the person who is to select the office must give notice of his having done so. If the defendant had received notice that an insurance was effected in the Roek Life Insurance Company, I by no means say that he would not be bound to inform himself of any conditions to which it might be subject.

ROLFE, B. I am of the same opinion. I own that when the case was first opened, my impression was in favour of the plaintiff; and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable: but that is not so where a party contracts to do a particular act; for then it is his own fault for entering into such a contract. In the progress of the argument, my opinion changed; and I think that the plaintiff was bound to give notice. I find it stated in Viner's Abr. "Condition" (A. d.), pl. 10,—“If I am bound to enfeoff such persons as the obligee shall name, he ought to give notice of those he names, otherwise I am not bound to enfeoff them:” and reason seems in favour of this principle of law. The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of that option having been exercised.

Judgment for the defendant.

[457] VANDERSTEGEN AND ANOTHER v. WITHAM. Exch. of Pleas. 1840.—Where the trustees of a lady, who had authorized the defendant to receive her rents, countermanded his authority, and brought an action to recover the money received by the defendant under that authority:—Held, that the Court had no power to order the proceedings in the action to be stayed, in order to give time to the defendant to obtain an injunction to restrain the action.

[S. C. 8 Dowl. P. C. 369; 9 L. J. Ex. 174; 4 Jur. 367.]

W. H. Watson applied for a rule to shew cause why the proceedings in this action should not be stayed, in order to enable the defendant to apply for an injunction to restrain the plaintiffs from proceeding in the action. It appeared from the affidavits, that the defendant was the attorney of a Mrs. Vaughan, and had been authorized by her to receive certain rents and money for her; but that the plaintiffs, who were her trustees, had countermanded his authority, and brought this action to recover the money which he had so received. A bill in equity had been filed by the defendant against the plaintiffs, to obtain the injunction; and the affidavits stated, that he was advised and believed he had sufficient grounds for obtaining it, but that, by the practice of the Court, it could not be obtained until the lapse of about sixteen days. Watson referred to, and relied upon, a note at the conclusion of the case of *Best v. Thorowgood*,^(a) which is as follows:—“A stay of the *postea* was afterwards obtained, until answer put in by the plaintiff to a bill in equity filed against him by the defendant.”

PARKE, B. It is impossible for us to interfere, and to stop the plaintiffs from proceeding in their action, which, upon the facts stated, they are entitled to bring. If the defendant has any equity, he must apply to the proper Court to restrain the plaintiffs from proceeding with the suit. As to the authority cited from the case of *Best v. Thorowgood*, the note is very short, and it does not appear upon what ground the rule was granted in that case; nor am I satisfied that the decision of the Court there was correct, or consider it to be a sufficient authority for us to interfere [458] and stop the plaintiffs' proceedings, when we do not know what answer they may give to the bill which has been filed against them, and it may turn out that the defendant has no equity at all.

ALDERSON, B. It seems to me that we ought not to grant this application. It is, in effect, calling upon this Court to grant an injunction now, on the chance that some other Court will grant one at some future period. If we have power to stay the proceedings for sixteen days, there is no reason why we should not stay them for a longer period, and grant a perpetual injunction. If it be thought expedient that the

(a) 4 Tyrw. 264; S. C. nom. *Best v. Argles*, 2 C. & M. 394. See 3 Dowl. P. C. 701.

Courts of law should have the power of granting injunctions, the legislature may, if they think proper, confer such a power, but at present they have none.

GURNEY, B., and ROLFE, concurred.

Rule refused.

GRANGER v. COLLINS. Exch. of Pleas. 1840.—Assumpsit. The declaration stated, that whereas before and at the time of making the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a term of years, and thereupon afterwards, to wit, on &c., agreed to let to the plaintiff, who then agreed to take of the defendant, the said house and premises at a certain rent; and in consideration of the premises, the defendant promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, without any eviction from the parties entitled to the reversion; nevertheless, he the plaintiff was evicted by the party entitled to the reversion:—Held, on demurrer, that the declaration was bad, inasmuch as, the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid as the defendant's promise arose from that relation.

[S. C. 9 L. J. Ex. 192.]

Assumpsit. The declaration stated, that whereas theretofore, and before and at the time of the making of the agreement thereafter mentioned, the defendant held the house and premises thereafter mentioned, for the residue of a certain term of years therein; and thereupon afterward, to wit, on the 20th day of December, 1837, the defendant agreed to let to the plaintiff, who then [459] agreed to take of the defendant, the said house and premises, situate and being in Hunter-street, Brunswick-square, in the county of Middlesex, including the use of the several fixtures therein, for the term of three years from the 14th day of August, 1837, at the rent of 73l. 10s. a-year, payable quarterly, [setting forth the days of payment, &c.] and in consideration of the premises, the defendant afterwards, to wit, on the day and year first aforesaid, promised the plaintiff that he should quietly hold and enjoy the said house and premises during the said term, and according to the true intent and meaning of the said agreement, and without any eviction from or by the party or parties entitled to the reversion of or in the said house and premises, expectant on the reversion of the defendant's lease. And the plaintiff in fact saith, that afterwards, to wit, on the day and year first aforesaid, he entered into and upon the said house and premises, and became and was possessed thereof as such tenant as aforesaid, and that he duly performed all things in the said agreement contained on his part and behalf to be performed; nevertheless the plaintiff in fact saith, that afterwards, and during the said term of three years in the said agreement mentioned, to wit, on the 5th day of July, 1839, he the said plaintiff was evicted from the said house and premises by the party or parties entitled to the reversion of and in the said house and premises expectant on the termination of the defendant's lease, contrary to the promise of the said defendant, &c.

The defendant pleaded a plea, to which the plaintiff demurred specially; but as the Court, on a former day, had intimated a doubt whether the declaration could be maintained, and the argument now turned on that question alone, the plea is omitted.

The defendant's points of objection to the declaration, appended to the demurrer book, were as follows:—That the declaration states such a promise by the defendant as [460] the law will not imply, and imposes a much more extensive liability upon the defendant than he is subject to in point of law.

That the defendant's promise, as stated in the declaration, would render him liable even for a wrongful eviction of the plaintiff by the party or parties entitled to the reversion expectant on the termination of the defendant's lease, or for an eviction (as in the present case) in consequence of the plaintiff's own wrongful act, his breach of the agreement under which he held the premises as the defendant's tenant.

That the promise stated in the declaration is not warranted by the introductory statement therein, nor is such a promise as would be inferred or implied by law from the facts stated in the declaration.

Kelly, in support of the declaration. It may be admitted that the declaration

would be bad, if the promise were laid as resulting from the simple relation of landlord and tenant: but it is submitted that it is not so stated. It may be that the consideration for the promise is ambiguously stated, and might be insufficient upon special demurrer. There is nothing here to shew that the defendant did not enter into a written agreement, to the effect of the promise set forth in the declaration. [Parke, B. If there had been any special agreement to that effect, it ought to have been stated.]

Montagu Smith, contra, was not called upon.

LORD ABINGER, C. B. If the plaintiff originally became tenant to the defendant, without any agreement as to the eviction, the law would not afterwards impose such a liability on the defendant as is here stated. No such liability arose from the simple relation of landlord and tenant, and that, we think, is the relation on which the [461] plaintiff has declared. The promise is laid more largely than the law will imply from such a relation. In *Brown v. Crump* (1 Marsh. 567), a declaration, that in consideration that the defendant had become tenant to the plaintiff of a farm, he undertook to make a certain quantity of fallow, and to spend £60 worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, those obligations not arising out of the bare relation of landlord and tenant. The declaration is therefore bad, and there must be

Judgment for the defendant.

TREDWEN v. BOURNE. Exch. of Pleas. 1840.—Where a mining company was formed, the capital to be £30,000, in 3000 shares of £10 each; and 2000 shares only were actually subscribed for, of which the defendant took 100:—Held that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to shew that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors.—The members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines.

[S C. 9 L. J. Ex. 290; 4 Jur. 747. See *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawkin v. Bourne*, 8 M. & W. 703.]

Debt for goods sold, and on an account stated. Plea, nunquam indebitatus. At the trial before Rolfe, B., at the last assizes for Cornwall, it appeared that the action was brought against the defendant as a shareholder in the "Trewalfas Tin and Copper Mining Company," to recover the price of coals, timber, candles, &c., furnished in 1838 and 1839 to the Trewalfas Mine, in Cornwall, belonging to the company. It appeared, from the evidence of the clerk of the company, that it was formed in the year 1837, the prospectus stating that the capital was to be £30,000, in 3000 shares of £10 each. The defendant, who resided at Liverpool, took 100 shares: in all 2000 only were disposed of. There were directors, a secretary [462] and other officers, and an office in London at which the business of the company was transacted. The mines belonging to the Company were worked, and mineral raised and sold, but no profits were made by the concern. The goods in question were supplied on the order of the directors, and were necessary for the ordinary use of the mine. There was no evidence that the defendant had ever been at the mine, or had attended any meetings of the company; but two letters signed by him and several other shareholders, of the dates of November, 1837, and February, 1838, being requisitions to the directors for a meeting to remove one of their body, were put in. It was objected for the defendant, that there was no evidence to charge him in this action; that there was nothing to shew that the directors, who actually made the contract with the plaintiff, had any authority, express or implied, from the defendant to do so. The learned Judge thought there was evidence to go to the jury, and left the case to them with the direction, that if they were satisfied the defendant was a shareholder, and knew of the concern being carried on by the directors, and the parties in their employ, in the manner it was, he was liable in this action. The jury found a verdict for the plaintiff, damages 182l. 4s., leave being reserved to the defendant to move to enter a

nonsuit, if the Court should be of opinion that there was no evidence to charge the defendant.

Crowder now moved accordingly. First, this Company having been originally constituted on the condition that it should be carried on with a capital of £30,000, in 3000 shares, and 2000 only having been actually taken, the defendant cannot be liable as a shareholder, unless upon proof that he assented to its being carried on with the smaller amount of capital; *Pitchford v. Davies* (5 M. & W. 2): and there was no [463] such proof in this case. It is clear that the mere circumstance of his being a shareholder is not sufficient to render him liable: *Vice v. Lady Anson* (7 B. & C. 409; 1 M. & R. 113), *Dickinson v. Fulpy* (10 B. & C. 128; 5 M. & R. 126), *Bourne v. Freeth* (9 B. & C. 632; 4 M. & R. 512). There was no proof that the defendant had attended any meetings of the company; nor were any deeds and documents put in, to shew that he had done any act as a partner. [Parke, B. His letters clearly shew that he knew the concern had begun, and that he was dissatisfied with the management of it. The sole question is, whether there was evidence to go to the jury of the defendant's having authorized the directors to carry on the concern for his benefit.] There was no evidence whence an authority to them could be implied, to pledge his credit to persons supplying goods on their order.

But, secondly, a mining differs in this respect from an ordinary trading partnership. It is in the latter only that the members give each other a general authority to bind them as partners: per Lord Tenterden, C. J., in *Vice v. Lady Anson* (1 M. & M. 99; 7 B. & C. 411); *Dickinson v. Fulpy*. [Parke, B. A mining concern is a trading concern.] The business of it is carried on quite differently from that of an ordinary trading firm: regular calls are made as money is wanted for the purpose of the partnership, which are paid down; and the directors have only authority to manage the concern with the funds so supplied, but not to pledge the credit of individual shareholders. [Parke, B. The directors have authority to do all that it is usual to do in the management of mining companies. Alderson, B. *Dickinson v. Fulpy* was the case of a bill of exchange.] The doctrine laid down in the case of *Fleming v. Hector* (2 M. & W. 172), as [464] to the committee of a club, applies here. [Lord Abinger, C. B. A club is not a partnership for acquiring profits. The making of calls is quite consistent with a dealing on credit: the calls may not be demanded until the expiration of the credit.] If the credit of the shareholders may be pledged at all, why may it not by the drawing of a bill, as well as otherwise? [Parke, B. It may, where the drawing of bills is necessary or usual in carrying on the concern. You do not prove any engagement whereby it was stipulated that the directors should have only the limited authority you contend for: and the question is, whether there was not evidence to go to the jury, that the defendant gave them a more extended authority, viz. to do all that directors of a mining company usually do for carrying on the concern. In *Fleming v. Hector*, the rules of the club were proved, which shewed that the authority of the directors was expressly limited. If the real nature of the transaction here was, that the directors were only to manage a ready-money fund, and you had made that out, the case would be different.] It is submitted that the case is so as it stands. Here money was furnished in the first instance for carrying on the partnership. It is a question of law for the Court, whether the legal inference of authority, which the plaintiff is to make out, has been established.

LORD ABINGER, C. B. With regard to the first ground of objection, if it had been shewn that the defendant was ignorant of the fact that no more than 2000 shares had been subscribed for, and that the concern was going on upon that footing, that would have been a good ground of defence to this action. But the question is, whether the defendant's letters did not furnish evidence to go to the jury that he was cognizant of its being carried on with a smaller amount of capital than was originally intended; and I cannot say that they did not. As to the second [465] ground, it is said that a mining company, which, as was decided in *Dickinson v. Fulpy*, is not necessarily formed with the power to pledge the credit of individual members by the drawing of bills—is also not formed with power to bind each other by dealing on credit: but these are two very different propositions. Whether the directors have such a power, must depend on the general nature of the concern; it is a matter for the jury to decide upon, unless the party gives evidence to shew that their authority was expressly limited: and if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to

deal on credit for the purpose of carrying on their business. I think, therefore, the defendant has not raised a sufficient foundation to support the second objection. Being a shareholder, it was competent to him to have produced the deed of settlement whereby the members were mutually bound, if it were material to his defence. I should have left it to the jury to judge for themselves whether such companies do not ordinarily deal on credit; if they do, the shareholders are liable, unless by some evidence the party shews that in the particular case he is not liable.

PARKE, B. No doubt the plaintiff is bound to make out his case: the only question is, whether he has not here proved a *prima facie* case; if he has, the jury had a right to consider it, no answer being given on the part of the defendant. The sole question was, whether there was evidence to go to the jury, that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, I should have thought it was not sufficient. But his letters, which were put in, shewed, first, that he knew the directors were acting in the management of the partnership; and, secondly, that he was taking a personal interest in the concern: and they were evidence for [466] the jury that he authorized the directors to do what they did, for his benefit. It is said that he was deceived as to the amount of capital: but whether he knew the amount actually subscribed or not, there was proof that he authorized the directors to proceed in the management of the concern. Either he knew it, or, not knowing it, chose to authorize the directors to proceed. No point was made at the trial that this was such a partnership as could not deal on credit; if it had, the plaintiff would probably have supplied evidence on that point; and a Cornish jury would probably have said it was the constant practice to purchase materials for mines on credit: at all events, the objection was not taken. There was, therefore, a sufficient *prima facie* case for the jury. If the defendant had shewn, that by this particular contract the directors were only to deal with the actual fund put into their hands, and that they had no power to pledge the credit of the shareholders, that would have been a defence, because the plaintiff has not trusted to any representation of the defendant, or bargained personally with him. But the sole question being, whether there was a *prima facie* case for the jury, I think the two letters of the defendant, and the fact of his being a shareholder, in the absence of proof of any limited agreement on his part, constituted such *prima facie* case, and therefore that there ought to be no rule.

ALDERSON, B. concurred.

ROLFE, B. I am of the same opinion. The goods supplied by the plaintiff were of daily use in the mine; they were habitually furnished, to the amount of £820; the accounts were regularly sent up to town and audited, and this was only the balance of the last invoice on the books. It is clear what was the usual mode of dealing here, and if it had been put to the jury, there can be no doubt what their finding would have been.

Rule refused.

[467] LAMB v. VICE AND FOUR OTHERS. Exch. of Pleas. 1840.—An officer of the Palace Court entered into a bond, with sureties, to the knight marshal of that Court, conditioned for the due performance of the duties of his office; and (*inter alia*) that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the Court. Having taken insufficient bail from a defendant arrested in an action in that Court, an order was made requiring him to pay the amount of debt and costs in the action, which he disobeyed:—Held, that the knight marshal was entitled, as a trustee for the plaintiff in the action, to recover, in an action on the bond, the full amount of the debt and costs.

[S. C. 8 Dowl. P. C. 360; 9 L. J. Ex. 177; 4 Jur. 341. Applied, *Pugh v. Stringfield*, 1858, 4 C. B. (N. S.) 369; *Lloyd's v. Harper*, 1880, 16 Ch. D. 309; *In re Flavell; Murray v. Flavell*, 1883, 25 Ch. D. 97.]

Debt on bond, in the penal sum of £500. The declaration set out the condition of the bond, whereby, (after reciting that the defendant John Vice was admitted by the plaintiff, knight marshal and one of the judges of the Court of the King's Palace of Westminster, to be one of the bearers of the virges of the household of our sovereign lord the then King, and one of the officers and ministers of the Court of our sovereign

lord the then King, and of the King's palace of Westminster, during the will and pleasure of the plaintiff), it was stipulated, that if the defendant, and his followers for the time being, should and would, from time to time and at all times thereafter during the continuance of the defendant John Vice in the said place or office, well, faithfully, and honestly behave themselves in the same place or office, in all things according to the duty of the said place or office; and the defendant should and would faithfully and honestly serve and execute all such writs, process, or warrants issued out of the said Court, as should be delivered unto him, to be executed by him according to his utmost power, and should and would make a due return in all cases where a return thereof was or is required by law; and should and would, upon every arrest by the said John Vice to be made, take sufficient bail of able persons within the jurisdiction of the said Court, where the party arrested should be by law bailable, for the appearance of the party so arrested at the next Court of the said palace of Westminster after such arrest; and should and would duly return and deliver unto the said Court the said bail-bond thereupon so taken, at the next Court day after such arrest made as aforesaid: And further and also, if the said John Vice should and would from time to time and at all times thereafter observe, perform, and obey all the lawful order and orders, rule and rules of the [468] said plaintiff, or any other judge or judges of the said Court, touching and concerning himself, or his duty and behaviour, in his place as aforesaid,—then that obligation was to be void, &c. The first breach stated, that theretofore, to wit, on &c., within the jurisdiction of the said Court of the Queen's Palace at Westminster, one Richard Deane became and was indebted to one Emanuel Moses in a sum exceeding £20, upon and in respect of certain causes of action before then, and within the jurisdiction of the said Court, accrued to the said Emanuel Moses against the said Richard Deane, to wit, the sum of 46l. 16s., upon a bill of exchange for that amount, dated &c., and drawn by J. H. M. upon and accepted by the said Richard Deane, within the jurisdiction of the said Palace Court, payable two months after date to the said J. H. M., indorsed to the said Emanuel Moses for a valuable consideration, which bill, when presented for payment, was dishonoured: that the said Richard Deane being so indebted to the said Emanuel Moses, heretofore and after the making by the defendants of the said writing obligatory, and before the commencement of this suit, and whilst the defendant John Vice was such officer of the said Palace Court as aforesaid, and before the making and passing of the stat. 1 & 2 Vict. c. 110, a certain writ of *capias* was duly issued out of the said Court, directed to the bearers of the virges of her Majesty's household, and the officers and ministers of her Majesty's said Court of her Palace at Westminster, and every of them, and tested in the name of the plaintiff, as such knight marshal as aforesaid, and marked for bail for 46l. 16s. by affidavit. The declaration then alleged the delivery of the writ to the defendant John Vice, the arrest of Richard Deane, and the taking of a bail-bond from him and two sureties; and that it was the duty of the defendant John Vice duly to take only good, able, sufficient, and responsible sureties, within the jurisdiction of the said Court, in the said bond for the appearance of the said [469] Richard Deane, and not to release him from custody and arrest until he had taken such bond with good, able, solvent, and sufficient securities: That the said two sureties, J. H. and T. R., at the time of their so becoming pledges and sureties, and signing the said bond, were not, nor was either of them, nor have they, nor hath either of them, at any time since been, good, able, sufficient, solvent, or responsible sureties, within the jurisdiction of the said Court, for the said R. Deane, but that they were and each of them was, at the time of their becoming such sureties as aforesaid, wholly insufficient for that purpose, and insolvent, bad, and unable sureties in the premises; that the said R. Deane had not appeared; that the said debt had not been paid or satisfied; and that the body of the said R. Deane had not been surrendered in discharge of his bail, or otherwise. By means of which said premises, the said Emanuel Moses hath been and is wholly deprived of the benefit of the said arrest of the said R. Deane, and of the means of satisfying the said debt, and the costs and charges by him in and about his said suit in that behalf expended, and in and about the said arrest of him the said R. Deane, &c.

The second breach stated the removal of the before-mentioned cause into the Court of Queen's Bench by a writ of *habeas corpus cum causâ*; notice of special bail thereupon; notice of exception thereto; that they did not appear or justify; a rule of the Palace Court, served on the defendant, to bring in the body of the defendant Deane;

that the defendant, not regarding his duty in that behalf, but wrongfully contriving and intending to injure him the said then plaintiff Emanuel Moses, did not bring into Court the body of the said R. Deane, according &c.; and that upon an application to the said Court, at the suit and at the instance of the said E. Moses, it was ordered, in and by a certain rule and order of the said Court &c., that the [470] defendant should forthwith pay to the said then plaintiff E. Moses, or his attorney, the sum of 40l. 16s., the debt in the said last-mentioned action, together with the costs of such action, to be taxed, and also the costs of and occasioned by the said application in that behalf as aforesaid, to be likewise taxed: that this rule was personally served on the defendant, but that he did not pay, and hath not paid, to the said then plaintiff E. Moses, or to the now plaintiff, or to either of them, the said debt, interest, and taxed costs, amounting to &c., to wit, 66l. 9s. 4d., although the same was afterwards, to wit, on &c., demanded of the defendant, who had full notice of the premises; and that the defendant had not obeyed the lawful rule and order of the judges of the said Court, as aforesaid, and had therein made default contrary to the tenor and effect of the said condition, &c.

The defendants having suffered judgment to go by default, a writ of inquiry to assess damages was issued, and came on to be tried before Lord Abinger, C. B., at the sittings after last Hilary Term. The order of the Palace Court was put in and proved, and it was shewn to be the practice of that Court, whenever an order of this kind was disobeyed, to allow the party injured to bring an action on the bond, in the name of the marshal. Under the direction of his Lordship, the damages were assessed at 66l. 9s. 4d., leave being reserved to the defendant to move to reduce the amount to nominal damages.

Warren now moved accordingly. This case is one falling within the provisions of the 8 & 9 Will. 3, c. 11, s. 8, which requires the plaintiff to assign or suggest breaches of the condition of the bond: and he is only entitled to recover the amount of actual damage sustained by him, the judgment standing as a security for future damage. Two breaches are assigned: 1st, that the defendant Vice [471] has taken insufficient bail in the action against Deane, whereby Moses, the plaintiff in that action, has lost the benefit of the arrest; 2nd, that he has disobeyed an order of the Court for payment of the debt and costs to Moses or his attorney, and that no payment has been made to Moses, or to the now plaintiff. It is evident that no damage has arisen or can arise to the now plaintiff, in consequence of either of these breaches of the condition: the damages ought therefore to be nominal. The proper mode of proceeding, for the benefit of Moses, the original plaintiff, was by attachment for disobedience of the rules of Court. The plaintiff was under no obligation at common law or by statute to take such a bond as this, and cannot be considered as a trustee for Moses. A creditor may sue on an administration bond given to the ordinary, *Archbishop of Canterbury v. House* (Cowp. 140); but that is under the authority of the statute 22 & 23 Car. 2, c. 10, which requires a bond to be given in order to protect the interests of creditors and next of kin. So with regard to bail bonds; one of the objects of the stat. 23 Hen. 6, c. 9, was to secure the appearance of the defendant, in order to prevent the plaintiff from being delayed in his suit: it was not, however, until the passing of the 4 Anne, c. 16, s. 20, which made bail bonds assignable, that the plaintiff had the full benefit of the bond. [Parke, B. The party had an equity to sue in the name of the sheriff, without any assignment.] This is not a bond which the original plaintiff had any equity to sue upon, inasmuch as he had, at common law, an effectual remedy by attachment. There is no statute which requires the obligee to take such a bond for the security of third parties: and having himself suffered no substantial injury, he is entitled to nominal damages only. It is not like the case of a sheriff, who is answerable for the acts and defaults of his subordinate [472] officers, and therefore entitled to claim an indemnity from them: the plaintiff is no ministerial officer, but one of the judges of the Court.

LORD ABINGER, C. B. The plaintiff clearly was a trustee for Moses; he might sue on the bond in the plaintiff's name, or the plaintiff might sue for the benefit of Moses. Nothing is more common than for a cestui que trust to sue on a bond in the name of his trustee. If the defendant had pleaded the bankruptcy of the plaintiff, it would have been a good replication that he was suing merely as trustee.

PARKE, B. The object of this bond is not merely to indemnify the obligee from actual damage to himself: according to the practice of the Palace Court, the knight

marshal takes such a bond, as a trustee for the suitors who may really be injured by the breach of its conditions. With respect to bail bonds, even before the statute of Anne, there was an equitable right in the party to compel the sheriff to allow him to sue upon the bond in his, the sheriff's name; in such case the sheriff would surely be entitled to recover, for the benefit of the party, the full amount of damage sustained. The very form of this bond clearly indicates that the plaintiff has taken it as a trustee, for the benefit of third parties.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

[473] *BROOKE v. MITCHELL*. Exch. of Pleas. 1840.—Where an order of reference required that the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day:—Held, that the award was “published” and “ready to be delivered,” within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses: and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready.

[S. C. 8 Dowl. P. C. 392; 9 L. J. Ex. 269; 4 Jur. 656.]

This was an action of trespass. After the issuing of the writ, and before declaration, by a judge's order, dated 27th May, 1839, it was ordered that all matters in difference in the cause should be referred to two arbitrators, “so that they should make and publish their award in writing, ready to be delivered to the parties in difference, or such of them as should require the same, on or before the 1st day of June then next; and in case the said arbitrators should differ respecting the matters thereby referred, then that they should be at liberty, by a memorandum in writing to be indorsed thereon, to appoint an umpire between them in the matters thereby referred, so that the said umpire should make and publish his umpirage in writing, ready to be delivered to the said parties, or such of them as should require the same, on or before the 13th day of July next.” The arbitrators differed, and appointed an umpire, who, on the 11th July, 1839, made and executed his award, in the presence of and attested by two witnesses, to whom it was fully made known and declared at the time of its execution. On the afternoon of the 12th, the attorneys of both parties received a letter from the umpire, stating that he was about to declare his award, and desiring them to attend at his office at half-past five o'clock on that evening. They accordingly did so, when he read over to them and declared his award, and delivered it to the plaintiff's attorney. At ten o'clock, A.M., on the same day, the plaintiff died.

In Michaelmas Term. Hoggins obtained a rule to shew cause why the award should not be set aside, on the ground that it was not made and published in the lifetime of the plaintiff.

W. H. Watson and Fortescue shewed cause. This award was “made and published,” within the meaning of those words in the submission, when it was signed by the umpire, and the execution of it attested, and it thereby became his complete act. The term “publish” does not import the giving of notice to the parties; the submission is satisfied by the instruments being complete, and ready for delivery if required. It is analogous to the case of a will made under a power requiring it to be signed and published in the presence of and attested by witnesses, in which case a delivery of the will in the presence of the witnesses is equivalent to a publication of it: *Curteis v. Kenrick* (3 M. & W. 461): that being, as Parke, B., there says, “something whereby the party acknowledges that the instrument is a complete act, containing his final mind; that it is no longer ambulatory.” But further, it may be doubted whether notice is necessary at all in the case of an award. In declaring upon an award, it is unnecessary to aver that the defendant had notice of the award, unless the submission provides that notice shall be given: 2 Saund. 62 a., n. (4); *Juxon v. Thornhill* (Cro. Car. 132). In *Child v. Horden* (2 Bulstr. 143), it is said, “If a man be bound to perform the order of J. S., no notice is to be given of this, unless there be a special provision for notice to be given, but he, at his peril, being bound to take notice of this, because he hath undertaken upon himself to perform it; and where

such an undertaker is to do and perform a thing, he is to do and perform the same according to his undertaking, without any notice to him given thereof." [Parke, B. The question turns entirely on the meaning to be given to the word "publish." It is only when the act to be done is within the knowledge of one party only, that it is necessary to give notice (see *Iyse v. Wakefield*, ante, 442).] The only argument that can be raised on the other side is derived from the words of the stat. 9 & 10 Will. 3, c. 15, s. 2, which limits the time for applying to set aside an award to the last day of the next term after its [475] being "made and published to the parties." [Alderson, B. That is quite reasonable; because otherwise the time might elapse within which the award is to be set aside, without its ever having come to the knowledge of the party. The cases decided with reference to that clause of the statute—*Musselbrook v. Dunkin* (9 Bing. 605; 2 M. & Scott, 740), *M. Arthur v. Campbell* (5 B. & Adol. 518; 2 Nev. & M. 444)—depend entirely on those words: but here all that is required is, that the authority of the arbitrator should be finally exercised, and the award is perfect and complete upon its execution. The other side must contend that there is no award at all until notice.

Hoggins, contra. No award was "made and published, ready to be delivered to the parties," until the time when the parties, in pursuance of the letter of the umpire, attended to receive it from him. *Musselbrook v. Dunkin* decides that an award is "published to the parties," only when they have notice that it is ready for delivery on payment of the arbitrator's charges: and *M. Arthur v. Campbell* only establishes that the same rule is applicable, although the charges be unreasonable. Now the terms of this submission amount to the same thing; because not only must there be a publication of the award, but it must be ready to be delivered. The umpire first exercises his own mind, and makes the award; and even supposing he communicated it to the witnesses, that does not satisfy the submission: he might still keep it, and refuse to deliver it to the parties. [Parke, B. It was ready to be delivered to the parties if they had required it. After execution in the presence of two attesting witnesses, it was a complete act so far as the umpire was concerned: he could not have altered it.] There is no case which says that an arbitra-[476]-tor, before notice, cannot cancel the award, and make another. *Blondell v. Brettargh* (7 Ves. 232) is an authority in favour of the defendant. Here the award is not to be received by the party until the time mentioned in the umpire's letter. [Alderson, B. He only mentions a convenient time for them to come; would he not have delivered it if the party entitled to it had applied sooner?] In *Wilson v. Wilson* (2 Saund. 327 c., n. (3)), where, in debt on bond conditioned for the performance of an award, to be made in writing ready to be delivered to the parties in difference, or such of them as should require the same, on or before such a day, the defendant pleaded, that the arbitrators did make their award on the day limited in the condition, and that he on that day required them to deliver the award to him, but they neglected and refused so to do; and issue being joined thereon, it appeared in evidence that the arbitrators had made their award on the day, but, because it was not stamped, refused to deliver it to the defendant at his request; the jury, under the direction of Eyre, C. J., found that the arbitrators had not complied with the condition of the bond, and gave a verdict for the defendant, which was acquiesced in by the plaintiff. The words of the submission in the present case bring it within the principle established by *Musselbrook v. Dunkin*.

PARKE, B. I am of opinion that this award was sufficiently published, for the purpose of making it valid, in the lifetime of the plaintiff. For that purpose it is only necessary that the act should be complete, so far as the arbitrator is concerned; that he should have done some act whereby he becomes *functus officio*, and has declared his final mind. That is the rule to be collected from the cases of *Brown v. Lawser* (4 East, 584), and *Henfree v. Bromley* (6 East, 309); [477] and that is the meaning of the term "publication." Here the instrument was complete as an award, and the umpire could make no alteration in it, after the execution of it: he was then *functus officio*, having declared his final mind. As to the time of moving to set an award aside, it is quite reasonable that the party should have two terms from the time of notice; and I quite agree with the cases which have so laid it down, by analogy to the terms of the statute of Will. 3, "published to the parties:" but that does not affect the question whether the award is a complete instrument. *Blondell v. Brettargh* was quite a different case from the present, and is no authority either way; for there, in fact, no award had been made before the death of the party; all that the arbitrators

had done was to agree upon the minutes of an intended award. *Musselbrook v. Dunkin* was the case of an application to the Court to set aside the award, and the only question there being whether the motion was in time, the Court say that at all events an award is to be considered as published, when the parties have notice that it is ready for delivery on payment of the reasonable charges. But that case is improperly applied, when it is said to lay down the principle that the award is not complete until it is so published. In *M^rArthur v. Campbell*, the Court of King's Bench thought that the instrument was published, for the same purpose, when the arbitrator gave notice that it might be had on payment of his charges, whether reasonable or not. I think that was a correct determination; but the Court of Common Pleas were also quite right in saying, that, at all events, the time had elapsed in the former case.

ALDERSON, B. The only difference between the cases of *Musselbrook v. Dunkin* and *M^rArthur v. Campbell*, is, that the Court of Common Pleas thought there was no sufficient notice, until there was such notice, that upon pay-[478]-ment of the reasonable charges, the party had then knowledge of the award: the Court of King's Bench held, that even an exorbitant fee must be first paid, and the parties must trust to the Court to deal with the arbitrator. The latter is perhaps the more correct rule, because it leads to less dispute afterwards, whereas the former would make the time for moving to set aside the award depend upon the variable time when the Master might make his report as to the reasonableness of the charges. But all that is laid down in *Musselbrook v. Dunkin* is, that that motion was too late when two terms had elapsed after the Master's report. I apprehend that the meaning of the publication, in the rule which regulates the time for an application to set aside an award, is not the publication of the award itself, but, by analogy to the statute, publication to the parties, i.e. when they have notice of its contents, and are therefore in a situation to move to set it aside. But on the terms of this submission, the award is made and published, when the arbitrator, by some act, has expressed his final determination on the matters referred to him.

GURNEY, B. After the execution of the award, and its having been read over to the witnesses, there was as complete a publication of it as could be; the umpire could not afterwards revoke or alter it; and it was then ready to be delivered.

Rule discharged with costs.

KNILL v. STOCKDALE. Exch. of Pleas. 1840.—The Court set aside, as frivolous, a demurrer to a count on a bill of exchange by indorsee against acceptor, on the ground that (after stating that J. & C. made the bill) it stated it to be payable to the drawers' order, not then naming them: and they refused to let in the defendant to plead a plea which, as he alleged, shewed that the bill was without consideration.

[S. C. 8 Dowl. P. C. 772; 9 L. J. Ex. 204; 4 Jur. 942.]

This was an action by indorsee against acceptor of a bill of exchange. The declaration stated that S. J. and [479] J. C., on the 24th of September, 1839, made their bill of exchange in writing, directed to the defendant, and thereby required the defendant to pay to the drawers' order 101l. 2s. 6d., for value received. It then alleged, in the usual terms, the acceptance by the defendant, the indorsement by the drawers to the plaintiff, and the nonpayment.

The defendant demurred specially to the count, on the ground that the defendant was required to pay to the drawers' order; yet the count did not state the drawers' names; and that in this respect it was in an unusual form, and not conformable to the precedents.

A rule having been obtained to set aside the demurrer as frivolous,

Gurney shewed cause, and produced an affidavit of the defendant, stating, that the goods for which the bill was given were bought by the defendant of S. J. and J. C., as brokers and agents of H. & Co., and that he the defendant was not to be called upon for payment of the price of the goods, until after account sales had been furnished by H. & Co. of the sale of the goods; and on the defendant accepting the bill at the request of S. J. and J. C., the bill was to be renewed from time to time until the goods were sold and account sales rendered; that the bill was indorsed to the plaintiff without consideration or value; and that the goods had not, to the know-

ledge of the defendant, been sold, nor had account sales been rendered. Gurney contended, first, that the declaration was in form contrary to the precedents, and the demurrer could not be said to be frivolous. [Parke, B. The declaration is quite certain enough: it states that J. & C. made, that is, drew, the bill, and that it was made payable to the drawers', that is, their own, order. The rule must be absolute.] He then applied to be let in to plead *de novo*, upon the grounds stated in the affidavit, which shewed there was no consideration for the bill. [480] [Parke, B. The affidavit states a parol agreement for altering the term of the bill as it appears on the face of it: it has been expressly decided that such an agreement cannot be given in evidence to vary the contract expressed in the bill: *Moseley v. Hanford* (10 B. & C. 729). At all events, you ought to have taken your stand before, and pleaded to the declaration.]

Per Curiam. Rule absolute.

ERDY v. MARTIN. Exch. of Pleas. 1840.—A writ of *ca. sa.*, issued after the passing of the 1 & 2 Vict. c. 110, but before the promulgations by the Judges of the forms of writs of H. T., 3 Viet., commanded the sheriff to take the defendant to satisfy the debt and costs, together with interest at the rate of £4 per cent., and to have that money, with such interest, before the Court, &c., and to all such things as by the statute of 1 & 2 Viet. he was authorized and required to do in that behalf:—Held, that the party might alter the writ, conformably to the additional remedies given by the statute, although no new form had yet been promulgated by the Judges: and that the above form of writ was good.

[S. C. 8 Dowl. P. C. 342; 4 Jur. 537.]

In this case the defendant had been arrested upon a writ of *capias ad satisfaciendum*, tested in November, 1839, (after the passing of the stat. 1 & 2 Viet. c. 110, but before the issuing of the new forms of writs framed by the Judges under that statute), which, after commanding the sheriff, in the usual form, to take the defendant, &c., to satisfy the plaintiff the debt and costs, proceeded thus—"together with interest upon the said two several sums of money, at the rate of £4 per cent. per annum, from the 28th day of November, in the year of our Lord 1839, on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said J. Erdy, for his damages and interest as aforesaid, and that you do all such things as, by the statute passed in the second year of our reign, you are authorized and required to do in this behalf."

[481] W. H. Watson moved to set aside the writ, and discharge the defendant out of custody, on the ground of irregularity. This writ neither follows the old precedents, nor the new form promulgated by the Judges, which, however, did not come into operation until the first day of the present term [Parke, B. The 17th section of the 1 & 2 Viet. c. 110, enacts, that every judgment debt shall carry interest at the rate of £4 per cent. per annum, from the time of entering up judgment: and as the statute gives the additional right to interest, what objection can there be to the writ being altered accordingly? The Judges are empowered by the statute to frame new forms of writs, and when they are promulgated they must be followed: but in the meantime, why should not the plaintiff have the benefit of the statute, making the necessary alteration in the writ? There is nothing in the statute to compel the use of the old form, until the new writs are framed: the 20th section enacts, "that such new or altered writs shall be sued out of the Courts of law, &c., as may by such Courts be deemed necessary or expedient for giving effect to the provision of the act, and in such forms as the Judges of such Courts respectively shall from time to time think fit to order." But for that provision, parties would not be bound by the forms issued by the Judges, but might adapt the writ to the present state of the law.] The statute undoubtedly enacts, that every judgment debt shall carry interest, yet the sheriff cannot levy it under a writ of *ca. sa.* [Alderson, B. The form of the writ is in accordance with the present practice.] Under a writ of *ca. sa.* it is the duty of the sheriff not to take the money; it is an escape if he does. [Parke, B. The effect of the writ is to keep the defendant in custody until he pays the debt and the interest

also.] This writ also requires the sheriff to do all such things as by the statute he is required; the new form contains no such words as those.

[482] PARKE, B. I am of opinion that no rule ought to be granted. The legislature having given a more extensive remedy on executions, the plaintiff was at liberty to alter his writ accordingly, although the Judges had not promulgated any new form of writ for that purpose. Indeed, I am disposed to think that the rule of Hilary Term, 2 Vict., was itself sufficient to authorize him to make the necessary alteration.

ALDERSON, B., concurred.

Rule refused.

MORTIMORE v. WRIGHT. Exch. of Pleas. 1840.—The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child: and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them.—The defendant's son, an infant of 20 years of age, had lodged for some time with the plaintiff, during a part of which he had earned wages, and paid for his board, &c. He afterwards fell ill, and was unable to pay for the necessaries with which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be 21, and would then be able to pay what he owed the plaintiff himself:—Held, that this letter was no admission of a liability in the father.

[S. C. 9 L. J. Ex. 158; 4 Jur. 465. Approved, *Shelton v. Springett*, 1851, 11 C. B. 452. Referred to, *Bazeley v. Forder*, 1868, L. R. 3 Q. B. 565.]

Debt for board and lodging furnished to the infant son of the defendant, and for nursing, attendance, and necessaries supplied to him during sickness, with counts for money paid and on an account stated. Plea, nunquam indebitatus. At the trial before Rolfe, B., at the Middlesex Sittings in Hilary Term, it appeared that the defendant's son, who was between nineteen and twenty years of age, lodged with the plaintiff from May, 1837, to September, 1839, when he came of age. For the last six or seven months of that time he was too ill to follow his usual occupation, and was supplied with necessaries and attendance by the plaintiff, without making any payment for them. He had previously earned £1 a week, and had from time to time paid his bills to the plaintiff. No proof was given of any orders from, or request by, the defendant to the [483] plaintiff to supply his son with anything: but the following letter from him to the plaintiff was relied on as an admission of his liability:—

“Yoxford, August 9, 1839.

“Mrs. Mortimore,—I am sorry to hear Joseph is in such a bad state of health. You have wrote to me for money, but I cannot advance any at this time, being so near harvest that the farmers want all they have to pay their men; but Joseph will come in possession of upwards of £80 on September the 6th, 1839, being 21 years old that day, and then he can pay you what he owes you himself.—Yours respectfully,
“WILLIAM WRIGHT.”

It was contended for the defendant, that there was no evidence to go to the jury of any contract by which the defendant was bound to pay the debts in question, and that the plaintiff ought to be nonsuited. The learned Judge inclined to that opinion, but on the authority of *Blackburn v. Mackey* (1 C. & P. 1), which was cited for the plaintiff, he declined to nonsuit. The plaintiff's letter, to which the above was an answer, was then put in as a part of the defendant's case:—

“Great Ormond Yard, August 6th, 1836.

“Sir,—I am extremely sorry to be obliged to trouble you in this manner; but ever since the first night your son Joseph came to London, I have had him lodging in my house: I have acted to him in every respect the same as a mother, and for the last six months he has not been able to pay me one penny, and during his illness I boarded and attended to him; that he now owes me 10l. 13s. 9d., and part of it lent money: and

I am so much distressed by losing so much by others, that has [484] compelled me to write to you, which Joseph's cousin can vouch for, as he is well acquainted with the parties. Sir, if you will be so kind as to advance me the money, or a part of it, you will certainly do an act of charity, for I am in the greatest want of it. If you can persuade your son to come home, I think he might soon be better, otherwise I think he will soon go into a decline, for he looks very ill. Sir, if you will please to send me an answer as soon as possible, you will much oblige your humble servant,

"ELIZABETH MORTIMORE."

The learned Judge directed the jury, that before they could find for the plaintiff, they must be satisfied that the defendant, by his letter, meant to admit an original liability on his part to pay his son's debts. The jury, however, found for the plaintiff, damages 13l. 6s., the learned Judge reserving leave to the defendant to move to enter a nonsuit. In Hilary Term, Knowles obtained a rule accordingly, or for a new trial, against which

Lee and Horry now shewed cause. The letter of the defendant was sufficient evidence of liability to go to the jury, and the learned Judge was right in refusing to nonsuit. The case of *Blackburn v. Mackey*, which was cited at the trial, is directly in point. There, a letter written by the father of a young man under twenty-one, who had been supplied with clothes by a tailor, certainly not containing terms any stronger in acknowledgment of a liability than this, was held by Lord Tenterden to be evidence for the jury, to say whether it admitted an original liability. The fair inference from the defendant's letter was, that if he had been in funds, he would have paid the plaintiff. [Lord Abinger, C. B. In the case cited, there was an express promise to pay the first bill, if sent.] Although it was clear no contract existed on his part before. [Parke, B. The words were equivocal; it might be either that he was willing to pay as a favour, or that [485] he made no objection in fact or in law to his liability on the first bill.] But further, here the son continued afterwards to board with the plaintiff; and after notice to the father of the son's illness, and that necessaries were being supplied to him, he ought to have directly repudiated any liability, otherwise he is bound to pay for them. In *Nichole v. Allen* (3 C. & P. 36), which was an action for board and lodging furnished to an illegitimate child of the defendant, it was proved that he knew of her being with the plaintiff, and had formerly allowed £12 a year for her support; and Lord Tenterden there said—"Leaving out of the case all about the allowance, it stands thus: he knows where she is, and allows her to remain there:" and again—"There is not only a moral but a legal obligation on the defendant to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shewn that she is maintained in the plaintiff's house, and he knows it; and it then lies on the defendant to shew that she is there against his consent, or that he has refused to maintain her any longer at his expense." [Lord Abinger, C. B. That is only a *nisi prius* decision, and I cannot assent to any such doctrine.] *Law v. Wilkin* (6 Ad. & E. 718; 1 N. & P. 697), was a decision in *banc*. There a boy at school had been supplied with clothes by the plaintiff, had taken them home at the holidays, and brought them back to school; and it was held, (overruling the opinion of Parke, J., who had nonsuited at the trial), that these facts were evidence to go to the jury of an implied authority from the father to furnish the clothes. [Lord Abinger, C. B. If that be so, I am sorry for it: I cannot concur in the decision. Parke, B. But for that decision, I certainly should have thought there was no single fact in that case to shew the authority of the father, [486] but only mere conjecture.] Here the defendant's letter raises an inference that the previous payments by the son were payments by the father through the instrumentality of the son.

Then, as to the question of a new trial, the two letters taken together, with the fact of the defendant's allowing his son to remain with the plaintiff, after her request that he would take him home on the ground of his ill health, were sufficient evidence from which the jury might reasonably infer that he authorized his continuing there at his charge.

Knowles, *contra*, was stopped by the Court.

LORD ABINGER, C. B. I am clearly of opinion that there was no evidence for the jury in this case, and that the plaintiff ought to have been nonsuited. The learned Judge was anxious, as Judges have always been in modern times, not to withdraw

any scintilla of evidence from the jury ; but he now agrees with the rest of the Court, that there ought to have been a nonsuit. In the present instance, I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. In the present case, it is not pretended that there is any evidence whatever to charge the defendant, independently of the letter written by him, which is relied on for that purpose : but the interpretation which is sought to be [487] put upon that letter is no respect warranted by the terms of it. [His Lordship read the letter.] There is nothing whatever in this letter to shew any intention to acknowledge a debt due from the writer ; on the contrary, the father insists that the son, and not himself, is the debtor, and refers the plaintiff to the son for payment. This is rendered even more clear by the former letter of the plaintiff, to which the defendant's is an answer ; and it is manifest that no admission of any liability whatever was intended, or even expected. With regard to the case in the Court of King's Bench, of *Law v. Wilkin*, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts which do not appear in the report ; but as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative : which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted ; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts ; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person ; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices.

[488] PARKE, B. I am of the same opinion, and concur in the observations which have fallen from my Lord Chief Baron ; although I should have acted as my Brother Rolfe did at the trial, in declining to nonsuit, from the doubt created by the case of *Blackburn v. Mackey*, and in the expectation that the jury would find for the defendant, which they undoubtedly ought to have done, after the additional evidence given by him. We are now, however, to decide whether, at the time when that objection was taken by Mr. Knowles at the trial, there was any evidence to go to the jury ; and I am of opinion that there was not. It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts ; except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability ; but the mere moral obligation to do so cannot impose upon him any legal liability. Then, did the evidence in this case carry it further ? All the facts which were in evidence at the trial were directly opposed to the notion that the defendant had admitted any liability on his part, with the exception of his letter, which, as explaining its own purport, was rightly admitted in evidence, without that to which it was an answer. That letter is to be read according to the ordinary import of its language ; and so reading it, I cannot find in it any admission of liability : it is not even equivocal in its terms, but directly refers to the debt in question as one which the son himself owed ; and it is quite consistent with every word of it, that the father was willing to make an advance to the plaintiff by way of gift, if it had been in his power. There was no proof of any contract in this case, which was absolutely necessary to render the defendant liable ; and whatever may be the moral obligations of parties, juries must not be allowed to make them contract without legal evidence. The present case is distinguishable from *Blackburn v. [489] Mackey*, which may possibly be supported, although I doubt much whether, even in that case, there was any evidence for the jury.

ROLFE, B. I am of the same opinion. Had it not been for the case of *Blackburn*

v. Mackey, which was cited at the trial, I should certainly have nonsuited the plaintiff; but, upon reflection, I doubt whether in that case there was any evidence for the jury, and I am clearly of opinion that none was given in this case. After the evidence given for the defendant, the case became still stronger against the plaintiff, and I quite expected a verdict for the defendant.

Rule absolute to enter a nonsuit.

REGINA v. THEOPHILUS LANE. Exch. of Pleas. 1840.—Under the stat. 25 Geo. 3, c. 35, s. 1, the interest of a crown debtor in leaseholds renewable on lives, may be sold.—The Court refused, at the instance of the Crown, to direct a sale by private contract, but referred it to the Remembrancer to certify which was the most advantageous mode of selling the property.

Waddington applied for an order of this Court for the sale of a leasehold interest, which had been extended at the suit of the Crown. The defendant having been a defaulter, an extent issued in the year 1768, under which a lease renewable on lives, held by him from the Custos and Vicars of the Collegiate Church of Hereford, was seized by the Crown, and the profits had been ever since taken by receivers appointed by the Crown, and the leases regularly renewed to them. The question was, whether a leasehold interest came within the words of the statute, 25 Geo. 3, c. 35, s. 1, which empowers the Court to direct the sale of the “right, title, estate, and interest” of any debtor to the Crown, and of his heirs and assigns, in any “lands, tenements, or hereditaments, which have been or shall hereafter be extended under any writ of extent,” &c. The lands were required for the site of a new church.

[490] PARKE, B. The crown debtor has still an equitable interest in the renewals; the crown receiver would be a trustee for him as to the surplus after satisfaction of the debt of the Crown. The legal interest of the receiver would be disposed of by his own act, independently of any order of the Court; but you want the order, in order to dispose of the equitable interest of the crown debtor. You may take an order.

Order granted.

On a subsequent day, Waddington applied for an order of the Court to the Queen's Remembrancer, to direct a sale by private contract. That officer, considering a sale by auction the usual course, had declined to order a private sale without the authority of the Court.

The Court directed that the Remembrancer should certify to them which mode of selling the property was, in his judgment, the most advantageous for the interests of all parties.

WILD AND BAUGH v. WILLIAMS AND ANOTHER. Exch. of Pleas. 1840.—The Court will not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud is made out between the releasor and the defendant. Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied.

[S. C. 9 L. J. Ex. 277.]

Sir F. Pollock had obtained a rule to set aside a plea *puis darrein continuance* in this action, of a release given by the plaintiff Baugh to the defendants. The action was for work done by the plaintiffs, under a joint contract, for the defendants. The work was begun in February 1837; in May 1838, Baugh ran away, only £7 being then due to the plaintiffs: the plaintiff Wild worked on until the following August, and now brought this action in the joint names of himself and Baugh, for an alleged balance due in respect of the whole work. Baugh had made an affidavit in support of this application, in which he deposed when he executed the release, he did not know that he [491] was signing anything more than an acknowledgment that no money was due to him for any work done after he went away.

R. V. Richards shewed cause. The Court will not set aside this plea, unless a case

of gross fraud be made out, which is not the case here : *Herbert v. Pigott* (2 C. & M. 384), *Jones v. Herbert* (7 Taunt. 421). Besides, it must, at all events, appear that Baugh was a mere name, having no real interest in the action, whereas this is a case of two joint contractors. *Innell v. Newman* (4 B. & Ald. 429) which may be referred to, is quite distinguishable; there the action was brought by a feme covert, as executrix, in the name of her husband, from whom she lived apart, under an agreement that she should enjoy, as her separate property, all effects she might acquire. [He was then stopped by the Court.]

Sir F. Pollock and Whateley, contra, urged, that Baugh clearly had no real interest in the action, and that Wild was in substance the only plaintiff, and Baugh a mere trustee for him.

LORD ABINGER, C. B. We should be pushing the case much further than authority or principle warrants, if we yielded to this application. It is not enough that the releasing party, on taking the accounts, would be a debtor to his co-contractor. If this was a fraudulent release, the plaintiffs can raise that issue on the plea.

PARKE, B. If there was fraud on Baugh himself, so that he is not bound by the release, that will be a good replication. This is an application to the equitable jurisdiction of the Court, and, in order to its being granted, [492] fraud must be shewn as between the releasor and the releasee. That is not done; not even the first essential step is made out, namely, that Baugh was in fact a mere trustee, much less that the defendants knew him to be so.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged with costs.(a)

VAUGHAN v. WATT. Exch. of Pleas. 1840.—On the 24th July goods were pledged with the defendant, a pawnbroker, in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff Vaughan, but it did not appear that this fact was then known to the defendant. A few days afterwards, the same person applied to the defendant for a copy of the duplicate, and a form of declaration of the loss of it, pursuant to the stat. 39 & 40 Geo. 3, c. 99, s. 16, and 5 & 6 Will. 4, c. 62, s. 12. On the 6th August, the plaintiff produced the duplicate to the defendant, and demanded the goods, tendering the money advanced on them and interest, but the defendant refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the defendant then (on the 9th August) learnt that the party who pledged the goods was the plaintiff's wife:—Held, that upon these facts, the Judge at the trial was wrong in directing the jury that the detention of the goods was in point of law a conversion; and that he ought to have left it to them to say whether the defendant had a bona fide doubt as to the title to the goods, and if so, whether a reasonable time for that doubt to be cleared up, by the party's going before a magistrate and verifying the declaration, pursuant to the 39 & 40 Geo. 3, c. 99, s. 16, had elapsed on the 6th of August; and if it had, that the refusal then to deliver them to the plaintiff amounted to a conversion.

[S. C. 9 L. J. Ex. 272.]

Trover for different articles of wearing apparel, &c. Pleas: first, not guilty; secondly, that the goods were not the property of the plaintiff: on which issues were joined. At the trial before Rolfe, B., at the Middlesex Sittings in Hilary Term, the following appeared to be the facts of the case:—On the 24th July, 1839, the goods in question were pledged with the defendant, a pawnbroker, by a female of the name of Hubbard, in the name (as the defendant understood it) of Mary Warne, and the duplicate was so made out. On the next day he was sent to by that person, (whom he did not then know, but who afterwards proved to be the plaintiff's wife), to say that she had lost the duplicate, and she demanded and obtained from him a copy thereof, and also a form of a declaration of the loss of it, pursuant to the stat. 39 &

(a) See *Crook v. Stephen*, 5 Bing. N. C. 688.

40 Geo. 3, c. 99, [493] s. 16, (a) and 5 & 6 Will. 4, c. 62, s. 12. (b) Some days afterwards, upon an allegation that this document also [494] was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to the police magistrate at Hatton Garden, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance on the following day, when he attended accordingly, but was compelled to go away before the case was called on. On the 9th, however, the parties again attended before the magistrate; and the plaintiff then stated that it was his wife by whom the goods had been pledged. The magistrate, however, after hearing the circumstances, declined to interfere. The plaintiff then brought this action, the writ being sued out on the 21st August. It was contended for the defendant, that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned Judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might, in that case, never have it in his power to recover possession of them; and under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit. The jury were discharged as to the second issue.

G. T. White having accordingly obtained a rule for a nonsuit, or for a new trial, (citing *Isaac v. Clark* (2 Bulst. 312), and *Green v. Dunn* (3 Camp. 215, n.)),

(a) Which enacts, "that in case any such note or memorandum as aforesaid shall be lost, mislaid, destroyed, or fraudulently obtained from the owner or owners thereof, and the goods and chattels mentioned therein shall remain unredeemed, then and in every such case the pawnbroker or pawnbrokers with whom the said goods and chattels were so pledged, shall, at the request and application of any person or persons who shall represent himself, herself, or themselves to the pawnbroker as the owner or owners of the goods and chattels as aforesaid, deliver to such person or persons so requesting and applying for the same, a copy of the note or memorandum so lost, mislaid, destroyed, or fraudulently obtained as aforesaid, with the form of an affidavit of the particular circumstances attending the case, printed or written, or in part printed and in part written on the said copy, as the same shall be stated to him or her by the party applying as aforesaid; for which copy of such note or memorandum, and form of affidavit, in case the money lent shall not exceed the sum of five shillings, the pawnbroker shall receive the sum of one halfpenny; and in case the money lent shall exceed the sum of five shillings, and not exceed the sum of ten shillings, the pawnbroker shall receive the sum of one penny; and in case the money lent shall exceed the sum of ten shillings, the pawnbroker shall receive the like sum of money as he is entitled to receive and take on giving the original note or memorandum, such money to be paid by the party applying for the same at the time of making the said application; and the person or persons having so obtained such copy of the note or memorandum, and form of affidavit, as aforesaid, shall thereupon prove his, her or their property in, or right to such goods and chattels, to the satisfaction of some justice of peace for the county, riding, division, city, town, liberty, or place where the goods or chattels shall have been pledged, pawned, or exchanged, and shall also verify on oath or affirmation, as the case may be, before the said justice, the truth of the particular circumstances attending the case mentioned in such affidavit or affirmation, to be made as aforesaid, the caption of such oath or affirmation to be authenticated by the handwriting thereto of the justice before whom the same shall be made, and who shall and is hereby required so to authenticate the same; whereupon the pawnbroker shall suffer the person or persons proving such property to the satisfaction of such justice aforesaid, and making such affidavit or affirmation as aforesaid, on leaving such copy of the said note or memorandum, and the said affidavit or affirmation, with the said pawnbroker to redeem such goods or chattels.

(b) Which substitutes, in lieu of any oath, affirmation, or affidavit, required by any acts for regulating the business of pawnbrokers, a declaration to the same effect.

started off with the said carriage, without a driver or other person to manage, govern, or direct the same, whereby the said carriage of the defendants then ran and struck with great force against the said carriage of the plaintiff, and thereby greatly crushed and injured the same, and the plaintiff was thrown with great force and violence out of his carriage upon the ground, &c. &c.

Pleas, first, not guilty; secondly, that the said carriage and horses in the declaration mentioned, or either of them, were not under the care of the defendants, or either of them, in manner and form, &c.; upon which issues were joined.

At the trial before Maule, B., at the Middlesex Sittings in last Michaelmas Term, the following appeared to be the material facts of the case:—

The defendants are elderly ladies resident in Moore Place, Lambeth, keeping a carriage of their own, but hiring horses and a coachman from a job-mistress of the name of Mortlock. They generally had the same horses, [500] and always the same coachman, a man of the name of Kemp, (the only regular coachman in Miss Mortlock's employ), to whom they paid 2s. for each drive, having told him when they first set up their own carriage, three years ago, that they would pay him that sum. He received regular weekly wages from Miss Mortlock. The defendants sometimes took the coachman and horses into the country for several weeks, when they paid him a certain sum per week. They had a plain coachman's coat and a livery hat, for which Kemp was measured, and which he wore when driving the defendants, and took off on his return to their house, where the coat and hat were hung up in the passage. On the 21st December, 1838, he went into the defendant's house to pull off the hat, (he did not wear the coat that day, having his own box coat on), and left no one in charge of the horses: they started off, ran against the plaintiff's chaise, which was drawn up on the side of the footpath, threw him out, and seriously injured him, and damaged the chaise.

This being the state of facts, it was contended for the defendants that Kemp was, under the circumstances, the servant, not of the defendants, but of the job-mistress, and that the defendants were not responsible. The following cases were referred to; *Laugher v. Pointer* (5 B. & C. 547), *Smith v. Lawrence* (2 Man. & R. 1), *Brady v. Giles* (1 M. & Rob. 494), *Fenton v. Dublin Steam Packet Co.* (8 Ad. & E. 835; 1 P. & D. 103), *Randleson v. Murray* (8 Ad. & E. 109; 3 N. & P. 239). The learned Judge thought there was evidence to go to the jury, but gave the defendants' counsel leave to move to enter a nonsuit: it appearing to him that there was some evidence that the carriage was under the defendants' care, both in respect of their choosing this particular coachman, and also in respect of his having gone to put [501] back their hat, and left the carriage unattended to. And he told the jury, that if the coachman was, at the time the horses ran away, acting as the servant of the defendants, they were liable: and that he thought he was acting as such servant, if the job-mistress appointed him specially at the defendants' desire, or if in putting back his hat he acted for the defendants. The jury found a verdict for the plaintiff, damages 198l. 9s.

Kelly having obtained a rule nisi for entering a nonsuit, pursuant to the leave reserved,

Thomas (Sir F. Pollock being with him) shewed cause at the sittings after Hilary Term. The direction of the learned Judge was right, and the verdict ought to stand. The only question is, whether the carriage and horses could be said to be in the care of the defendants, in the sense imputed by the declaration. The important case on this subject is that of *Laugher v. Pointer*, in which the judges of the Court of King's Bench were equally divided. There the owner of the carriage hired a pair of horses of a stable keeper to draw it for a day, and the latter provided the driver, who was paid by gratuities given by the owner of the carriage. Lord Tenterden and Littledale, J., held that the owner of the carriage was not liable to be sued for an injury done by his negligent driving; Bayley, J., and Holroyd, J., being of a contrary opinion. The present case, however, is distinguishable from that, and falls within the exceptions stated by the two former learned Judges to the doctrine there laid down. Lord Tenterden says—"In the case now before the Court, the hirer makes no contract with the coachman; he does not select him; he has no privity with him; he usually gives him a gratuity, but he is not obliged by law to give him anything; and from thence I conclude that the coachman is not the servant of [502] the hirer; and if the coachman is not the servant of

the hirer on such an occasion, but is chosen and intrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses." And again—"Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages, and the furnishing a livery, may also be circumstances worthy of attention, because they also may, in some cases, be considered as evidence of a choice and a contract." In the present case the defendants exercised a choice in the selection of this particular coachman; they paid him, by agreement, a certain sum for each drive; and they supplied him with livery, which he was changing in the house when this accident occurred. The case, therefore, goes far beyond that of *Laugher v. Pointer*, and falls within the observations of all the judges in that case. In *Randleson v. Murray*, the defendants, who were occupiers of a bonded warehouse in Liverpool, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. While being lowered, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held liable, Lord Denman, C. J., saying, "It makes no difference whether they employed people of their own to move their goods, or procured others who were likely to move them more expertly, and left it to their superintendence." In *Fenton v. Dublin Steam Packet Company*, where the plaintiff's vessel was sunk by a steam-boat, of which the defendants were owners, but which was at the time chartered [503] to another for a voyage, his Lordship says—"The charterer may be answerable also; but unless the charter-party has interfered with the general control of the owners, they are clearly liable." [Alderson, B. "Interference" there means some interference which causes the injury.] Such was the case here, the injury having occurred while the coachman was absent for the defendants' benefit. It was their duty to send somebody to take care of the horses, while he was acting in compliance with their directions for their benefit. If a party holds himself out to the world as the owner of a vehicle, by the negligent driving of which damage is occasioned, he is liable, though he has ceased to be the actual owner: *Stables v. Eley* (1 C. & P. 614). Here the defendants were clearly, in every respect, the ostensible owners of the carriage and horses. But further, the terms of their agreement with the coachman, giving him a stated sum for each drive, which was evidently a regular part of his livelihood, made him their servant. In *Brady v. Giles* (1 M. & Hob. 494), a case similar to the present, Lord Abinger, C. B., refused to nonsuit, holding it to be, in all such cases, a question for the jury whether the parties were acting as the servants of the owner or of the hirer of the carriage. The learned Judge did the same in the present case, and the jury have found that the coachman was the servant of the defendants. But independently of any special circumstances in the present case, the plaintiff contends that the doctrine laid down by Bayley, J., and Holroyd, J., in *Laugher v. Pointer*, is the correct one, and that the coachman is in point of law the servant of the hirer. He cited also *Illidge v. Goodwin* (5 C. & P. 190), and *Croft v. Alison* (4 B. & Ald. 590).

Channell, Serjt., (Kelly with him), in support of the [504] rule. The special circumstances relied on in this case do not distinguish it from the case of *Laugher v. Pointer*. In the first place, there was no bargain for any specific wages to be paid by the defendants to Kemp the coachman, but merely an understanding that he should receive a certain gratuity; and he was paid regular weekly wages by his employer. The same was the state of facts in *Laugher v. Pointer*. Nor was he selected by the defendants to drive them, he being the only regular coachman in the yard. When Lord Tenterden, in *Laugher v. Pointer*, refers to "length of time" as a circumstance which may indicate the approbation and continuance of the particular coachman, he means to refer to some definite period of employment by the hirer; and all the circumstances specified by him, of time, wages, livery, &c., were meant to be important, as indicating "a choice and a contract." But can two parties be concurrently liable? Convenience is against it, as leading to multiplicity of actions. And if one only be liable, convenience also indicates that the action should be against the party who originally hired the driver as a servant. And this is consistent with justice, because he is the most culpable, if the driver is not trustworthy or skilful. Holroyd, J., in *Laugher v. Pointer*, expressed an opinion that one party only could be liable. It is

clear that Kemp was in the service of Mortlock for this particular employment and duty. Then is there anything to warrant the inference, that in suffering him to drive them, the defendants not only evinced a choice, but entered into a contract? [Parke, B. It appears to us that there are no special circumstances which distinguish the present case, and that we must decide the difference between the Judges in *Laugher v. Pointer*. There is no satisfactory evidence of any selection, by which this man was made the defendant's servant; the question is therefore the same as in that case.] All that could be urged on both sides of the question was fully stated in that case, [505] and it is needless to repeat the arguments to be found there.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by

PARKE, B. This case was tried before my Brother Maule, when he had a seat in this Court. A verdict was given for the plaintiff, and points reserved, which were argued before my Brothers Alderson and Rolfe, and myself, at the sittings after last term. The declaration was in case. It stated, that the plaintiff was possessed of a chaise and horse which he was driving; that the defendants were possessed of a chariot, to which two horses were harnessed, which said carriage and horses were then under the care of the defendants; and that the defendants so carelessly conducted themselves, that through the carelessness and negligence, want of proper caution, and improper conduct, of the defendants, the horses so harnessed started off with the carriage, without a driver or other person to manage, govern, or direct the same, whereby the defendants' carriage was struck against the plaintiff's carriage, and the plaintiff sustained personal injury.

There were two pleas—first, not guilty; secondly, that the carriage and horses, or either of them, were not under the care of the defendants, or either of them.

On the trial, it appeared that the defendants were two old ladies, who had been in the habit of employing a person of the name of Mortlock, and his daughter, who succeeded him in the business of a job^{the}ber, to supply them originally with a fly and horse and driver, by the day, at a certain sum for the whole; but about three years ago they became possessed of a carriage of their own, since which they had been furnished by Miss Mortlock occasionally with a pair of horses and a driver, by the day or drive, for which she charged and received a certain sum. She paid the driver by the week, and the defendants besides gave him a gratuity for each day's service. For the last three years, the same coachman constantly drove the defendants' carriage, and they had purchased a livery hat and coat for him, which, it appeared, were usually hung up in the passage of the defendants' house, and the coachman, before he drove, was in the habit of going in and putting on the coat and hat, and when he had finished the drive, of returning and replacing them. On the day in question, he wore the hat only, and when he had returned home with the ladies, and after they had got out of the carriage, the coachman went in to replace the hat, and left the horses without any one to hold them, and they set off whilst the coachman was so occupied, and ran against the plaintiff's carriage, overturned it, and inflicted serious personal injury on the plaintiff, besides doing damage to the carriage itself. It appeared that there was no other regular coachman in the job-mistress's yard, but when he was otherwise employed, some other person in the yard acted as coachman, but never for the defendants since they had their own carriage, though occasionally before.

It was objected, that the defendants were not liable, because the damage was caused by the neglect of the coachman, who was not their servant, but the servant of his mistress, Miss Mortlock.

For the plaintiff, it was contended, that they were liable for the coachman's neglect, independently of the special circumstances of the case; and that there were besides two peculiar grounds, on which the defendants ought to be held responsible. First, that there was evidence to go to a jury of selection and choice by the defendants of the particular coachman, so as to make him their servant; [507] and secondly, that when the coachman went in to leave his hat, he was, in so doing, acting as the servants of the defendants, and therefore his neglect was theirs.

The jury found a verdict for the plaintiff, with 198l. 9s. damages, and my Brother Maule reserved liberty to move to enter a nonsuit.

On the argument, in the course of which the principal authorities were referred to,

we intimated our opinion that we should be called upon to decide the point which arose in the case of *Laugher v. Pointer*, and upon which not only the Court of King's Bench, but the twelve Judges differed; as the special circumstances above mentioned did not seem to us to make any difference: and we are still of opinion that they did not. It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my Brother Maule thought there was some evidence to go to the jury, of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the only regular coachman of the job-mistress's yard; when he was not at home, the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely [508] to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is some evidence to go to a jury, of any fact, it seems to us, that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, without leaving any one at the horses' heads. If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime.

Besides these two circumstances, the fact of the coachman wearing the defendants' livery with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been [509] liable on such contract: but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is matter of evidence only of the man being their servant, which the fact at once answers.

We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer*, in which the able judgments on both sides have, as is observed by Mr. Justice Story in his Book on Agency, page 406, "exhausted the whole learning of the subject, and should on that account attentively be studied." We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale.

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.

Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer—he who had selected him as his servant, from

the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another: consequently, a third person entering into a [510] contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says in the case of *Bush v. Steinman* (1 Bos & P. 404), and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, "shock the common sense of all men:" not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street. It is true that there are cases—for instance, that of *Bush v. Steinman*, *Sly v. Edgley* (6 Esp. 6), and others, and perhaps amongst them may be classed the recent case of *Randleston v. Murray*—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother Littledale, in his very able judgment in *Laugher v. Pointer*.

The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: [511] but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them. It is unnecessary to repeat at length the reasons given by my Brother Littledale for this distinction, which appear to us to be quite satisfactory; and the general proposition above referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue.

Rule absolute.

THE ATTORNEY-GENERAL v. DUNN AND ANOTHER. Exch. of Pleas. 1840.—A British subject, domiciled and having real and personal estate in England, went abroad and purchased, in 1828, the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March, 1832, he sent to R. several cases of plate, books, and wearing apparel. In September, 1832, he made his will in London. In the same month he left England and went to Florence, where

he remained two months, and thence to R.; he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till October, 1833, when he went to Rome, and there lived in furnished lodgings until his death in February, 1834:—Held, that upon these facts there was no evidence of the testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an intention to make R. his domicile: that his English domicile therefore remained, and legacy duty was consequently payable on the bequests contained in his will.—Quere, whether if he had obtained a domicile abroad, legacy duty would not still have been payable.

[Questioned, *President of United States v. Drummond*, 1864, 33 Beav. 449. Not applied, *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1; *Lyull v. Paton*, 1856, 25 L. J. Ch. 746.]

This was an information against the defendants, as executors of Thomas Boone Tattnall Boone, deceased, for legacy duties. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Hilary Term, a special ver-[512]-dict was taken by consent for the opinion of this Court, which stated in substance as follows

Thomas Boone Tattnall Boone, the testator in the pleadings mentioned, was born in or about the month of June 1787, at Nassau, New Providence, in the Bahama Islands. John Mubryne Tattnall, the father of the said T. B. T. Boone, was a British-born subject, and, at the time of the birth of the said T. B. T. Boone, resided at Nassau aforesaid, and then held a situation in the service of his then Britannic Majesty King George the Third. The said T. B. T. Boone, during his infancy, visited England for the purpose of his education; and in or about the 8th of July, 1806, was admitted a student at the Inner Temple, with a view of his being called to the English bar; and on the 28th of June, 1816, he was called to the English bar, and upon that occasion took the usual oaths, among which were three oaths in the following form [setting out the oaths of allegiance, abjuration, and supremacy]. The said T. B. T. Boone practised as a barrister at the English bar from the time of his having been so called as aforesaid until the year 1822, in which year he acquired a large addition to his fortune under the will of Elizabeth Boone, a relation, and thereupon he applied for and obtained a license of his then Majesty King George the Fourth, to assume and use the surname of Boone in addition to his former surname of Tattnall, he having before the granting of such license used and been known by the names of Thomas Boone Tattnall only. [The application and license were then set out.] The said T. B. T. Boone, in pursuance of such license, assumed the surname of Boone, and from thence continued to use the same.

In or about the year 1824, the said T. B. T. Boone, then being in England, purchased a freehold estate containing about eight acres of land, at Lee, in the county of Kent, and some few years afterwards he purchased a few feet of ground to gain a right of way to his land; and under and by virtue of the said purchases and conveyances [513] thereof respectively, became and was seised in his demesne as of fee of and in the said pieces of land respectively. In the said year 1824 he took a lease for a term of years of a house at Islington, in the county of Middlesex, which he occupied for a few years, but afterwards let the same, and resided in lodgings when in London. At the time of the said T. B. T. Boone so assuming the surname of Boone as aforesaid, he ceased to practise as a barrister at the English bar, and from that period spent the greater part of his time in travelling abroad, occasionally visiting England.

In or about the month of May, 1828, the said Thomas Boone Tattnall Boone purchased the Marquisate, castle, and estate of Rasina, of about 800 acres, situated in the Papal States, with the exception of about one acre which is situate in Tuscany. The said T. B. T. Boone hired and engaged, and had in his service at the time of his decease, Italian domestics and other servants at the castle of Rasina in the following capacities; that is to say, a steward or valet, a factor or bailiff, and man-cook, and a gardener, and two female household servants. He expended large sums of money in repairing the said castle, making and laying out the grounds thereto belonging, and in making roads, and otherwise improving the said estate at Rasina, and such improvements were going on at the time of his death. From the 11th September, 1828, until the month of April, 1831, he kept all the before-mentioned servants at Rasina except as hereinafter mentioned, although he did not make the castle of Rasina his constant residence during the last-mentioned period; but when in that neighbourhood he some-

times occupied the same, as it suited his convenience, and sometimes took and lived in furnished lodgings in the town adjacent thereto: at other times during the last-mentioned period he visited and remained at Rome, Florence, and other parts of Italy, residing on [514] those occasions in furnished lodgings; such visits to Rome, Florence, and the said other parts of Italy having continued for some months respectively. It was the habit of the said T. B. T. Boone, on arriving in any one of the said towns where he so passed some months as aforesaid, after his valet had provided him with the necessary servants, to send the said valet to Rasina, to look after the said works which had been undertaken at the said estate.

In the month of April, 1831, he the said T. B. T. Boone set off from Florence, where he had been previously staying, with his said valet, and arrived at Paris on the 1st of May in the same year, and a few days afterwards left Paris for Jersey and London, in which capital he arrived on the 22nd of June then next. A short time afterwards he went to Cheltenham, to pass the remainder of the summer: in the autumn of the same year he returned to London, and from thence went to Brighton, at which latter place he resided until the month of March, 1832, when he again returned to London, at which last-mentioned place he remained during the months of April and May, and part of June. At the last-mentioned time, he sent from London to the said castle and estate in Italy, a case of plate, and others of books and wearing apparel. He looked over his freehold estate in Kent hereinbefore mentioned, residing in lodgings at Greenwich, from the middle of June, 1832, until the month of August then next, at which last-mentioned time he removed to London, where he remained in furnished lodgings till the time of his departure for the continent, which happened in the first week of September, 1832: he then proceeded from England to Florence, where he remained for the space of about two months, and from thence to the said estate of Rasina. The said Thomas B. T. Boone then lived at Rasina, and in the neighbourhood thereof, sometimes at the castle of Rasina, and sometimes in furnished lodgings in the towns adjacent thereto, until the month of October, [515] 1833. In that month he, taking with him his valet and a man-cook, and leaving his other servants at Rasina, set off from the said estate of Rasina, and went to Rome, where he took furnished lodgings No. 22, via Babbuino. After three weeks' stay at Rome, he sent his valet back to Rasina, in order to attend to the works which were in progress there, and to begin a new road which was to lead to the Tratta of Perugia, but kept the said man-cook with him at Rome. The said Thomas B. T. Boone, after a few days' illness, died in the same lodgings, No. 22, via Babbuino, at Rome, on the 28th of February, 1834.

The said Thomas Boone Tattall Boone described himself, when travelling as aforesaid in foreign states, as a native of England, and was so described in the passports which it was necessary for him to obtain from the proper authorities in the different foreign governments and states in which he travelled and lived as aforesaid. The passport used by the said T. B. T. Boone, on his before-mentioned journey from Rome to Florence, was granted to him by the Secretary of State of the Pope of Rome, on the 30th March, 1830, and in such passport the said T. B. T. Boone was called and described in the following words in the Italian language, viz.—“Il Tommaso Tauttall Bioone, Inglese, qui domiciliato, Marchese di Rasina;”—in English, “The Signor Thomas Tattall Boone, an Englishman residing in this city, the Marquis of Rasina.” At the time of the granting of this passport, there was residing at Rome a British Consul. It was customary for the Papal Government not to grant a passport to a foreigner leaving Rome, if there were in Rome a minister representing the nation to which such foreigner belonged; but there was not any law in Rome which prohibited the Secretary of State of the Pope from granting passports to British subjects leaving Rome, and such Secretary of State had full authority to grant such passports if he thought proper so to do. The passport used [516] by the said T. B. T. Boone, on his journey from Florence to Paris, and from thence to St. Malo in France, on his way to Jersey and England, in the months of April and May, 1831, was granted to him by the Pope's nuncio residing in Florence. On the 1st of April, 1831, and at the time when the last mentioned passport was granted, there was residing in Florence a British minister, and the Florentine authorities were also themselves in the habit of granting passports to the persons requiring the same. In such last-mentioned passport the said T. B. T. Boone was called and described in the following words in the Italian language:—“Il Tommaso Tauttall Bioone, Marchese di Rasina, nativo di Inghilterra, domiciliato in Roma.” The said Thomas B. T. Boone affixed his signature

to the said last-mentioned passport in the following words—"T. Tattnall Boone." And at the foot of the passport there was a note or memorandum in the Italian language, in the words following:—"Relasciato il presente dietro altro passaporto scaduto, & depositato in questa Nunziatura apostolica"—in English, "The present granted on the receipt of the former passport expired, and deposited in this Apostolical Nunciature." The said former passport mentioned in the said note or memorandum, was the passport so granted at Rome to the said T. B. T. Boone in manner aforesaid. It has always been customary for the government of Tuscany not to grant a new passport to a foreigner, if there were in Tuscany a minister representing the nation to which such foreigner belonged, or representing the nation by whose government the passport had been granted, under the protection of which such foreigner had come to Florence; and it has been usual for any such foreigner, in the event of the loss of a passport, or the expiration of its stated term, to address himself to either of such last-mentioned ministers, and to obtain from either of them a new passport; and there was not nor is there any law in Florence, which prohibited the Pope's nuncio [517] residing in Florence, from granting a passport to a British subject leaving Florence, if he thought proper so to do.

In the police regulations in force at Paris, in the month of May, 1831, a direction is contained in the following words in the French language—"Tout étranger arrivant à Paris avec un passeport délivré par une autorité de la nation à laquelle il appartient, doit être renvoyé devant son ambassadeur, pour faire legaliser la signature de cette autorité, et ce n'est qu'après qu'elle a été ainsi certifiée, que la Prefecture accorde une permission de séjour, ou un visa de départ;" that is to say—"Every foreigner arriving at Paris with a passport granted by an authority of the nation to which he belongs, ought to be sent to his Ambassador, in order that the signature of that authority may be legalised, and it is only after it has been so certified, that the Prefecture grants to the holder a permission to reside, or visa of departure." The "country to which the foreigner belongs" is understood by the police authorities at Paris to be the country of which he is stated in his passport to be a native; and upon a foreigner arriving in Paris, being the holder of a passport upon which had been obtained a "visa," signed either by the Ambassador of the country of which such holder is, or upon the face of the passport is described to be a native, the police authorities of Paris have been accustomed to grant to the holder of the passport their permission to reside, or a visa of departure. The said Thomas B. T. Boone, on the 19th May, 1831, then being in Paris, and about to leave that place on his said journey to St. Malo, Jersey, and England as aforesaid, presented the before-mentioned passport, granted to him in Florence by the Pope's nuncio residing there as aforesaid, to the British Ambassador then residing at Paris, for his signature, and the said Ambassador then signed the same; and the said Thomas B. T. Boone, on the 20th of the said month of May, 1831, presented the said passport to the proper officer of police in Paris for [518] signature, and the said officer then signed the same. There was residing in Paris, during the whole of 1831, a nuncio or minister from the Pope of Rome.

The said Thomas B. T. Boone never at any time obtained from his late Majesty King William the Fourth, or from his late Majesty George the Fourth, any license, grant, or other authority to use, assume, or bear the title of Marquis of Rasina, or any other foreign title of honour.

At the time of the death of the said Thomas B. T. Boone, he was considered by the government authorities at Rome to be an English subject, and in accordance with the practice and custom adopted at Rome when English subjects die there, all the property and effects of the said Thomas B. T. Boone, which were then in his lodgings at Rome, were taken possession of by the English Consul at Rome, for the executors of the will of the said Thomas B. T. Boone.

The said Thomas B. T. Boone, whilst he was in England, in August 1832, as aforesaid, disposed of his said leasehold house at Islington, and also at the same time sold his freehold property in the county of Kent. He at that period further caused notice to be given of calling in £2000 which were owing to him, and secured by a mortgage of some freehold and leasehold houses in London and in the county of Essex, but did not succeed in obtaining payment thereof.

Whilst the said T. B. T. Boone was in England, in September 1832, he made his last will and testament in writing, as follows:—

"This is the last will and testament of me, Thomas Boone Tattnall Boone, now

residing at 65, Regent Street, London. I give my property in the Papal States, called Rasina, and the plate, china, books, and pictures, to my brother. I give my carriages and harness to my mother. I give £100 a-year to my sister, Mrs. De la Houssaye, [519] during my mother's life. £500 sterling I give to my faithful servant Angelo Boncinelli, and my gold watch, chain, and seals, and £500 to his wife, Rosina Boncinelli, to be settled on her in Italy. I give the interest accruing from all the rest of my property in possession, remainder, and reversion, to my mother during her life: afterwards one-half of the interest to my brother, and one-half of the interest to my sister: upon the death of my sister the capital to go to her children, if she have any, and if not, to my brother; upon the death of my brother, the capital to go to his children. I appoint Ralph Brown and Henry Wordsworth, 32, Threadneedle Street, London, (the defendants), my executors, giving them £100 each. Dated the 4th day of September, 1832.

"T. B. TATNALL BOONE (L.S.).

"Signed and sealed in the presence of Charles Stokes,
"65 Regent Street, Piccadilly, London."

The said Ralph Brown and Henry Wordsworth are strangers in blood to the testator, and British-born subjects, resident in the city of London, and attorneys of this Court; and they, on the death of the said T. B. T. Boone, took upon themselves the burden of the execution of the said will, and duly proved the same in the Prerogative Court of the Archbishop of Canterbury, on the 7th day of April, 1834.

[The case then stated, that the testator, at the time of his death, was possessed of the said real estate at Rasina, and of the live stock and effects therein; and that he had then no real estate in this country: it then set forth the particulars of his personal estate; that the executors had assented to the several legacies bequeathed by the will, and retained the amount for the legatees; it then stated the value of the several specific legacies; and that no duty [520] had been paid in respect of the said bequests, or any of them; and that the residue of the personal estate in England, after payment of debts and legacies, amounted to £14,000.]

The question for the opinion of the Court was, whether, under the facts found in the special verdict, legacy duty were payable in respect of the bequests contained in the will of the said T. B. T. Boone.

The Attorney-General, for the Crown. The first question which arises in this case is, whether, upon the facts stated in the special case, the testator had acquired a domicile in the Papal States. (a) It will not be disputed that he was previously domiciled in England. He resided here for many years, was called to the bar, purchased property in England, and had all the rights belonging to an Englishman and a member of the bar. Nor can the general doctrine be denied, that the original domicile remains until another has been acquired. Then how can it be said that a foreign domicile has been acquired in this case? It could not be by merely travelling abroad, or by purchasing an estate in a foreign state. If the testator had died during the interval when he was in England in 1831 and 1832, at which time he made his will, could it have been said his property would not be subject to legacy duty, and that he must not then have been considered as domiciled in his native country? [Parke, B. He might retain all the rights of a British subject, if he were ever so much domiciled in a foreign country, because domicile and national character are quite different things.] Surely not, if it were clear that he had abandoned his country. It was, indeed, even doubted in *Curling v. Thornton* (2 Addams, 14), whether an Englishman could acquire a foreign domicile. [Parke, B. That is altogether overruled by *Stanley v. Bernes* (3 Hagg. 373).] No doubt; and it will not be disputed that an English subject may acquire a foreign domicile, with reference to a testamentary disposition, so that if he makes a will, it will be determined by the law of the

(a) The Court suggested, that the question what was the domicile of the testator, was a question of fact, which ought in strictness to have been found by the jury: and it was agreed between the counsel on both sides (although the Attorney-General insisted that it was a question of law) that the Court should be at liberty, upon the facts stated in the case, to find whether the testator had or had not acquired a domicile in the Papal States, and that such finding should be inserted in the special verdict, and should be final.

domicile, not by the forum originis, and if he dies intestate, his personal property will be distributed according to the law of the domicile, not according to that of the locus rei sitæ. But there is no pretence for saying, that the testator in the present case had permanently abandoned his country: he had, indeed, purchased the title and estate of Rasina, but it is not because a person has a residence in a foreign country, to which he may go occasionally, that he is domiciled in that country. On all occasions Mr. Boone described himself as a native of England; he applied to the English Ambassador to have his passport visé, not to the Nuncio of the Pope; and finally, he was considered an English subject by the authorities of Rome; his property was taken possession of by them as the property of any English subject would be who was in itinere at Rome; and they could best judge whether he was to be treated as an English subject, or as having become a subject of the Papal States. He resided only occasionally at Rasina; for months together he lived in different towns in Tuscany and elsewhere, not merely at an inn, but in lodgings; and it might just as reasonably be contended, that he was domiciled in Tuscany.

One of the leading authorities on the subject of the law of domicile is that of *Bruce v. Bruce* (2 Bos. & P. 229, n.; 6 Bro. P. C. 566). In that case it [522] was held in the House of Lords, that a Scotchman who entered into the service of the East India Company, and served in India as an officer in their army, was domiciled in the East Indies, the Company being considered in the nature of foreign sovereigns. But the testator in this case accepted no office under the Pope, and did nothing to attach him to any foreign government. In *Somerville v. Somerville* (5 Ves. 787), although Lord Somerville had a house and resided a great part of the year in England, it was held that he was domiciled in Scotland, the domicile of origin never having been lost. In *Curling v. Thornton*, one question was, whether the party had in fact acquired a foreign domicile, and upon that point the judgment of Sir John Nicholl is unimpeached. He says—"The facts relied upon in the allegation by way of defeating the claim of this will to probate, are these: that in 1815 the deceased went to France, and finally withdrew from England in 1816, the following year; that in 1817 he applied for and obtained a royal ordonnance, authorising him to fix his domicile in that country, and assuring to him, during his residence there, the enjoyment of all civil rights; that he continued resident from that time till his death there in March, 1825, only once in that time coming over to England, merely to transact matters of business (one being the making of the will in question); finally, that he removed nearly all his moveable effects to France, and purchased an estate or estates there in 1817, which estate or estates he actually retained to the time of his death." And the learned Judge upon those facts—stronger than any which exist in the present case—intimated a clear opinion that Colonel Thornton was not to be considered domiciled in France, as not having completely and permanently abandoned his forum originis. In *Stanley v. Bernes* where the testator was held to have acquired a domicile abroad, the facts [523] were very strong indeed. There, the deceased was a native of Ireland; he went to Lisbon prior to the year 1770; in 1809 he went to Madeira; and from the time he first left Ireland he was resident in the Portuguese dominions. In 1770 he abjured the Protestant religion; he married a person, who, although of Irish extraction was a native of Portugal, and a Catholic; his children were all brought up as Catholics, and all the inmates of his house were of that faith; and he had signed the bond of allegiance to Portugal. In 1823, he made a declaration of adherence to the Portuguese Constitution, which was required to be taken by all Portuguese subjects who held offices or received pensions. It is clear, that if it be possible for a British subject to acquire a foreign domicile, it was done in that case: the party went when young to a foreign country; he had no property or residence, no profession or status in his native country; he took the oath of allegiance to a foreign Government; he was there naturalized, married, and had property, and for a long period of years was entirely the subject of that adopted country. In no single particular is a parallel to be drawn between that case and the present. Here the testator did nothing in a foreign country but what a mere traveller might do; he never took upon himself allegiance to any foreign power; he always treated and described himself as an Englishman.

[The Attorney-General then proceeded to argue, that even assuming the testator to have acquired a domicile in the Papal States, his personal property in England would be liable to legacy duty: but as the judgment of the Court had no reference to this point, the arguments upon it are omitted. He cited *Attorney-General v. Cockerell*

(1 Price, 165), *Attorney-General v. Bealson* (7 Price, 560), *Logan v. [524] Fairlie* (12 Sim. & Stu. 284; 1 Myl. & Cr. 59), *In re Ewing* (1 C. & J. 151), *Attorney-General v. Jackson* (2 C. & J. 101; S. C. on error in Dom. Proc., 8 Bligh, 15; 2 Clark & F. 48), *In re Bruce* (2 C. & J. 436), *Jackson v. Forbes* (ib. 385), *Arnold v. Arnold* (2 Myl. & Cr. 256).]

R. V. Richards, for the defendants. The case plainly divides itself into two parts: the first a question of fact, whether the testator was or was not domiciled in the Papal States; and the second, if that fact be found in favour of the defendants, whether he, being so domiciled, is a party coming within the description intended by the word "person," in the clause of the 55th Geo. 3, c. 184, Sched. Part 2 imposing the legacy duty.

The first point that presents itself for consideration is, what is the meaning of the word "domicile"; a term introduced in modern times only into the laws of this country. The synonyme given to it in the dictionaries is "house," or "home." Wherever a man's home is, that is his domicile: to what country he owes allegiance, is altogether a different matter. Nor can the intention of returning to his native country prevent the acquiring of a domicile abroad. Every person who goes to India in the service of the Company, every merchant who goes abroad to conduct his business, goes with the expectation and intention of returning at some period. He is not less a native of England because he resides and is domiciled abroad; and the manner in which he describes himself in passports or otherwise, cannot affect the question of domicile. In *Bruce v. Bruce*, Lord Thurlow thus explains the doctrine of domicile:—"A person's origin, in a question of where is his domicile, is to be reckoned but as one cir-[525]-cumstance in evidence, which may aid other circumstances: but it is an enormous proposition, that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is *primâ facie* evidence that he is domiciled at that place, and it lies on those who say otherwise, to rebut that evidence. It may be rebutted, no doubt: a person travelling—on a visit—he may be there some time on account of his health, or business; a soldier may be ordered to Flanders, and be detained at one place there for many months:—the case of ambassadors, &c. But what will make a person's domicile or home, in contradiction to these cases, must occur to every one. A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune; but if he dies in the interval, will it be maintained that he had his domicile at home?" Applying the rule there laid down, which was adopted in *Somerville v. Somerville*, the only question is, what is the home, or permanent residence, of the party at a particular period? Now, upon the facts found in this case, does it not appear that the deceased was domiciled at Rasina? or, at all events, that he had ceased to be domiciled in England? Here the original domicile was in the Bahama Islands; the domicile in England was an acquired one, and the facts shew that he subsequently abandoned that also, and assumed a new domicile abroad. In 1828 his intention was clearly formed to reside permanently at Rasina, and make that his domicile; and in 1832 that intention was completed. The circumstances of his hiring household servants of all kinds, and of his carrying on improvements there for several years, evinced an intention to make it his home: the sending of his plate and books shewed it still more clearly. In the same year, 1832, he disposed of his real property in Kent, and sold his house at Islington; thereby completely breaking up his domicile here. Where had he [526] after that time any home in England? [Lord Abinger, C. B. You make out a very probable case that he intended to make Rasina his permanent residence and domicile; but that is a very different question from whether he had actually done so. We cannot tell, from the case, whether he ever resided a week together at Rasina.] The argument is, that he had selected it as his permanent home, having abandoned and broken up his English domicile; although the improvements going on there prevented his constant and regular residence. [Parke, B. Suppose we are of opinion that the testator has acquired no domicile abroad since he had a domicile in England, then you do not dispute that the old domicile remains, and that his property is liable to pay the legacy duty?] No; but it is contended, that assuming him not to be domiciled at Rasina, still he had abandoned his domicile in England, and assumed one in the Papal States. [He was then proceeding to the second point, when the Court intimated that it was unnecessary to hear him on that point, as they were against him on the former.]

LORD ABINGER, C. B. We are all agreed that there is not sufficient evidence to establish any domicile after Mr. Boone quitted England. We have considered it very much, and with some anxiety. My impression at first was, that there might be; but I now think, that if I were on a jury, I could not find that fact, unless I were prepared to find that an intention is the same thing as an act. I cannot find that the testator is remaining in any one place; and with respect to Rasina, the evidence does not enable us to say that he was there for a week at a time, or that his house was furnished; and when he was there, he did not live in the house, but in towns adjacent, and in ready-furnished lodgings. It does not appear, on the facts of this case, that at any one time he was there for more than a short period. He had an intention, probably, of making that [527] his permanent residence, after he had completed certain improvements; but in the meantime he was wandering about in the towns of Italy. There is no more reason for saying he was resident in the Papal States, than that he was resident at Florence: he appears to have been some time in each place, but in ready-furnished lodgings, and in all of them it was as a man passing from place to place. A man may travel about the continent for four or five years, amusing himself at the bathing places, or visiting galleries of works of art; yet however long he may remain, it does not constitute a domicile in any of those places, more especially if he has had a domicile, which he never loses until he has acquired another. I think that in this case there is not sufficient to enable us to determine that in fact Mr. Boone was domiciled either at Rasina, or at any other place abroad; in that case it is admitted that he retained his English domicile: and if he did, it is equally admitted that the legacy duties are payable. I express no opinion upon the question whether they would be payable, if the Court thought that his domicile was abroad, although I entertain an opinion on that subject: but we are all agreed, as the counsel have proposed to put us in the place of a jury, and we are to find as a fact what ought to have been found by the special verdict, that although it is probable, that if the testator had lived, he would have lived at Rasina, and made it his domicile, there is no evidence of anything more than intention, and that we cannot find that he was domiciled either at Rasina, or in any other part of the continent. His English domicile therefore remains.

PARKE, B. I am entirely of the same opinion. It seems to me, that, giving full effect to all the evidence, the only conclusion that we can arrive at, is that of an intention on the part of the testator to fix his domicile somewhere [528] abroad, probably at Rasina. Very likely, if his house at Rasina had been fitted up, and he had gone there to reside for some weeks or months, we might have come to the conclusion that he had fixed his domicile there. But, upon the facts disclosed in the special verdict, I think the Court cannot come to any other conclusion than that it was uncertain: there is no certainty, I think, of anything except of his intention to change his domicile. It is admitted, that his former domicile continued until not only an intended, but until an actual, acquiring of a new one. If it had appeared that the testator's domicile had been in the Papal States, I am by no means prepared to say that I have made up my mind what legacy duty would have been payable: that subject requires a good deal of consideration. There is no small difficulty in reconciling the principles of all the cases which have preceded this.

ALDERSON, B. Independently of the facts of the case shewing a domicile in England, there is nothing to shew a domicile out of England: all the facts stated at the beginning of the special verdict are consistent with the testator's being an English-born subject. I wish, however, to guard myself particularly against the conclusion, that if the domicile had been in the Papal States, the Crown would not have been entitled to the duties. As at present advised, I think it would.

Judgment for the Crown.

[529] HINDLE v. POLLITT.(a) Exch. of Pleas. 1840.—Where, at the sale of the stock of the defendant, the tenant of a farm, W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them:—Held, that the manure made by these cows was manure made on the farm, and

(a) This case was decided in Hilary Term.

that the removal of it by W. was a breach of the condition of a bond, whereby the defendant had stipulated with his landlord that he would "put and spread all the manure and compost then collected in the midden-stead, or on any other part of the farm, on the meadow land, and would not sell, cart, or convey away any dung, compost, or manure from the said farm."

[S. C. 9 L. J. Ex. 288.]

Debt on bond, dated 20th of March, 1828, in the penal sum of £200. The declaration set forth the condition, whereby—after reciting that the defendant had been tenant to the plaintiff, and also that he ought to have given up the possession of the lands and grounds belonging to a certain farm, called Stanley House, on the 2nd day of February then last, and of the buildings belonging to the said farm on the 12th day of May then next, according to the terms of his notice; and also reciting, that the plaintiff had consented and agreed to waive the said notice, and to allow the defendant to continue his occupancy of the said farm, with the closes of land and out-buildings and appurtenances thereto belonging, and then occupied therewith by the defendant, for and during the term of one year then next ensuing, to be computed as to the land from the 2nd day of February then last, and as to the buildings from the 12th day of May then next, on condition that the defendant should sign a warrant of attorney in ejectment, to quit the said farm and premises at the expiration of the said year to be computed as aforesaid, which he the defendant had accordingly done, and also on condition that the defendant should execute the said writing obligatory:—it was conditioned, that if the defendant, his heirs, executors, or administrators, did and should put and spread all the manure and compost then collected in the midden-stead, or on any other part of the said farm, on the meadow land to the said farm belonging, immediately after the execution of the said writing obligatory, and did not nor should sell, cart, or convey away any dung, compost, or manure from the said farm, nor plough or sow with corn any part of the said farm, except [530] the close called the Stone Bridge Meadow, nor break up or set with potatoes any part of the said farm, except the Blackholes in the close called the Rails Meadow, nor mow any of the pasture land belonging to the said farm, nor take any cattle to agist, nor sell, nor permit to be sold, any of the hay produced on the said farm, before the 25th day of December then next, but did and should in all respects cultivate and manage the said farm in a husband-like manner, and leave all the buildings thereto belonging (main walls and principal timbers excepted) in good repair and condition, to be approved by one J. F. of &c.; and also did and should pay unto the plaintiffs the yearly rent or sum of £135 for the said year, to be computed as aforesaid, the whole of the said sum of £135 to become due on the 1st day of May then next; and also did and should, immediately on the execution thereof, pay down all rent and arrears of rent then due to the said plaintiff, the amount of such arrears to be settled by the said J. F.; and also did and should quit and give up the possession of the said farm to the plaintiff in manner following, (that is to say), the land (except the close called the Barnfield) on the 2nd day of February then next, and the buildings and the said close called the Barnfield on the 12th day of May in that present year; and also did and should permit and suffer the plaintiff to plant timber or other trees, and make any road or roads in, over, or upon any part of the said farm, after the 10th day of October then next, without making any compensation for any damage to be occasioned thereby, or being deemed a trespasser in respect thereof; and also did and should well and sufficiently fence off the close adjoining the road on the north side of Woodfold Park Wall, and give up all claim to the pasturage of the unclosed land on the sides of the said road:—then and in case of the due performance (amongst others) of all and every the aforesaid conditions, that obligation should be void, otherwise should be of [531] force; as by the said writing obligatory, &c. The declaration then averred, that the plaintiff did allow the defendant to continue the occupation and possession of the said farm and premises, with the appurtenances, in the condition mentioned, for the said spaces of time respectively, and on the terms and conditions, in the said condition of the said writing obligatory mentioned. It then assigned breaches of all the above clauses of the condition:—first, that the defendant, during the continuance of the tenancy, to wit, on the 21st of March, 1838, and on divers other days and times, did sell, cart, and convey away from the said farm and premises, a great quantity, to wit, 200 cart-loads of dung, compost, and manure; secondly, that the defendant broke up

and set with potatoes divers, to wit, fifty acres of the land of the farm, being other and different land than the Blackholes in the close called the Rails Meadow; thirdly, that he did not cultivate or manage the farm in a husbandlike manner, but on the contrary thereof, before the proper time and season for so doing, according to the custom of the country, removed from off the farm horses, cattle, and sheep belonging to him, whereby a less quantity of manure was made on the premises than otherwise would have been; fourthly, that he did not fence off the close adjoining the road on the north side of the Woodfold Park Wall, according to the condition; and lastly, that he did not give up all claim to the pasturage of the uninclosed land, but, on the contrary, depastured his cattle on the pasturage of the uninclosed land on the side of the road in the condition mentioned.

The defendant, by his pleas, denied all the breaches assigned, and issues were joined thereon.

At the trial before Maule, J., at the Lancaster Summer Assizes, 1839, the facts relating to the first breach, viz. the removal of manure off the farm, appeared to be as follows. On the 4th of December, 1838, the defendant's stock on the farm was sold by auction. The tenant of [532] an adjoining farm, of the name of West, attended, and bought two cows. He asked the defendant's daughter to let them stay on the farm, and he would take hay for them and keep them there. She consented, and they remained accordingly—one a week and the other five weeks. West bought hay daily to feed them, and none of the defendant's was used for that purpose. They stood in a shippin on the farm-yard, and West took away the manure made by them, and spread it on his farm. The learned Judge, in summing up, stated it to be his opinion that this was no breach of the condition, but that it meant that the manure which was not to be conveyed off the farm should be the produce of the farm. [It is not necessary to refer to the facts relating to the other breaches.] The jury having found for the defendant,

Cresswell, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection: against which, in Hilary Term,

Alexander and Tomlinson shewed cause. Looking at the substantial meaning of this condition, it does not apply to such a case as this. In the first place, the plaintiff has taken upon himself to prove a positive act done by the defendant himself, within the terms of the condition: he is bound, therefore, to prove that the removal was the act of the defendant, or of his servant, or of some party directly connected with him: if done without his knowledge, it is not within the prohibition of the bond; and here there was no evidence whatever of such knowledge on his part. Even if a removal of the manure under such circumstances can be within the condition, it ought to have been the subject of a special action against West. [Alderson, B. The difficulty is, that the learned Judge did not leave to the jury the question, whether it was removed by the defendant. They have negatived only the fact, that none was removed which was produced on the farm, not that none was removed by the defendant.] But secondly, the learned Judge put the true construction on the bond. The tenant's duty is only this,—to take care that whatever the farm has produced the farm shall have the benefit of. This manure was not made on the farm, nor were the cattle benefited by the farm. Could it be said that the removal of manure made by the droppings of a neighbour's horse, who came on a visit to the tenant, would be a breach of such a condition? In the mode in which the breaches are assigned in the declaration, no entire sentence of the condition is set forth, but it is cut up into minute and separate portions: but in order to put a reasonable construction upon it, it is necessary to refer to the recital and condition generally, to see whether those particular clauses are not explained and controlled by the context. Now the condition is, that the defendant shall put and spread all the manure and compost then collected in the midden-stead, or on any other part of the farm, on the meadow land, and shall not sell, cart, or convey away any dung &c. from the farm, nor plough or sow any part of the farm except the Stone Bridge Meadow, nor break up or set with potatoes any part except the Blackholes, &c. &c.: but shall in all respects cultivate and manage the farm in a husbandlike manner. The last clause explains all that has gone before: it means that the tenant shall not do any of the acts there specified contrary to the rules of good husbandry. Now it would be no violation of the rules of good husbandry, to take away manure brought on the farm for a temporary purpose, and not mixed with the produce of the farm: the tenant is only

to leave that which is produced from the farm for the use of the succeeding tenant. There is no such phrase used as "brought upon" the farm: the words "then collected on" the farm, evidently refer to manure the produce of the farm: and the subsequent words ought reasonably to receive the same construction.

[534] Cresswell, (W. H. Watson with him), *contrà*. The argument on the other side assumes that the words, "but shall in all respects cultivate and manage the farm in a husbandlike manner"—apply to and qualify all that preceeds: but that is not the case. The first clause of the condition applies to manure then collected in the midden-stead, or elsewhere on the farm: the subsequent words apply to manure afterwards to be made. How can this argument apply to the prohibition against taking in cattle to agist?—that is not contrary to good husbandry. The last general clause is only cumulative to the previous positive stipulations, applying to anything omitted in them, which is a violation of the rules of good husbandry. Whenever manure is dropped on the farm, which the tenant is therefore entitled to keep there, he has it in right of the farm, and has therefore no power to remove it. Would it have been necessary to aver, in an action for the breach of any of these specific stipulations, that it was contrary to good husbandry? [He was then stopped by the Court.]

LORD ABINGER, C. B. This certainly appears to be a very ungracious action, unless there is something further in the case than appears to the Court. I am much inclined to agree with the general rule of construction laid down by my brother Maule, and differ only in its application to the present case: I think this was manure made on the farm; and that independently of any technical question as to the breach of the rules of good husbandry in removing it. The question is not by whose provender the manure was produced, but whether it was made on the farm. Now suppose the farm were near some place where a large fair were held, and it was convenient to the farmer to take in the cattle brought to the fair, for several hours: would he have a right to remove the manure made by these cattle?—would not all their droppings be manure made on the farm? Clearly so. Therefore, without entering upon any [535] question as to the propriety of the construction adopted by the learned Judge, I think the application of it was wrong, and that this was manure made on the farm, and the produce of the farm. The rule must therefore be absolute.

ALDERSON, B. I am of the same opinion. If, indeed, we were to construe the bond according to its very literal construction, the absurdity would follow, that if a cart-load of manure were brought from a distant farm, and stopped for an hour on this, the tenant could not remove it. But I think it means manure produced on or belonging to the farm. This is produced on the farm, by being first upon the farm in the shape of manure by dropping from the cattle, though they are fed by provisions coming from another farm. It is made on, produced on, belonging to the farm. There was therefore a substantial breach of the condition, and the plaintiff was entitled to the verdict, on the facts found, and left to the jury. We must adopt a reasonable construction of the instrument, and not put upon it a far-fetched one, even for the purpose of doing what may appear to be equitable in the particular case. I think the words cannot be restrained as Mr. Tomlinson contends, but that the proper construction is this: first there is an affirmative covenant; then a number of negative covenants; then a general provision for the observance of the rules of good husbandry: the last is a restriction on the negative covenants alone, and means, that in all other respects not provided for before, the tenant shall conduct himself in a husbandlike manner.

GURNEY, B., concurred.

Rule absolute.

[536] WELCOME v. UPTON. Exch. of Pleas. 1840.—To an action for trespass for taking the plaintiff's cattle in an open field called P. & G. Field, and impounding them, the defendant pleaded first, that T. B., and his ancestors, had been immemorially used and accustomed to have, for themselves and their heirs and assigns, the sole and several pasturage in 217 acres of P. & G. field, in gross, for all his and their cattle, from the 4th Sept. to the 5th April: that T. B. in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns for ever: that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing

on the said 217 acres. The second plea alleged a right of sole pasturage, in gross, for thirty years before the commencement of the suit, (under the stat. 2 & 3 Will. 4, c. 71, s. 2), in J. B. and his ancestors, and a demise from him to the defendant; concluding as in the first plea. The replication traversed the right of T. B., as alleged in the first plea, and the enjoyment of J. B. as of right without interruption, for thirty years, as alleged in the second.—It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the 217 acres, and that above thirty acres had thus been appropriated, but no encroachments had been made on that part of the 217 acres on which the alleged trespass was committed:—Held, that these interruptions, being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that, not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea.—Held also, 1st, that recitals in a deed-poll of the date of 1800, made by an ancestor of the present owner of the pasturage, and relating to the pasturage, were admissible in evidence to prove the marriages, deaths, &c., of the ancestors of the owner: 2dly, that leases and agreements made by the ancestors of the present owner, demising the pasturage in question, were evidence to prove the seisin and user of T. B., the grantor, as shewing the enjoyment by parties who claimed under him.—Held, also, that the right of pasturage alleged in the pleas was capable of being granted away, and did not necessarily descend to the heir of the grantor.—Quære, whether such a right of pasturage, in gross, be within the 5th section of the Prescriptive Act, 2 & 3 Will. 4, c. 71.

[S. C. 9 L. J. Ex. 154.]

Trespass for taking and seizing the plaintiff's cattle, horses, and cows, then depasturing in a certain open field, called "Port and Guilton Field," and impounding the same, &c.

The defendant pleaded, first, that before and at the time of making the indenture thereafter mentioned, Thomas Brereton, and all his ancestors whose heir he then was, from time whereof the memory of man was not to the contrary, had, and every of them had been used and accustomed to have, and of right ought to have had, and the said Thomas Brereton, at the time of making the said indenture, of right ought to have had, for himself and themselves, his and their heirs and assigns, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, two roods, three perches, of and in the said open field, called Port and Guilton Field, in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, until [537] the 5th day of April next following: that the said Thomas Brereton, on the 19th of April, 1755, by indenture made between him and Samuel Billingsley, granted to the said Samuel Billingsley the said sole and several herbage and pasturage of and in the said 217a. 2r. 3p. in Port and Guilton Field, to have and to hold the said sole and several herbage unto the said Samuel Billingsley, his heirs and assigns for ever. The plea then stated the vesting of the right to the said herbage and pasturage, on the 1st of January, 1826, in J. R. F. Billingsley, and that he demised the same, on the 1st of March, 1836, to the defendant; and justified the seizing and impounding the plaintiff's cattle, on the ground of their being upon and depasturing the land in question.

The defendant pleaded, secondly, that for thirty years before the commencement of this suit, J. R. F. Billingsley and his ancestors had enjoyed as of right, without interruption, for himself and themselves, his and their heirs and assigns, the sole and several herbage of the said field, in gross, for all manner of his and their cattle to depasture on, from the 4th of September in each year to the 5th of April following. The plea then stated a demise by J. R. F. Billingsley of the herbage in question to the defendant, and a justification of the alleged trespass, in the same terms as in the former plea.

Replication to the first plea, that the cattle of the plaintiff were seized by the defendant in a certain part of the said open field in the declaration mentioned, (setting out the abutments), and that the defendant, of his own wrong, seized and impounded the said cattle there being; without this, that before and at the time of making the indenture in the first plea mentioned, the said Thomas Brereton and all

his ancestors whose heir he then was, from the time whereof the memory of man, &c., had been used and accustomed to have, and of right ought to have had, for himself and themselves, his and their heirs and assigns, the sole and several herbage and [538] pasturage of and in the said part of the said open field, and of the said 217a. 2r. 3p. in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th day of September in each and every year, until the 5th day of April next following, in manner and form, &c. Replication to the second plea, that for and during the full period of thirty years next before the commencement of this suit, the said J. R. F. Billingsley and his ancestors had not enjoyed as of right, without interruption, for himself and themselves, and his and their heirs and assigns, the sole and several herbage and pasturage of and in the said 217a. 2r. 3p. of and in the said open field, in gross, for all manner of his and their cattle to feed and depasture thereon, from &c., in manner and form, &c.

On these replications issues were joined.

At the trial before Littledale, J., at the last Sussex Assizes, the defendant gave in evidence, in support of his pleas, the same conveyance of the right of pasturage, in 1755, from Thomas Brereton to Samuel Billingsley, which was produced on the former trial (see 5 M. & W. 398). He then tendered in evidence a deed-poll dated 23rd October, 1800, made by a descendant of Samuel Billingsley, and relating to the right of pasturage in question, in order to prove, by its recitals, the marriages, deaths, and survivorships of the descendants of Samuel Billingsley: and also a lease dated in 1800, and an agreement in 1817, by which certain members of the family of Billingsley had let the pasturage to one James Upton. It was objected for the plaintiff, first, that the recitals in the deed-poll were no evidence against the plaintiff, who was not party or privy to the deed; and, secondly, that the lease and agreement were not admissible, inasmuch as they did not prove any seisin of or user by Thomas Brereton. [539] The learned Judge thought all these documents admissible, and they were accordingly received.

It appeared in the course of the evidence that from the year 1818 down to the present time, various encroachments, by buildings and enclosures, had been made upon the 217 acres of land mentioned in the pleadings, and that above thirty acres of it had thus been appropriated by different parties; but no such encroachment had been made on that portion of the open field on which the alleged trespass was committed. It was contended for the plaintiff, that these acts of interruption negatived the right of Brereton to the pasturage of the 217 acres, as claimed by the plea, and shewed that he and those who claimed under him had not enjoyed an uninterrupted user of it. The learned Judge, in summing up, stated his opinion that the interruptions proved were not such as to defeat the right alleged in the second plea; and that as they had taken place only within the last twenty years, they could not effect the right of Brereton, as alleged in the first plea. The jury having found for the defendant,

Platt now moved for a new trial, on the ground that the deed-poll, lease, and agreement were improperly received in evidence, and also on the ground of misdirection as to the effect of the encroachments. He moved also for judgment non obstante veredicto, on the ground that the right of pasturage claimed in the pleas was descendible to heirs, and was incapable by law of being conveyed out of the line of descent.

First, the recitals in the deed-poll were no evidence, as against the plaintiff, who is a stranger to it, for the purpose for which it was put in, viz. to prove the state of the Billingsley family at the time of its execution: Com. Dig., Evidence (B. 5), *Ford v. Grey* (1 Salk. 285). [Lord Abinger, C. B. The recitals are evidence of the state of the family, and of the pedigree, just as a letter written by the party who [540] made the deed would be. *Alderson, B.* The inscriptions on tombstones are evidence only as being statements made by the family.]

Secondly, the lease and agreement were no evidence to prove Brereton's right to the pasturage. [Parke, B. They tended to prove that he had enjoyed the right immemorially, by shewing that persons had enjoyed it from him, and from others claiming under him.]

Thirdly, the learned Judge misdirected the jury as to the effect of the interruptions proved. The first plea, which alleged an exclusive right in Brereton to the sole and several herbage, was negatived by proof of repeated interruptions by encroachments.

[Parke, B. The interruptions proved began in modern times, and therefore were no evidence to disprove Brereton's title, which was prior to them, and with which they were not connected. Alderson, B. If Brereton had the right in question in the year 1755, the jury were properly directed that modern interruptions would not defeat it.] At all events, they were evidence for the jury that J. R. F. Billingsley had not enjoyed an uninterrupted user. [Parke, B. Being made on that part which is not claimed by the defendant, they were at all events very slight evidence only, if any, of the want of right on the part of the defendant. The issue on the second plea does not bind the defendant to shew a right to the pasturage of the entire open field of 217 acres, but only of that part of it where the cattle were taken. Alderson, B. If the argument for the plaintiff be well founded, as soon as a party lost a small corner of the field by encroachment, he lost the whole. Would the claim of a party to a right of way be defeated by shewing that some person had narrowed it by a few inches?]

Fourthly, the right claimed in the second plea, which is a right to take the whole pasturage in gross, is not within the stat. 2 & 3 Will. 4, c. 71, s. 5, which relates only to [541] rights appendant and appurtenant. Its words are—"It shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed," &c.

Lastly, the first plea is bad in substance, and the plaintiff is entitled to judgment non obstante veredicto. The right claimed in the plea is not a right of ownership in the soil; it is a prescriptive right, lying in grant, and was not capable of assignment by Thomas Brereton, but ought to have descended to his heirs. In 2 Bla. Comm. 266, it is said—"If a man prescribes for a right of way in himself and his ancestors, it will descend only in the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent." Nor is the argument inapplicable, by reason of this right being alleged in the plea to be in Thomas Brereton and his assigns, for "assigns" has here the same meaning as "heirs": Co. Litt. 384 b. [Lord Abinger, C. B. This is not a right of common, but a right of taking all the herbage. Parke, B. Have you any authority that such an estate as this cannot be conveyed?] There is no authority to be found, except that which is derived from the analogy between this right and a right of common. *Weekly v. Wildman* (1 Id. Raym. 407) is an authority to shew that a right of common sans nombre is not assignable.

LORD ABINGER, C. B. I am of opinion that the plaintiff is not entitled to judgment non obstante veredicto. I think that the interest of Thomas Brereton in the sole and several pasturage was capable of transfer. Instances of sole pasturage are to be found in the South Downs in Sussex, and they are frequently transferred in gross: it is the same with the cattlegates in the north of England, although some have thought the owners of them are tenants [542] in common of the soil. Here there is proved to exist a sole and separate right of pasturage, which may be assigned as a valuable interest. It must be exercised according to the ordinary rules of property, no authority being shewn for its being exempted from them. The plea of prescription was proved: the immemorial right of pasturage was shewn to have been in Thomas Brereton, and was assigned by him to Billingsley, through whom the defendant claimed it. As to the interruptions to the enjoyment, they were of modern date, and could not affect the right of Brereton.

PARKE, B. It appears to me that there has been no miscarriage at the trial, with respect to the evidence. The question upon the first issue is, whether Thomas Brereton and his ancestors were entitled, in the year 1755, to the sole and separate herbage of the field in question. It was evidence to prove that issue, that parties claiming under him had exercised acts of ownership with respect to it. It was certainly evidence of a seisin in fee in Thomas Brereton, that parties afterwards coming in under him enjoyed the right in the same manner in which he claimed to enjoy it. The next objection is, that the deed-poll ought not to have been admitted in evidence. The only object of its production was to prove relationship: it came from the proper repository, and was rightly received for the purpose of connecting the parties named in it with the present claimant of the right. As to the interruptions, the learned Judge was correct in saying that if Thomas Brereton had a right to the sole pasturage in 1755, his right could not be defeated by interruptions which commenced long afterwards. If the only question in this case had been, whether a right of common in gross be within the stat. 2 & 3 Will. 4, c. 71, s. 5, we should probably have granted a rule for the purpose of giving that

question further consideration, although we might be disposed to think that [543] the present case is within the equity of the statute. But if the first plea be good, the determination of that question becomes immaterial. The first plea claims a prescriptive right in Thomas Brereton and his ancestors, and in his and their heirs and assigns, of sole and several pasturage in the close in question. That plea is good. It is laid down in Co. Litt. 122, that a party may prescribe to take the sole and several herbage; and although this was doubted in *North v. Cox* (1 Lev. 253), it was afterwards established as law by the cases of *Hoskins v. Robins* (Pollexf. 13), and *Potter v. North* (1 Ventr. 385). The word "assigns," in the plea, may be rejected as insensible. Then the remaining question is, whether a party who has such a right as this may grant it away from his heirs. I think there can be no doubt that he is not bound to use it by himself and his descendants only, and that the parties are equally entitled to it, whether they claim under him by deed or by descent.

ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

SHANLEY v. COLWELL. Exch. of Pleas. 1840.—A cognovit given by a defendant who is in custody in execution on a judgment, for the debt and costs in that action, in consideration of his discharge, is valid, if a writ have been sued out to support it: and it lies upon the party impeaching its validity to shew that no writ has been sued out.

[S. C. 8 Dowl. P. C. 373; 9 L. J. Ex. 176; 4 Jur. 561.]

Petersdorff had obtained a rule calling upon the plaintiff to shew cause why the cognovit given by the defendant to the plaintiff, and the judgment thereon, should not be set aside, on the ground that it was obtained from the defendant while he was in custody in execution for the same debt and costs for which the cognovit was given. It did not appear from the affidavits on either side, whether [544] the cognovit was founded on any writ sued out or not. The defendant was discharged from custody on giving the cognovit.

Kelly shewed cause. This cognovit is good. It is, indeed, given for the same debt and costs for which the defendant had already been taken in execution, but it is not given in the same action, and it is founded upon a good consideration, viz. the discharge of the defendant out of custody. No doubt the debt is extinguished by the execution; and if the debtor were out of custody, a security given for the past debt would be of no force, as being without consideration; but the discharge from custody is a good consideration for a new security. At all events, it lies on the defendant, who seeks to set aside a judgment good on the face of it, to impeach it by his affidavits; and here he does not state that no writ was issued on which to found the cognovit: the Court will therefore presume that a writ was issued, the contrary not being shewn.

Petersdorff, contra. The defendant's affidavit states, that the cognovit was given "for and in respect of the same debt for which he was then in execution"—which was then satisfied, so far as related to the action in which the judgment was obtained; and it is not suggested that there has been any proceeding on which the second judgment, which has been signed for the same debt and costs, could be founded. It lay on the plaintiff to shew affirmatively that a writ had been issued; it was not a fact in the defendant's knowledge; all he could do was to depose that the cognovit was given for the same debt. To require more, would impose on him the necessity of searching through all the Courts for an indefinite period. All that it was incumbent on him to do, to shew a *prima facie* case of irregularity, he has done.

[545] LORD ABINGER, C. B. I think this rule must be discharged, on the ground suggested by Mr. Kelly, that the defendant has failed to make out that no writ has been issued, on which to found the cognovit. A discharge from prison may, I think, be a good consideration for giving a new security for the debt for which the party is in execution. It is true, a party who has been taken in execution under a *ca. sa.*, and discharged out of prison, cannot make a valid agreement to return into custody; but that rule stands on technical reasons. The judgment is *functum officio* by the execution, and cannot be made the foundation of subsequent proceedings. But a new security given to procure the discharge of the debtor may be valid, and on this ground

there can be no objection to a cognovit given for such a purpose. There must, indeed, be a new writ sued out to support the cognovit; but the party who seeks to set aside such an instrument must shew clearly and distinctly, that there has been no process to warrant it. Here the defendant does not shew, as he might have done, that no writ has been issued.

PARKE, B. There is no objection to this cognovit, if there is a writ to support it. But the only defect that can be urged against it being the want of a writ, the party who objects on that ground ought to shew that there was in fact no writ. If a writ had actually issued, the cognovit would stand on the same ground as a warrant of attorney, being a new security given in a nominally different action, and so valid in point of law. If a defendant who has been once in execution, and discharged, is again taken in execution for the same debt, he would be entitled to his discharge, on the ground that the debt was satisfied by the former execution; so also, if an action be brought, the discharge from the execution would still be an answer. But if he gives a cognovit, which has reference to a writ [546] actually sued out, even for the same cause of action for which he is in execution, he precludes himself from the objections he might have taken in pleading to that action, and the instrument is a good and valid security. Here the only objection is the want of a writ, and that is not distinctly shewn by the defendant.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged without costs.

PIKE v. DAVIS. Exch. of Pleas. 1840.—Where a Judge at Chambers, upon the hearing of a summons on affidavit, dismisses the summons upon the merits, the party may renew his application to the Court, on additional affidavits.

[S. C. 8 Dowl. P. C. 387; 9 L. J. Ex. 322; 4 Jur. 395.]

This was a rule calling upon the plaintiff to shew cause why the execution issued against the defendant should not be set aside, with costs, on the ground that the defendant was not indebted to the plaintiff. A summons to the same effect had been taken out at chambers, and heard on affidavits before Gurney, B., who dismissed it on the merits, with costs.

Petersdorff, on shewing cause against the rule, objected that, the matter having been fully heard and decided on by the learned Judge, who it was not suggested had fallen into any error in point of law, the defendant had no right, having failed in that application, to amend his affidavits, and come to the Court to have the case reheard on the merits. If such a course were allowed, parties would make a practice of going before a Judge at Chambers, in order to ascertain the nature of their adversary's case, and then produce additional affidavits to answer it.

LORD ABINGER, C. B. A party clearly has a right to [547] move to set aside a Judge's order if made; and if he refuse to make one, what other remedy is there except an application to the Court? Nor is there any rule which says, that a party shall not have the power of laying additional facts before the Courts by affidavit.

The case was ultimately referred to the Master.

GILLARD v. BATES. Exch. of Pleas. 1840.—Where an attorney sued for work and labour, in issuing an execution against C., and the defence was that he was employed by B. and not by the defendant:—Held, that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he the plaintiff had been employed by B. to issue execution against C.: and that this was not a privileged communication.

[S. C. 8 Dowl. P. C. 774; 9 L. J. Ex. 171.]

Debt for work and labour, money paid, and on an account stated. Plea, *nunquam indebitatus*. At the trial before Rolfe, B., at the last Devon Assizes, it appeared that the action was brought by the plaintiff, an attorney, against the defendant, the

manager of the West of England District Bank, to recover the charges of entering up judgment upon a warrant of attorney, which one Clarke had given to one Bendle, and which Bendle, being a debtor to the bank, had deposited as a security for his debt in the hands of the defendant. The defence was, that the plaintiff was employed by Bendle, and not by the defendant: to prove which the defendant called one Bendridge, an attorney, the plaintiff's agent, who had been employed by the plaintiff to sue out process against Clarke in respect of the warrant of attorney; and he having stated that the plaintiff called on him one morning in company with Bendle, it was then proposed to ask him, whether the plaintiff had not said at that interview, that he had been employed by Bendle to sue out execution against Clarke. The plaintiff's counsel objected to this question, on the ground that, the witness being the plaintiff's agent, such communication to him was privileged. The learned Judge overruled the objection; and the witness answering the question in the affirmative, the jury found for the defendant.

[548] Rowe now moved for a new trial, and contended that the communication in question was privileged, and ought not to have been received in evidence; and cited *Parkins v. Hawkshaw* (2 Stark. Rep. 239).

Per Curiam. This is in no respect a privileged communication. It is something said by the plaintiff to his agent, on introducing an individual who was to be the plaintiff in another action. The privilege does not attach to every thing which the client says to his attorney: the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is necessary, it becomes privileged.

Rule refused.

[549] BRASHIER v. JACKSON. (a) Exch. of Pleas. 1840.—An amendment of the nisi prius record, under the 3 & 4 Will. 4, c. 42, s. 23, must be made during the trial and before verdict, and the Judge cannot give the party power to amend on a future day.—Where the original declaration stated that the plaintiff became and was tenant to the defendant of a messuage, on terms contained in articles of agreement between them, whereby the defendant agreed to grant the plaintiff a future lease for 21 years, containing certain covenants; and averred that the plaintiff covenanted to accept such lease, and that, in consideration of the premises, &c., the defendant promised the plaintiff that he should hold and enjoy the premises for the term, without any let, hindrance, &c., from the defendant or any person claiming through him; that the plaintiff remained and continued such tenant as aforesaid until &c., and paid a quarter's rent; but that the plaintiff broke his promise in this, that one R. had lawful title to the premises under a previous lease, granted by the defendant and others, and ejected the plaintiff, &c.: to which declaration there were pleas of non assumpsit, and that the defendant did not become tenant modo et formâ:—Held, that the amendment of the declaration, by such alterations and insertions as were necessary in order to treat the agreement, not as an actual demise, but merely as an agreement for a future lease, and making the breach to consist, not in the plaintiff's not holding or enjoying without eviction, but in the defendant's having no title to grant a lease, was not within the stat. 3 & 4 Will. 4, c. 42, s. 23, inasmuch as it introduced an entirely new contract and new breach.—By articles of agreement, dated 2nd May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a messuage, &c., for twenty-one years from Midsummer day then next, at a rent of £45, payable quarterly, on the usual days of payment in every year during the said term, the first payment to commence on the 29th September then next: to be entered upon immediately by the plaintiff, he having on the day of the date paid £25 to the defendant: and in the lease were to be contained covenants to pay the rent, to repair, &c. &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years:—Held, that this instrument amounted to an agreement for a

(a) This case was decided in Michaelmas Term last, but was unavoidably omitted in its proper place.

lease only, and not to an actual demise; and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment.

[S. C. 8 Dowl. P. C. 784; 9 L. J. Ex. 313.]

Assumpsit. The declaration (as originally framed) stated, that [heretofore, to wit, on the 24th day of June, A.D., 1838, at the request of the defendant, the plaintiff became and was tenant to the defendant of a certain messuage or tenement and premises, with the appurtenances, upon certain terms contained in] certain articles of agreement in writing [theretofore] made by and between the defendant and the plaintiff, and signed by them respectively, and bearing date the 2nd day of May, in the year [aforesaid, whereby,] after reciting as therein is recited, it was agreed by and between the defendant and the plaintiff in manner following: that is to say, the defendant did thereby, for himself, his heirs and assigns, covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that he the defendant, his heirs or assigns, should and would make a good and sufficient lease by indenture of [the said] premises to the plaintiff, for the [550] term of twenty-one years, to commence from Midsummer-day then next ensuing; to hold the same at and under the yearly rent of £45, payable quarterly, on the four most usual days of payment in every year during the said term, the first payment thereof to commence on the 29th day of September then next: to be entered upon immediately by the plaintiff, he paying upon the day of the date of the said agreement £25 to the defendant: and in the lease, it was thereby also agreed between the parties, there should be contained on the part of the plaintiff, his executors, administrators, and assigns, a covenant for the payment of the said rent, to bear and pay all the rates, taxes, and assessments which should be made in respect of such premises during the said term, &c.; and also to keep in good and substantial repair the said messuage, to deliver up quietly at the end of the term, not to assign or underlet without consent, nor to exercise offensive trades, and all other usual and reasonable covenants on the part of the plaintiff, and the defendant for quiet enjoyment by the plaintiff, his executors, &c., during the said term; with a power to be therein contained for the said parties, or either of them, by notice in writing to be delivered six months previous to the end or expiration of the first seven or fourteen years, to determine the lease: And the plaintiff did thereby for himself, his executors, &c., covenant, promise, and agree to and with the defendant, his heirs and assigns, that he the plaintiff should and would accept such lease as aforesaid, and would execute and deliver unto the defendant, his heirs or assigns, a counterpart thereof, &c. &c.: And thereupon, to wit, on the said 24th day of June in the year aforesaid, in consideration of the premises, and that the plaintiff had then promised the defendant to perform and fulfil all things in the said agreement contained on his part to be performed and fulfilled, he the defendant then promised the plaintiff to perform and fulfil all things in the said agreement contained on his the defendant's [551] part to be performed and fulfilled, and that he [the plaintiff, should and would hold and enjoy the said premises, and every part thereof, with the appurtenances] for [and during] the said term of twenty-one years [without any lawful let, suit, entry, or disturbance whatsoever, of or by the defendant, or any of his heirs or assigns, or of or by any person or persons claiming by, from, through, or under the defendant, or by or through his or their acts, means, or default]. The declaration then averred the payment by the plaintiff to the defendant of the £25, general performance by him of the agreement, and that he had always been ready and willing to accept the lease, and execute a counterpart: and that although he the plaintiff [remained and continued such tenant as aforesaid, from the said 24th day of June in the year aforesaid] until the 22nd day of December in the year aforesaid, and did in due manner pay to the defendant the sum of 11l. 5s. of the rent aforesaid, for one quarter of a year of the said term, ending on the 29th day of September in the year aforesaid, yet the defendant did not perform or regard his said promise or agreement, but broke the same in this, that [he, the plaintiff hath not held or enjoyed the said premises with the appurtenances without any let, &c., of any person or persons claiming by, through, from, or under the defendant, or by or through his or their acts, means, or default], but, on the contrary thereof, one Thomas Robinson, being the assignee of the estate and effects of Robert Podbury, an insolvent debtor, duly adjudged to be discharged from imprisonment, to wit, on the 8th day of May in the year aforesaid &c., which said Thomas Robinson, as such assignee as aforesaid,

[at the time of the commencement of the said tenancy], and from thence until and at the time of the eviction, ejection, and expulsion hereinafter mentioned, had lawful right and title to the possession of the said premises, under and by virtue of a lease to the said Robert Podbury, granted long [552] before the making of the said agreement, by the defendant and certain other persons, for a term of years which is not yet expired, did [during the said tenancy of the plaintiff and] during the said term of twenty-one years, to wit, on &c., enter into the said premises, and in and upon the possession thereof, and ejected, expelled, and removed the plaintiff, &c. &c.

Pleas, first, non assumpsit; secondly, that the plaintiff did not become nor was he tenant to the defendant of the said message or tenement and premises, with the appurtenances, in the declaration mentioned, in manner and form &c.; thirdly, a traverse of the plaintiff's readiness to accept the lease and execute a counterpart; fourthly, a denial that Robinson had lawful right and title to the premises; and lastly, a denial of the eviction of the plaintiff by Robinson: on all which issues were joined.

At the trial before Lord Abinger, C. B., at the London Sittings after Hilary Term, 1839, (on the 21st of February), the agreement in question was put in, and appeared to be in the terms stated in the declaration. It was objected for the defendant, that the instrument did not amount to an actual demise, but only to an agreement for a future lease, and therefore that the second plea, denying that the plaintiff was tenant to the defendant, was proved, and that the defendant was entitled to a verdict on that issue. The learned Judge being of that opinion, the plaintiff's counsel applied to his Lordship to direct an amendment of the declaration under the stat. 3 & 4 Will. 4, c. 42, s. 23, by omitting such words as imported an actual tenancy, and inserting words applicable to an agreement for a lease. The defendant's counsel objected that such an amendment could not be made, as it would altogether alter the frame of the issues. The Lord Chief Baron however granted the application, and gave the plaintiff (notwithstanding the objection of the defendant's counsel, that the amendment must be made, if [553] at all, during the trial and before verdict) until four days before the commencement of the term to make his election whether he would amend or not. The trial proceeded, and a verdict was found for the plaintiff, damages 211l. 4s. 4d.; "with liberty for the plaintiff to amend, delivering his amendment four days before the term, and with leave for the defendant to move for a nonsuit, or verdict for the defendant, or otherwise, as he might be advised." And on the 8th of April, the following order for the amendment was drawn up and signed by the Lord Chief Baron, and indorsed on the postea, and a copy thereof was delivered to the defendant.

"According to the statute made in the 3rd and 4th years of the reign of His late Majesty King William IV., I do order that the plaintiff have leave to amend, and that he do amend accordingly the within record, by striking out of the declaration the words beginning 'heretofore' to the word 'in,' both inclusive,(a) and then inserting the word 'by'; and striking out the words 'theretofore' and 'aforesaid, whereby,' and inserting the words 'of our Lord 1838;,' striking out the words 'the said' and inserting the word 'certain'; and by striking out the words 'plaintiff should have held,' &c., to the word 'appurtenances,' inclusive, and then striking out the words 'and during,' and the words 'without any,' &c., to the word 'default,' inclusive, and inserting the words 'defendant had good right and title to grant the said lease:,' and by striking out the words 'remained and continued such tenant as aforesaid from the said 24th day of June in the year aforesaid,' and inserting the words 'confiding in the said agreement, &c., promise, immediately after the making of the said agreement, to wit, on the day of the date thereof, entered into and upon the said premises, and became and was the tenant thereof, and [554] so remained from thence;,' and by striking out the words 'he the plaintiff,' &c., to the word 'default,' inclusive, and inserting the words 'the defendant had not good right or title to grant the said lease;,' and by striking out the words 'at the time of the commencement of the said tenancy,' and inserting the words, on the said 24th day of June, in the year of our Lord, 1838."

"ABINGER."

(a) The parts in which the amendments were made are inclosed within brackets in the original declaration.

In the following Easter Term, Bompas, Serjt., moved for a rule to shew cause why the above order should not be rescinded, and why the verdict should not be set aside and a nonsuit entered. First, the amendment was not within the statute at all; it produces an entire change of the record, and necessarily introduces totally different issues. [Alderson, B. It is a new contract, and a new breach.] Secondly, the amendment must be made before verdict; the jury are to try the amended record. The plaintiff did not elect to amend at the time of the trial, nor could the defendant tell, until the service of the order on the 9th of April, many weeks after the trial, whether he would amend or not; and then he amended the declaration only, leaving the rest of the issue unaltered. [Alderson, B. If the Judge gives a power to amend in futuro, how can it be said that it is made in a matter which, in his judgment, is not material to the merits of the case? That implies that he must exercise a judgment on it at the time.] Thirdly, supposing the amendment not made, the defendant is entitled to a nonsuit, the instrument produced being only an undertaking to grant a future lease, whereas the declaration describes it as an actual demise. The promise alleged, that the plaintiff should hold and enjoy free from let &c. by the plaintiff, or those claiming under him, would not arise out of a mere agreement to grant a lease in futuro; the point arises, therefore, on the plea of non assumpsit.

A rule having been granted,

[555] Erle and Humfrey shewed cause in Trinity Term. First, the amendment was within the statute. [Alderson, B. How is it an alteration in the terms of the same contract?—it is a wholly different one. Besides, there is another objection, that it was not made at the trial.] It was taken as so made. It is the constant practice to take amendments at Nisi Prius as being then made, although in fact made afterwards. [Alderson, B. Surely it must be made at the trial, because the trial is to proceed, and the jury are to pass their opinion upon the amended record. The amendment must be conformable to the case proved, and the issues joined: but this alters all the issues in substance.] Then it is contended that the declaration is good as it originally stood, and that the plaintiff is entitled to retain his verdict upon it. It alleges that the plaintiff became tenant to the defendant on the terms contained in certain articles of agreement, containing certain specific stipulations, which are set forth. If the instrument of the 2nd of May was a lease, the declaration was proved in omnibus; and if it was only an agreement for a lease, it was proved in substance. The criterion whether an instrument amount to a lease or to an agreement only, is thus stated in Bac. Abr. Leases (K.): "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." Here there is an intention sufficiently expressed, that the defendant shall divest himself of the possession, and the plaintiff shall have it for a determinate time, and at a determinate rent. There is also, it is true, an intention expressed that another instrument shall be afterwards executed; but that does not prevent the first from operating [556] as a lease in the meantime. The law on this subject was fully gone into in the recent case of *Alderman v. Neale* (4 M. & W. 704), in which an instrument very similar to the present was held to operate as a present demise. Here, as there, the party was let into possession on terms distinctly ascertained, and might have gone on for the whole term without the execution of a formal lease. [They cited also, in support of this part of the argument, 1 Rol. Abr. 847, *Maddon's case* (Cro. Eliz. 33), *Poole v. Bentley* (12 East, 168), *Pinero v. Judson* (6 Bing. 205; 3 M. & P. 497), *Wright v. Trevozant* (Moo. & Mal. 232), *Warman v. Faithfull* (5 B. & Adol. 1042; 3 Nev. & M. 137).] The cases of *Morgan v. Bissell* (3 Taunt. 65), *Roe v. Ashburner* (5 T. R. 163), and *Hayward v. Haswell* (6 Ad. & Ell. 265; 1 Nev. & P. 411), which may appear contrary, are distinguishable. In the first the rent was not ascertained, in the second the premises were not, in the last the proposed lessor had no power of granting a lease. In each of them, therefore, there was something further to be done, which prevented the parties from entering upon certain lands for a certain time and at a certain rent, or something to be done before the other party could be clothed with the character of lessor.

But even if this was only an agreement for a lease, the declaration was substantially proved. The plaintiff became tenant to the defendant. On the 2nd of May, he was

put into possession by virtue of this contract: and if he was tenant from year to year, it was on the terms of the written agreement. Could he not have been sued for the £45 as rent by the year? or if he had not been paid the rates or taxes, or not repaired?

But, lastly, the second issue is in fact wholly immaterial. It matters not whether the plaintiff was tenant or [557] not; the only question is, whether the defendant has promised to grant him a lease for twenty-one years, and has broken that promise. [Maule, B. The promise is "in consideration of the premises;" that is, inter alia, of the plaintiff's having become tenant.] Then the agreement must be as binding on the one party as the other: if the defendant could have enforced the terms of it against the plaintiff, it must be reciprocal. If the production of the agreement would shew that the plaintiff held on the terms of paying 45l. a-year, it must also shew a valid contract as against the other party; and therefore the legal effect of it is that there is an implied promise of quiet enjoyment. [Alderson, B. If it be only an agreement to give a lease containing such a covenant, there is no actual promise: a further act is to be done before the promise arises. Maule, B. In stating this promise, you have stated a lease: if you have not proved a lease, you have not proved your declaration.]

Bompas, Serjt., and G. T. White, contra. The only question which really remains for consideration in this case, and which arises on the first and second issues, is, whether this instrument be an agreement for a lease only, or an actual lease. The authorities go clearly to this extent, that unless there be some words of present demise, the instrument does not amount to a lease. [They then cited and commented on the following cases:—*Muldon's case*, *Goodtitle v. Way* (1 T. R. 735), *Poole v. Bentley*, *Pinero v. Judson*, *Warman v. Faithfull*, *Wright v. Trezevant*, *Alderman v. Neate*, *Hegan v. Johnson* (2 Taunt. 148), *Doe d. Bromfield v. Smith* (6 East, 530), *Dunk v. Hunter* (5 B. & Ald. 322), *Rawson v. Eicke* (7 Ad. & Ell. 451; 2 Nev. & P. 423).] This is a demise contracted for, not one executed. The real effect of [558] the transaction is this, that the plaintiff gives £25 for permission to enter immediately, but does not become lessee until the execution of the lease, pursuant to the stipulations of the agreement.

Cur. adv. vult.

In Michaelmas Term, the judgment of the Court was delivered by

LORD ABINGER, C. B. [After stating the nature of the case, and the circumstances relating to the allowance of the amendment, he proceeded:] The Court are of opinion that I had no power, without the consent of both parties, to give the plaintiff the liberty of making the amendment after the trial, but that I should have postponed the trial for that purpose, according to the provisions in the 23rd section of the act of Parliament. But my Brother Bompas has also satisfied us that it was an amendment which ought not to have been allowed, inasmuch as it introduced a new contract, and would require a remodelling of all the pleas on the record. And we are of opinion, that as the declaration originally stood, the plea that the defendant did not become tenant modo et forma was substantially proved, the articles of agreement amounting only to a contract for a future tenancy. The result is, that a nonsuit must be entered.

Rule absolute accordingly.

[559] BASAN v. ARNOLD. Exch. of Pleas. 1840.—To an action on a bill of exchange by the indorsee against the acceptor, the defendant pleaded, that the bill was drawn and accepted for the accommodation of B.; that B. indorsed and delivered it to the plaintiff, in order that he the plaintiff should discount it and pay the value to B., but that the plaintiff did not discount it or pay the value to B., or to the drawer, or to the defendant. To this plea the plaintiff replied, de injuriâ:—Held, that the replication was good, inasmuch as the plea amounted to matter of excuse for the nonpayment of the bill.—The defendant pleaded, also, that after the indorsement and before the commencement of the suit, the plaintiff indorsed and delivered the bill to a person, whose name is to the defendant unknown; and the defendant then became, and still is, liable to pay the amount to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and is the holder thereof. Replication, that at the time of the commencement of this suit the plaintiff was, and still is, the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in that

plea is alleged :—Held, that this replication was bad, as the traverse was too large, and put in issue the plaintiff's being the holder of the bill, not only at the time of the commencement of the suit, but also at the time of the plea pleaded, which was immaterial.

[S. C. 8 Dowl. P. C. 356 ; 9 L. J. Ex. 189.]

Assumpsit on a bill of exchange for 68l. 9s. at three months, drawn by one Philip Lazarus upon and accepted by the defendant, and indorsed by the said Philip Lazarus to J. C. Batho, who indorsed the same to the plaintiff.

Pleas—first, that the defendant did not accept the bill ; secondly, that the said P. Lazarus drew and indorsed, and he the defendant accepted the said bill, for the accommodation of the said J. C. Batho, and without any valuation or consideration by any one given or received for the said drawing or indorsing, or for the said acceptance or the payment thereof ; of all which the plaintiff had notice : and the defendant further says, that the said J. C. Batho then indorsed and delivered the said bill to the plaintiff, and the plaintiff then took and received, and has always held the same, in order and upon the agreement and terms that he the plaintiff should discount the same, and then pay the value and proceeds thereof upon such discounting to the said J. C. Batho, and for no other consideration or value, and upon no other terms whatever. And the defendant further says, that the plaintiff did not discount the said bill, or pay the value or proceeds thereof upon such discounting, or any part thereof, to the said J. C. Batho, or to the said P. Lazarus, or to the defendant, but he the plaintiff holds, and always has held, the said bill without having given any value whatever for the same, and that neither the defendant nor [560] the said P. Lazarus nor the said J. C. Batho has ever received any value or consideration whatever for the said bill. Verification.

The defendant pleaded, thirdly, that, after the said bill was indorsed to the plaintiff, and before the commencement of this suit, to wit, on the 29th of July, 1839, he the plaintiff indorsed the said bill, upon good and sufficient consideration, to a certain person whose name is to the defendant unknown, and the defendant then became and still is liable to pay the amount of the said bill to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been and is the holder thereof ; and this the defendant is ready to verify, &c.

To the second plea the plaintiff replied *de injuriâ* ; and to the third he replied, that at the time of the commencement of this suit the plaintiff was, and still is, the holder of the said bill ; without this, that any other person is the holder thereof, in manner and form as in that plea is alleged.⁴

To both these replications the defendant demurred, and assigned the following causes :—To the replication to the 2nd plea ; that the said second plea does not admit that the defendant ever made any promise to pay the plaintiff, but amounts to a denial or traverse of any such promise ever having been made, and that the said second plea does not consist of a mere matter of excuse for the nonperformance of the promise declared on, but amounts to an avoidance thereof. And that the same plea contains also matter of interest in the defendant in the said bill of exchange ; and also that the defendant in his said plea justifies under authority from the plaintiff. To the replication to the last plea, that the special traverse, being the concluding part of the said replication to the last plea, which is the part thereof which professes to take issue on the plea, does not put in issue the allegation contained [561] therein, that such other person was the holder of the bill at the time of the commencement of the suit, or of the plea being pleaded, but seeks to raise an issue whether any other person was such holder at the date of the said replication. That if the said replication puts in issue the fact, whether any other person than the plaintiff were such holder at the time of such plea being pleaded, the issue thereby raised is immaterial ; that if the plaintiff intended to rely on the allegation in the replication, that the said plaintiff was, at the time of the commencement of the suit, and still is, the holder of the said bill of exchange, the plaintiff should not have pleaded the same as inducement to the special traverse, but should have concluded to the contrary, with the addition of such special traverse. And further, that the plaintiff, in the said replication hath so replied as to leave the said defendant in doubt as to the part of the said replication on which the plaintiff means to take issue, and that the said traverse is double and immaterial.

Joinder in demurrer.

Dowdeswell, in support of the demurrers. First, the replication to the second

plea is bad. That is not a plea in confession and avoidance, but it in effect denies that the defendant made any promise to pay the plaintiff the amount of the bill, and it sets up an interest in the defendant in the bill. [Parke, B. Was not this point settled in *Isaac v. Farrar* (1 M. & W. 65)? It was there held, that where the plea admits the contract and the breach, and only alleges facts by way of excuse, the replication *de injuriâ* is proper. The defendant admits the indorsement, but says it was without consideration.] The plea states that the indorsement was made for a special purpose only, and as that was not complied with, it passed no property in the bill to the plaintiff. It does not admit the indorse-[562]-ment and promise stated in the declaration; and the replication *de injuriâ* is therefore inapplicable; *Whittaker v. Mason* (2 Scott, 567; 2 Bing. N. C. 359). In *Buchanan v. Findlay* (9 B. & Cr. 749), Lord Tenterden says, "If goods or bills are deposited for a specific object, and the bailee does not perform the object, he must return them; the property in the bailor is not divested or transferred until the object is performed." [Parke, B. Is not this exactly the same as the case of *Isaac v. Farrar*? The plea admits the indorsement to the plaintiff, and that, *primâ facie*, transfers the property in the bill. The facts alleged in the plea constitute matter of excuse for the nonpayment of the bill. In *Whittaker v. Mason*, the action was for a breach of contract in not paying for goods by bills with security, and the plea set out a custom of trade that such security was only given when it was demanded before the goods were delivered: that is a totally different case.] At all events, the replication to the third plea is bad; for it does not put in issue the allegation in the plea, that the plaintiff was not the holder of the bill at the time of the commencement of the suit.

The Court then called upon

Knowles to support this replication. The allegation in the third plea is, that some other person and not the plaintiff was the holder of the bill; this, to render it material, must be taken to mean, at the commencement of the suit; and that is the allegation traversed by the replication. It therefore puts in issue the fact that the plaintiff was the holder of the bill at the time of the commencement of the suit. Besides, it is expressly alleged in the replication that the plaintiff was the holder at the time of the commencement of the suit; and although that is in the introductory part before the traverse, still it may be taken to assist the traverse. In all pleadings, the time referred to is the commencement of the suit, unless the contrary appears. That was the ground of the decision in *Owen v. [563] Waters* (2 M. & W. 91). [Parke, B., referred to *Evans v. Prosser* (3 T. R. 186), as overruling *Reynolds v. Beerling* (cited in the notes to *Sullivan v. Montague*, Doug. 112).] When the plaintiff traverses that any other person is the holder, in manner and form, it means at the time the plea points out, which is the commencement of the action.

Dowdeswell, contra. If the words "still is" had had the meaning contended for, the plea would have been held good in *Evans v. Prosser*, because then it would have referred to the time of the commencement of the action. In *Dendy v. Powell* (3 M. & W. 442), a plea of set-off, stating that "before and at the time of the commencement of the action the plaintiff was indebted to the defendant," was held bad on demurrer, for omitting to add "and still is indebted," which shews that the words "still is" have not the meaning contended for. Here the party may have got the bill back into his own hands subsequently to the plea being pleaded, consistently with what is stated in this replication. The plaintiff, by traversing that any other person is the holder thereof, in manner and form, &c., in fact alleges that the plaintiff was the holder at the time of the plea pleaded. *Le Bret v. Papillon* (4 East, 502). But the fact so averred is immaterial, and the defendant is embarrassed as to the mode of taking issue.

PARKE, B. The replication would make it necessary for the defendant to shew not only that the plaintiff was not the holder at the commencement of the action, but that he was not so at the time of the plea pleaded. The allegation is, that no other person is the holder thereof; such a traverse is too large, because it makes it incumbent on the defendant to shew that another person, and not the plaintiff, was the holder, both at the commencement of the action and at the time of the plea being pleaded. The latter [564] fact is immaterial, and therefore the replication is bad. I think the word "is" refers to the time of the plea pleaded. Both parties may have leave to amend, otherwise there must be judgment for the plaintiff on the replication *de injuriâ* and for the defendant on the replication to the third plea.

ALDERSON, B. I am of opinion that the replication to the third plea is bad. The plaintiff has pleaded in such a way as to compel the defendant to prove that which is immaterial.

The rest of the Court concurred.

Leave to amend accordingly.

THE COMPANY OF PROPRIETORS OF THE PARRETT NAVIGATION COMPANY v. JACOB STOWER, ISAAC TROTT, AND JAMES MUNCKTON. Exch. of Pleas. 1840.—Case. The first count of the declaration alleged, that the plaintiffs were proprietors of the Parrett Navigation under certain acts of Parliament, which empowered them to receive certain tolls, and in case of refusal or neglect of payment, to seize and distrain the goods in respect of which such tolls ought to have been paid, and the barge laden therewith, or any other goods belonging to the owners of such first-mentioned goods, or to the person from whom such tolls should be due, being on the said navigation or any part thereof, or any premises thereto belonging, and to detain the same until payment of the tolls. It then alleged that a certain sum was due and in arrear to the plaintiffs as and for tolls payable to them under the said acts, for the transit and conveyance of certain goods in a certain barge, then navigated and conducted by the defendants, I. T. and J. M., upon the said navigation; and averred a demand of the tolls from the person so navigating the said barge, who refused to pay the same, a seizure of the barge as a distress, and a rescue by the defendants whilst the plaintiffs' bailiff was about to detain and impound the same:—Held, on special demurrer, that the count was bad, inasmuch as it did not shew that the articles distrained were those in respect of which the tolls were due, or the property of the person from whom they were due, and consequently did not shew any authority to distrain them.—The second count stated, that the plaintiffs had seized a certain barge then navigated and conducted by the said I. T. and J. M., and a certain quantity of coals then being in the said barge, the said barge and coals then being on the said navigation, as a distress for certain tolls then in arrear for the conveyance of certain goods upon the said navigation, and had detained and impounded the said barge and coals, with intent to appraise and sell the same, according to the form and effect of the said statutes, whereupon the defendants on &c. broke the said pound, and rescued the barge and coals, whereby &c.:—Held, that this count was good, because the goods being alleged to have been impounded, they were then in the custody of the law, and the defendants had no right to retake them, and in so doing were wrong-doers.—A demurrer commencing, "And the defendant says that the said declaration is insufficient in law," and then proceeding to assign separate causes of demurrer to each count of the declaration, is in form a demurrer to the whole declaration; and if any count be good, the plaintiff is entitled to judgment, the demurrer being too large.

[S. C. 8 Dowl. P. C. 405; 9 L. J. Ex. 145, 180.]

Case. The first count of the declaration alleged, that before and at the time of making the distress thereafter [565] mentioned, the plaintiffs were and still are a body corporate, by the name of the Company of Proprietors of the Parrett Navigation, under and by virtue of an act passed in the 7 Will. 4, under and by virtue of which said act, and of a certain act passed in the 2 Vict., the said plaintiffs during all the time aforesaid were entitled to receive certain tolls, rates, and duties, &c.; and by which first mentioned act it was enacted, that all tolls &c. becoming due to the said Company under and by virtue of that act, should be paid to such persons, at such place or places near to the said navigation and other works, and under such regulations and in such manner, as the said Company should direct; and in case of refusal or neglect of payment, the said Company might, in case such tolls should amount to or exceed £20, sue for the same by action of debt or upon the case, or the said Company or their collectors or agents might, and they were thereby empowered, whether the tolls, rates, or duties exceeded the sum of £20 or not, to seize and distrain the goods, wares, and merchandize in respect of which such tolls &c. ought to have been paid as aforesaid, and the barge, boat, or vessel laden therewith, or any other goods, &c.,

belonging to the owners of said first-mentioned goods, &c., or to the person from whom such tolls &c. should be due, and any barge &c. belonging to the owner of such first-mentioned barge, or to the person from whom such tolls &c. should be due, and respectively being on the said navigation and other works, or any part thereof respectively, or any wharf, quay, landing-place, or warehouse belonging thereto, and detain the same until the payment of all and singular the tolls &c. which at the time of such seizure and distress made should be due and owing to the said Company. The count then averred, that the sum of 5l. 8s. 4½d. had been and was due and owing and in arrear to the plaintiffs, as and for tolls payable to them the plaintiffs, under the said acts, for the transit and conveyance of certain goods, wares, and merchandize, in a certain barge then navigated and con-[566]-ducted by certain persons, to wit, the defendants Isaac Trott and James Munckton, upon the said navigation, according to the provisions of the said acts in that behalf, and which said tolls, when they so became due as aforesaid, were payable at a place near to the said navigation, and to a certain person, to wit, one Francis Keehlman, in that behalf duly named and appointed by the plaintiffs under certain regulations of the plaintiffs, according to the provisions of the said act, whereof the said persons so navigating and conducting the said barge then had notice. The declaration then stated, that after the said sum of money became due, and whilst it was in arrear, and before the distress, the said F. Keehlman, being a person appointed by the plaintiffs to receive the tolls, demanded payment of the same from the said person so navigating the said barge, who refused to pay the same. It then alleged a seizure of the barge as a distress, and a rescue by the defendants while the plaintiff's bailiff was about to detain and impound the same, whereby the plaintiffs were greatly delayed in the recovery of the tolls, and deprived of the means of obtaining satisfaction thereof, and of the charges of the said distress, and were likely to lose the same.

The second count stated that the plaintiffs, by their bailiff, had seized a certain barge then navigated and conducted by the said Isaac Trott and James Munckton, and a quantity of coals then being on the said navigation, as a distress for certain tolls, to wit, 5l. 8s. 4½d. then in arrear and unpaid for and in respect of the conveyance of goods upon the said navigation, and had detained and impounded the said last-mentioned barge and coals, upon a certain part of the said navigation, being the most convenient part of the said navigation for that purpose, with intent to appraise and sell them, according to the form and effect of the said statutes in such case made and provided as aforesaid; whereupon the defendants broke and entered the [567] said pound, and rescued the said barge and coals, whereby the plaintiffs had been and were greatly delayed in the recovery of the said last-mentioned tolls so in arrear as aforesaid, and deprived of the means of obtaining satisfaction thereof, and of the charges of the said last-mentioned distress, and were likely to lose the same.

To this declaration there was a special demurrer, which commenced as follows:—
 “And the defendants, by &c., say that the said declaration is insufficient in law. And for causes of demurrer to the first count thereof, the defendants, according to the form of the statute in such case made and provided, set down and shew to the Court here the following, viz. for that it is not stated or alleged, nor doth it appear in or by the said first count, that the said badge in the said first count mentioned, and so seized as therein mentioned, was the goods &c., in respect of which the said tolls in that count mentioned, or any part thereof, became due or payable, or the barge &c. laden therewith, or any other goods &c. belonging to the owner of such first-mentioned goods, or any part thereof, or to the person from whom such tolls &c., or any part thereof, were due, or any barge, &c. belonging to the owner of such first-mentioned barge, or to the person from whom such tolls were due, as by the said first-mentioned act is required, &c. And also, for that the plaintiffs have not in or by their said first count shewn or set forth any good or lawful right or authority to seize or distrain the said barge therein mentioned. And for causes of demurrer to the said last count, the defendants, according to the form of the statute &c., set down and shew to the Court here the following” (setting forth similar causes).

“And for a further cause of demurrer to the whole of the said declaration, the defendants state and shew to the Court here, that the same is not properly intitled as of the Pleas side of this Honourable Court,” &c., &c. [an objection which was not insisted upon in the argument].

[568] The points marked for argument were, “that in neither count is a sufficient

right or power of distress shewn within the terms and meaning of the statute 6 & 7 Will. 4, cap. ci. s. 126, upon which the alleged right of distress is founded."

Hurlstone, in support of the demurrer, was stopped by the Court, who called upon

Butt to support the declaration. The second count is good, and as the demurrer is to the whole declaration, if either count is good, the plaintiff is entitled to judgment. The second count alleges that the barge and coals had been impounded, they were then in the custody of the law, and the defendants by breaking the pound became wrong-doers, and liable in an action for so doing. The gist of the action alleged in that count is the breach of the pound, and the statement of the seizure of the barge as a distress is mere inducement. In Co. Litt. 476, it is said, "If the distress be taken of goods without cause, the owner may recover; but if they be distrained without a cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law." This point was considered in *Cotsworth v. Bettison* (1 Ld. Raym. 104; 1 Salk. 247). That was an action for pound breach, and rescuing a mare which had been distrained damage feasant; and it was there argued that the plaintiff had not entitled himself to maintain the action, for he had not shewn any title to the place where he alleged the mare was damage feasant; but the Court said, "The taking of the distress is but an inducement to the action, and the breach of the pound is the gist of the action: it is not necessary to shew the cause of the distress so certainly. And Rast. Entr. 444, and all the other precedents in *parco* [569] *fracto* are in this manner." [Lord Abinger, C. B. Have you a right to call this a pound, which is in your own possession?] Yes; the distinction in such a case is only as to the necessity of feeding the animal. But no point has been made as to the impounding. If this were not an impounding, the defendants might have traversed that allegation, but by the demurrer they have admitted it. It is laid down in the books, that wherever an animal is once put in the pound, the owner cannot touch it.

Hurlstone, *contra*. The plaintiffs have shewn no right whatever to distrain the goods in question; and if so, the case cited does not apply. In that case there was a common law right to distrain; but here there is no such right, the plaintiffs have no power of distress except by virtue of the statute, and their right to distrain is limited to the subject-matters therein mentioned; and therefore the declaration ought to have gone on to shew that the goods impounded were such as they were entitled to seize on a distress. Besides, in the case cited, the question arose upon a motion in arrest of judgment, which is the same as if it had been upon a general demurrer. The plaintiffs on their own declaration shew themselves to be trespassers, since they do not shew they were entitled to take as a distress that which they allege they so took. At all events, the first count is bad; and the defendants are entitled to judgment on the demurrer to that count, for the demurrer is in substance a demurrer to each count; the causes of demurrer being assigned separately to each.

LORD ABINGER, C. B. I think the second count of the declaration is sufficient. It alleges that the plaintiffs had seized a certain barge and coals as a distress for certain tolls which were then due, and had impounded them. Being so impounded they were then in the custody of the law, and the defendants had no right to break the pound [570] and retake them; and in so doing were wrong-doers. That count therefore shews a good cause of action. With respect the first count, I think it is bad, inasmuch as it does not shew that the articles distrained were those in respect of which the tolls were due, or that they were the property of the person from whom the tolls were due. It therefore does not shew that the plaintiffs had any authority to distrain them. But as the demurrer is to the whole declaration, it is sufficient to say that one count is good, and the judgment must be for the plaintiffs.

ALDERSON, B. The demurrer is in form a demurrer to the whole declaration, and as one count is good, it is sufficient to entitle the plaintiffs to judgment.

Judgment for the plaintiffs.

SPILLER v. JOHNSON. Exch. of Pleas. 1840.—In an action brought in the name of the public officer of a banking copartnership company, established under 7 Geo. 4, c. 46, it is not necessary to allege in the declaration that the plaintiff is a member of the company, that he is resident in England, or that he has been duly

registered as required by the 4th section of that act: it is sufficient to describe the plaintiff as one of the public officers of the company duly appointed.

[S. C. 8 Dowl. P. C. 368; 9 L. J. Ex. 175; 4 Jur. 367.]

The declaration commenced as follows:—"James Robert Spiller, one of the public officers of certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, according to the statute in such case made and provided, under the style and firm of the Northamptonshire Banking Company, and which said J. R. Spiller hath been duly nominated and appointed and now is one of the public officers of the said company, according to the force, form, and effect of the said act of Parliament, complains," &c.

Special demurrer, assigning the following causes amongst others: for that it does not appear in or by the said declaration, that the plaintiff was or is a member of the said copartnership, or that he was or is resident in England, or that he was or is registered as such public officer.

[571] Martin, in support of the demurrer. The declaration ought to have alleged that the plaintiff is a member of the company, that he is resident in England, and that he is registered as the public officer, to entitle him to maintain the action. The question turns on the 4th and 9th sections of 7 Geo. 4, c. 46, the act for regulating banking copartnerships in England. The 9th section provides, that all proceedings commenced on behalf of any such copartnership "shall and lawfully may be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid for the time being, of such copartnership, as the nominal plaintiff for or on behalf of such copartnership." The mode of nomination there referred to is contained in the 4th section, which provides that "an account or return shall be made out, wherein shall be set forth the true names, title or firm of such corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners engaged or concerned in such copartnership; and also the names and places of abode of two or more persons being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as hereinafter is provided; and every such account or return shall be delivered to the commissioners of stamps," &c. The declaration ought to have shewn that these requisites have been complied with.

Peacock, *contrà*, was stopped by the Court.

LORD ABINGER, C. B. It is not at all requisite that those facts should be stated in the declaration. If the fact be that the plaintiff is not a member of the company, and [572] that the requisites of the act have not been complied with, the opposite party may avail himself of that as a defence to the action.

ALDERSON, B. In actions by the assignees of a bankrupt, it is not necessary to state in the declaration that they were elected by the creditors.

Judgment for the plaintiff.

PHILLIPS AND OTHERS v. HUTH AND OTHERS. Exch. of Pleas. 1840.—The plaintiffs owners of a cargo of tobacco, on the arrival of the vessel, placed the bill of lading (indorsed in blank) in the hands of W., as their factor, for sale. W. entered the goods at the Custom-house in his own name, and (before the cargo was weighed, and without the plaintiffs' knowledge) obtained a dock-warrant for it in his own name. W. had previously agreed with the defendants for the advance to him (W.) of £20,000, on the deposit of other dock-warrants as a security. The defendants, thinking that security insufficient, refused to advance more than £12,000; whereupon W. pledged with him the dock-warrant of the plaintiffs' tobacco, as a security for, and obtained thereon, the remaining £8000:—Held, that, under these circumstances, it did not sufficiently appear that W. was intrusted with this dock-warrant, within the meaning of the Factor's Act, 6 Geo. 4, c. 94, s. 2, and therefore that the plaintiffs were entitled to recover from the defendants the

proceeds of the tobacco, which was sold by the defendants on W.'s becoming bankrupt.—In order to make the factor a party intrusted with the dock-warrant, within the meaning of the act, it must appear that the owner of the goods intended that the factor should be possessed of it at the time of the pledge, or that he should exercise the power, which the possession of the bill of lading gave him, of obtaining the dock-warrants whenever he in his discretion might think fit.—The defendants had advanced to W. a sum of £14,000, on the deposit of American state bonds. W. & C. afterwards entered into partnership, and agreed with the defendants, in consideration of their discounting W. & C.'s acceptances for £14,400, to deposit with them as a security dock-warrants for goods held by them. W. & C. accordingly deposited with the defendants the dock-warrant of another cargo of tobacco belonging to the plaintiffs, which they had taken out in their own names, under similar circumstances with the former. The defendants gave up to W. the American bonds, and paid over to W. & C. the balance, after deducting the debt due to them from W., and the discount:—Held, that if, according to the intention of both parties, the £14,400 was to be placed entirely at the disposal of W. & C., to apply it to any purpose of their own as they pleased, and they directed its payment in account to the defendants in satisfaction of W.'s debt, this was an advance of money to W. & C. within the meaning of the 6 Geo. 4, c. 94, s. 2; but if their intention was, that the new advance was only for the purpose of satisfying W.'s former debt, and it would not have been made, except upon the understanding that it should be so applied, and the application of it otherwise would have been a breach of the agreement, then it was not an advance within the statute.

[S. C. 10 L. J. Ex. 65. Referred to, *Cole v. North Western Bank*, 1875, L. R. 10 C. P. 367; *Cahn v. Pockett's Bristol Channel Steam Packet Company*, [1899] 1 Q. B. 660. See *Hatfield v. Phillips*, M. & W. 647.]

Assumpsit for money had and received. Pleas, non-assumpsit, and a set-off for money paid; with a plea of payment into Court. At the trial, before Gurney, B., at the London Sittings after last Michaelmas Term, it ap-[573]-peared that the action was brought to recover the amount of the proceeds of certain tobacco, sold by the defendants under the following circumstances:—

The plaintiffs were the owners of two cargoes of tobacco, laden on board two vessels, called the "Amelia" and the "Mariposa," which arrived in the London Docks, the former on the 24th of September, 1836, and the latter on the 11th of October in the same year. On the arrival of the "Amelia," the plaintiffs placed the bill of lading of her cargo in the hands of Mr. Warwick, an extensive dealer in tobacco, as their factor, for the sale thereof: and on the arrival of the "Mariposa," they placed the bill of lading of that vessel in the hands of Messrs. Warwick & Clagett, (Warwick having taken Clagett into partnership in the interim), as their factors, for the like purpose. Both the bills of lading were indorsed in blank. The cargoes were entered at the custom-house by Warwick and Warwick & Clagett respectively, in their own names, so that they were enabled to obtain dock-warrants also in their names; and accordingly, on the 30th of September, Warwick obtained a dock-warrant in his name for the cargo of the "Amelia"; and another dock-warrant for the cargo of the "Mariposa" was obtained by Warwick & Clagett on the 7th of November following.

Prior to the arrival of the "Amelia," Warwick had agreed with the defendants to make a deposit of certain dock warrants of his own as a security for a loan of £20,000; and on the 24th of September, 1836, he wrote to the defendants as follows:—

"Messrs. F. Huth & Co.

"London, 24th Sept., 1836.

"Gentlemen,—In consideration of your having agreed to discount my acceptances for 10,156l. 3s. 3d., due the 15th of January next, and 10,198l. 12s. 7d., due the 15th of February next, I now hand you the warrants for the [574] under-mentioned goods, as security for the due payment of the said acceptances; and in case of nonpayment, you are authorized to sell all or any part of the said goods by public auction or private sale, and after payment of all costs of sale and charges on the goods, to apply the residue in payment of my said acceptances, and interest at the rate of £5 per cent. per annum, and all expenses to be incurred by you in relation thereto. Should there

be any surplus, you will pay the same over to me; and, on the contrary, should there be any deficiency, I agree to reimburse you the same immediately.—I am, &c.

“WM. SIDNEY WARWICK.

“London Dock Warrant, No. 1875, for 526 hhd. tobacco.
Ditto „ „ 1876, for 639 „ ”

The defendants, in pursuance of this agreement, advanced to Warwick the sum of £12,000; but, on examining the parcels of tobacco mentioned at the foot of the letter, they thought the security insufficient, and refused to advance more than that sum. Warwick, in order to induce them to advance the remaining £8000, agreed to pledge with them the dock-warrant of the tobacco by the “Amelia,” and accordingly, immediately on his obtaining it, on the 30th of September, he pledged it with the defendants, and obtained the further advance of £8000.

The dock-warrant of the cargo of the “Mariposa” was pledged with the defendants by Warwick & Clagett, on the 7th of November, 1836, under the following circumstances: it appeared that Warwick had, on the 17th of September, when he was carrying on business on his own account, obtained from the defendants an advance of the sum of £14,000, on a deposit of Louisiana and Virginia state bonds, to be repaid on the 17th of November following. On the 1st of October, the partnership between Warwick & Clagett was formed, to the knowledge of the [575] plaintiffs. An application was afterwards made by them to the defendants for a loan; and according to an arrangement then made, it was agreed that the defendants should discount Warwick & Clagett's acceptances for £14,400, on a deposit of dock-warrants as a security; the American bonds to be given up. The following written agreement was accordingly entered into:—

“Messrs. Frederick Huth & Co.

“London, 7th November, 1836.

“Gentlemen,—In consideration of your having agreed to discount our acceptances for £6400, say £6400, due 7th of February, 1837, £8000, say £8000, due 7th of February, 1837, together £14,400, we now hand you warrants for the under-mentioned goods, to be held by you as security for the due payment of the said acceptances; and in case of nonpayment thereof, you are authorized to sell all or any part of the said goods by public or private sale, and after payment of all costs of sale and charges on the goods, to apply the residue in payment of our said acceptances, and interest at the rate of £5 per cent. per annum, and all expenses incurred by you in relation thereto. Should there be any surplus, you will pay the same over to us; and, on the contrary, should there be any deficiency, we engage to reimburse you the same immediately.—We remain, &c.

“WARWICK & CLAGETT.

“London Dock Warrants:—

“No. 1880, 7th Nov., 1836, 492 hhd. tobacco, ex ‘Mariposa,’ à Virginia.

— 1881, „ „ 662 ditto, ditto ex ‘John Marshall,’ New Orleans.”

The American bonds were accordingly given up to Warwick, interest calculated on the former advance of £14,000 [576] to the debit of Warwick, and credit given for the £14,400, less discount, and a balance of 122l. 3s. 10d. was paid by the defendants to Warwick & Clagett.

It was proved that the weighing of tobacco does not usually commence until a month or more after its arrival in the docks, in consequence of its being unfit for that purpose, from being in a state of fermentation; and it is afterwards sold according to the weight at the King's Beam. The weighing of the tobacco by the “Amelia” commenced on the 8th of November, and ended on the 20th of December, and of that by the “Mariposa” commenced on the 13th of November, and ended on the 30th of January, 1837. This was not known to the plaintiffs, who frequently applied to Warwick & Clagett for samples and weights, and about the middle of January directed that the warrants, when obtained, should be in their own names. On the 8th of February, Warwick & Clagett stopped payment, upon which it became known to the plaintiffs, for the first time, that both the cargoes had been pledged to the defendants in the manner before mentioned.

It appeared from the evidence, that sales of tobacco were effected, sometimes by

delivery orders, sometimes by a transfer of the warrants, which latter, however, could not conveniently be done where less than the whole cargo was sold. No precise usage of trade in that respect was however established. The defendants sold both the cargoes, and paid into Court the balance, after deducting the amount of their advances.

It was contended by the plaintiffs' counsel at the trial, that the defendants were not entitled to retain the amount of their advances, under the Factors' Act, 6 Geo. 4, c. 94, s. 2,—first, because the warrant of neither cargo was intrusted to the factors, within the meaning of that act; secondly, because no advance was made on the pledge of the warrant of the cargo of the "Amelia," such as would authorize the defendants in retaining the proceeds of that cargo: [577] thirdly, with respect to the "Mariposa," because there was no advance of anything beyond the sum of 122l. 3s. 10d., on the pledge of the warrant of that cargo. The learned Judge having expressed his opinion, that, to establish a lien under this act, there must be a pledge of some document intrusted to the broker by the owner, not one which he had himself obtained for the purpose of committing a fraud, left the two following questions to the jury: first, whether the plaintiffs had intrusted these warrants, or either of them, to Warwick, or Warwick & Clagett: secondly, whether the defendants made advances upon the warrants of the "Amelia" and the "Mariposa"? The jury found both questions in the affirmative. They also found that the defendants believed that Warwick and Warwick & Clagett were the true owners: and the verdict was thereupon entered for the defendants.

Cresswell, in Hilary Term last, obtained a rule to shew cause why the verdict should not be set aside and a new trial had, on the ground of misdirection, and of the verdict being against the evidence. Cause was shewn in the Vacation Sittings after that term, by

The Attorney-General and J. Bayley, for the defendants. First, with regard to the cargo of the "Amelia." The defendants were fully entitled to retain the amount of their advances upon the warrant of that cargo. The question will turn upon the construction to be put upon the 2nd section of the Factor's Act, 6 Geo. 4, c. 94. It is thereby enacted, "that any person or persons intrusted with and in possession of any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any [578] contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents, or either of them." The question therefore is, was not Warwick intrusted by the plaintiffs with the dock-warrant of the cargo of the "Amelia"; or, at all events, was there not evidence to go to the jury that he was so intrusted? It is submitted that he was so intrusted. The plaintiffs, by intrusting him with the bill of lading, gave him authority to land the goods in his own name, and having so landed them, he was enabled to obtain the dock-warrants. By transmitting the bill of lading to the factor, they intrust him also with the dock-warrant, which is the necessary produce of the bill of lading. And where is the difference between the fact of the intrusting being established by such evidence, and by the universal course of trade, or by the express direction of the consignor? It can never be laid down as law, that the factor is not intrusted with the dock-warrant, because that instrument was never in the bodily possession of the consignor. A consignor living abroad never can have the dock-warrants in his possession; and if such were held to be the law, the effect would be to strike out dock-warrants, and every document of that description, except the bill of lading, out of the second section of the statute. If the consignor, by transferring the bill of lading, enables the factor to obtain the dock-warrant, he is intrusted with the dock-warrant by the authority of the consignor, as much as he is with the bill of lading. The question really is, can there have been an "intrusting" without the dock-warrant having been in possession of the owner [579] of the goods? If there

can, then it is a question of fact to be determined by the jury : here it was submitted to them by the learned Judge, and they have found that Warwick was intrusted with the dock-warrant. [Alderson, B. You imply an intrusting of the dock-warrant from the fact of the actual intrusting of the bill of lading?] Yes ; from an intrusting with that which necessarily gives the other. [Alderson, B. Not necessarily ; because, suppose the letter accompanying the bill of lading had said—"take out the dock-warrant in my name," in that case it would be quite clear the consignor did not intend to intrust the factor with the dock-warrant.] That would make no difference here ; it would be like the case where a general agent receives special instructions, in which case the persons with whom he deals are not bound thereby. The question is, was there not evidence to go to the jury that the factor was intrusted with the possession of the dock-warrant, when he was intrusted with the document which clearly authorized him to obtain the dock-warrant? The case of *Close v. Holmes* (2 M. & Rob. 22), which may be referred to on the other side, has no bearing on the present case. There Alderson, B. left it to the jury to say whether the defendants knew that the goods did not belong to Hollingworth, the consignee, and whether he had any lien on them ; the jury found that they did not, and that he had no lien on them : that finding made an end of the case. His Lordship expressed a clear opinion that the statute gave validity only to pledges by a factor of documents with which the real owners had previously intrusted him, and that it did not extend to the pledge of documents created (as in that instance) by the factor himself. But the documents in that case were merely a delivery order and a warehouseman's acknowledgment, which are materially different in their nature from dock-warrants, and [580] do not come within any of the words of the second section. There was in that case no dock-warrant or certificate—nothing to shew that Hollingworth was the owner of the goods ; nothing with which he could be said to have been intrusted by his principal. It was said to be a defect in that statute, that it did not authorize a pledge of the goods, but only of the symbol of property in the goods : the actual pledge, however, in that case, was of the goods themselves, so that it could not come within the protection of the act. Nothing there laid down by the learned Judge can be supposed to refer to a case like the present, where the goods are not pledged, but the dock-warrant which represents them. [Alderson, B. If you look at the argument in that case, it will shew what the case must have been. It was argued "that the act only gave validity to pledges made by the factor of bills of lading, and other documents of that nature, evidencing title, and with which the factor may have been intrusted by his principal. All the documents enumerated in the statute were of that description ; but here the Banking Company made the advance on the faith of a mere delivery order in the one case, and of a warehouseman's acknowledgment in the other." The marginal note is very incorrect. I have my note of the case. I expressed my opinion on the construction of the statute, thus : "The defendant must shew that Hollingworth was intrusted with the property by the plaintiff : there is no evidence of that in this case." That is all my note. I directed the jury to find for the plaintiff.] There is nothing in that opinion hostile to the case of the present defendants. [Parke, B. You say the giving of the bills of lading was evidence to go to the jury that the broker intrusted with them was really meant by the owner of the goods to take out the dock-warrants?] Yes ; if he thought fit in his discretion to do so. It is not necessary to shew that the consignor necessarily supposed that the dock-warrant would be obtained by the factor. [Parke, [581] B. Must he not mean to intrust the factor with the warrants?] Undoubtedly, he must mean to intrust the factor, if he should choose to take out the warrants. It must and does often happen, that the factor sells the goods before they arrive, on the faith of the bill of lading. The consignor leaves that to his discretion. [Parke, B. He means to intrust him contingently. If he does not sell the goods, by transferring the bill of lading before they arrive, when they do arrive, you say he means him to pursue the ordinary course, and take out the dock-warrants. We must come to the consideration of what the word "intrust" means.] The act does not apply to a case where there is a mere possession of the document, as where the possession of it is obtained by fraud or felony, without the authority of the consignor. It must be intrusted by him : but the word "intrust" applies just as much to the bill of lading as it does to the dock-warrant. When the consignor intrusts the factor with the bill of lading, by transmitting it to him as the consignee, then he intrusts him with the dock-warrant, which he enables and authorizes him to obtain by means

of that bill of lading; and if so, he is the person "intrusted with and in possession of" the dock-warrants, and is to be deemed and taken to be the true owner of the goods described therein, within the meaning of the act of Parliament.

The second objection is, that there was no advance of money on the deposit of the dock-warrant of the cargo of the "Amelia," because that deposit was made after the agreement of the 24th of September had been entered into. It is true that that agreement had been entered into; but the defendants had refused to advance more than £12,000 upon the security therein mentioned, and it was only upon the faith of the deposit of the dock-warrant of the cargo of the "Amelia," that the further sum of £8000 was advanced. That was, therefore, an advance within the meaning of this act of Parliament. [Parke, B. The defendants [582] were bound by their contract to discount the two acceptances mentioned in the agreement, upon the deposit of the two cargoes therein referred to. When they refused to do that, and refused to advance the remaining £8000, it gave Warwick a right of action against them. Is not that a different case from that of a party making an advance upon a new pledge of other property?] Warwick acquiesced in the proposed arrangement, and the defendants advanced him £8000 upon the deposit of the warrants of the "Amelia." That was, therefore, an advance entirely on the faith of that warrant.

Next, with respect to the pledge of the cargo by the "Mariposa." That transaction originated on the 17th of September, when Warwick was carrying on business on his own separate account. On that day he negotiated with the defendants for a loan of £14,000, to be repaid on the 17th of November following. The security given for that loan, for which Warwick was solely liable, was the deposit of Virginia and Louisiana state bonds. Then the partnership is formed, and the agreement of the 7th of November is entered into between Warwick & Clagett on the one hand, and the defendants on the other. That agreement was, that the American bonds should be returned to Warwick, and that the defendants should discount the acceptances of Warwick & Clagett for £14,400, to become due on the 7th of February following. It is not in dispute, that it was contemplated that this money should be applied in paying the debt then due from Warwick, in respect of the former loan of the 17th of September. Suppose the money had actually been paid in gold on the 7th of November, and that Warwick & Clagett having the £14,400, minus the discount, (which would reduce it to £14,220), it was their intention, as soon as they got that sum into their possession, to apply it to pay off the separate debt of Warwick; would not that be a transaction within the 2nd section of the act—it being [583] conceded, for the sake of the argument, that Warwick & Clagett were intrusted with the dock-warrant of the "Mariposa"? Would there not be an agreement entered into by Warwick & Clagett, "so intrusted and in possession as aforesaid," with the defendants, for the deposit of this document, "as a security for money advanced or given by such person or persons &c., upon the faith of such several documents, or either of them?" What took place in this case amounts to the same thing. when there is payment by an entry in account, it is the same, with regard to its legal effect, as if the manual operation had taken place of paying over the money, and paying it back again. Even then, no doubt, the objection suggested on the other side would arise, that this is not a transaction protected by the 2nd section, because it was in the contemplation of the parties that the money should be applied in repaying the debt due from Warwick alone to the defendants. But it is submitted that the application of the money in that way, even if that had been made part of the contract, would not take the ease out of the protection of the act:—still there would be an intrusting—still there would be an agreement to make the advance—still there would be an advance on the faith of the dock-warrant, and every single ingredient that the legislature has required for the protection of parties under the 2nd section. [Parke, B. It does not appear what was done with the former debt, as to any entry in the books.] The balance, after extinguishing the old debt, and deducting the discount, was actually paid over, a cheque being given to Warwick & Clagett for 122l. 3s. 10d. [Parke, B. The question is, whether Warwick could have pleaded payment to an action brought for the 1400l., advanced on the 17th September?] In answer to such an action, he would have given in evidence the agreement of the 7th November; he would have shewn that new bills were accepted for the sum of £14,400, that they were discounted by the defendants, that the defendants [584] gave a cheque for 122l. 3s. 10d., and that the Louisiana and Virginia bonds were returned by the defendants to him. That,

if not conclusive, would be ample evidence for the jury to draw the inference that the former debt had been satisfied. The old debt was thus extinguished, and a new debt was created. There is no single circumstance required by the 2nd section to give the lender of the money protection, which has not been here complied with; or, at all events, there was evidence to go to the jury that each and every one was complied with; and they have found that these advances were made upon the faith of the dock-warrant.

It may perhaps be argued, that this is a transaction within the 3rd, and not within the 2nd section of the act. That section enacts, "that in case any person or persons &c. shall accept and take any such goods, wares, or merchandize, in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, &c., before the time of such deposit or pledge; then and in that case such person or persons, &c., so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall acquire no further or other right, title, or interest in, upon, or to the said goods, wares, or merchandize, or any such document as aforesaid, than was possessed or could or might have been enforced by the said person or persons so intrusted as aforesaid, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, &c., so accepting or taking such goods, wares, or merchandize in deposit or pledge, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid." The 2nd section refers to the symbols of [585] property; the 3rd to the property itself. To make out that this was a transaction within the 3rd section, the plaintiffs must shew that the dock-warrant of the "Mariposa" was handed over by Warwick & Clagett for the debt before then due from Warwick & Clagett; because Warwick & Clagett are the persons intrusted with that dock-warrant; and it is only where there is a pawn of the instrument for a debt due from the person or persons intrusted with it, that the lien of the factor is transferred. But here there was no antecedent debt due from Warwick and Clagett; it was due from Warwick only. [Parke, B. Would it not be good as a pledge for the payment of the two bills, supposing the transaction was that the old debt should be wiped off, and new bills given by Warwick & Clagett for the old debt; and that the goods, or the warrant, should be deposited as a pledge for the due payment of the bills, and would not that fall within the 3rd section, so as to entitle the defendants to all the lien which Warwick & Clagett had? I throw it out for your consideration, whether, taking the facts to be as I have stated, and that there was no advance of money, but that it was only a wiping off of the old debt, and removing the sole liability of Warwick by means of the giving of these bills and the deposit of the dock-warrant, it is not "a debt due and owing from the persons intrusted and in possession as aforesaid," within the 3rd section. It is an argument which it may be desirable to consider; otherwise, if the case does not fall within the 2nd section, and does not come in that point of view within the 3rd, the defendants would be without security altogether.] The defendants contend that it was a transaction protected by the 2nd section. It was not a deposit by way of security for an old debt; that was extinguished; it was not an advance to Warwick, but to Warwick & Clagett: the consideration for the advance was the deposit of the dock-[586]-warrant with which Warwick & Clagett were intrusted, the plaintiffs having delivered the bill of lading to them, and given them permission and authority to obtain it. By the common law of England, a factor might sell at any price, however inadequate, but he could not pawn, however advantageous it might be to his principal. That defect was intended to be remedied, and for the general convenience of commerce, the legislature, by this act, intended to provide that a person *bonâ fide* advancing money to a party having the symbols of property intrusted to him, the former not being aware that the latter was not the actual owner, should have the security of the document pledged with him. Here Warwick & Clagett were intrusted with these dock-warrants; they asked for an advance on the security of them, and the money was advanced on the faith of their being deposited as a security. The defendants are therefore entitled to the protection of the statute, and the verdict found for them ought not to be disturbed.

Crompton and Waddington, *contrâ*. The questions which arose at the trial in

this case were altogether matter of law, and there was no question of fact properly to be left to the consideration of the jury, at least without a direction to them on the legal effect of the statute; and the jury had no right to construe it for themselves. If that be so, although the statement of the learned Judge to the jury cannot be complained of as containing any misdirection in terms on matter of law, yet the plaintiffs are entitled to a new trial without payment of costs.

First, there was no intrusting of the factors with the dock-warrant of either of these cargoes, within the meaning of the statute. The question is one which turns altogether on the legal construction to be put upon the words of the act, and no supposed consideration of hardship or inconvenience can be imported into it. The argument on the other side, as to this point, appears to be mainly rested on the supposition that it is a necessary, or at least an ordinary, part of the course of business, that a factor, immediately on receiving the bill of lading, would proceed to obtain a dock-warrant. But the evidence on the trial led to an entirely different conclusion. Several of the most extensive tobacco-brokers in the trade stated that they had never in their practice known a warrant taken out for the purpose of the sale of tobacco; and other witnesses stated that it was not usual to do so. It is necessary, indeed, for the purpose of pledging; but for the purpose of sale it appeared that a delivery order alone is necessary; and that a dock-warrant would even be an impediment, because it must in every case be taken down to the docks for the purpose of indorsement. It is argued, that the intrusting of the factor with the bill of lading, for the purpose of sale, is impliedly and in effect an intrusting of him with the dock-warrant, that being also a document by which the sale is effected. But that argument fails, when it appears that the dock-warrant is not necessary, nor even usual, in order to the effecting of the sale. [Alderson, B. Does that make it anything more than a matter of fact for the jury? My difficulty is, is not enabling the factor to obtain the dock-warrant some evidence of intrusting him with it? Parke, B. There seems to be a great difference between enabling and intrusting. Intrusting imports a confidence reposed in the mind. The question is, does it satisfactorily appear that the plaintiffs meant Warwick and Clagett to take out the dock-warrants?] The evidence shews clearly that they did not; since at a much later period they were not only in ignorance of their having done so, but expressly directed them to take out the warrants in the plaintiffs' own names. But the mere enabling is no evidence of an intrusting. Suppose I give a man the [588] key of my bureau, in order to go and bring out of it particular papers, and he takes out other papers; can it be said that I intrusted him with the latter, because by giving him the key I enabled him to obtain them? [Parke, B. The only question is, whether the enabling—the giving the power to do the act—is not some evidence of an intention that it should be done?] Not where there is another mode of effecting the purpose intended. It appears to be straining language very much to say that a party was intrusted with that, which he had indeed the power given him to create, but which he created only for the purpose and by means of fraud, and of the existence of which the principal was ignorant. Here the dock-warrant was obtained, at all events at a time when it was wholly unnecessary for the purposes of the trust, and merely for the purpose of effectuating a fraud upon the plaintiffs. But even if the evidence fell short of that, the onus is upon the defendants to prove that the case is within the statute; they were bound to prove, therefore, that it is the necessary and ordinary course of trade to sell by means of the obtaining of dock-warrants, and that they were in fact obtained in that necessary and ordinary course of trade, and really for the purpose of the sale. The word "intrusting" must be taken according to its fair and natural import, and to imply a particular trust imposed on the factor, with respect to the taking out of the particular document, at the time of the pledge. Admitting that there may be circumstances indicative of the intention of the principal to impose such a trust, without an express authority, even then there was, in the case of the "Amelia," no evidence to go to the jury from which to infer any such intention. It was not contended at the trial that there was, but it was put broadly, upon the construction of the act of Parliament, that the enabling was sufficient, and that the principal had thereby concluded himself. But if that be enough, an express pro-[589]hibition can make no difference, as against the pawnee, who supposes the factor to be the owner. But the pawnee is not the only party for whose protection the statute was framed, but the consignors and consignees also, who are protected only by the word "intrusted."

But it may be contended, further, that upon the true construction of the statute, it is meant that the principal shall have the opportunity of marking the document with the notice to which the proviso in the second section refers:—"Provided such person or persons, &c., shall not have notice by such documents, or either of them, or otherwise that such person or persons so intrusted as aforesaid is or are not the actual and bonâ fide owner or owners &c., of such goods," &c. And it may be for this reason, that the statute does not authorize, any more than before, a pledge of the goods themselves, but only of the documents which are the symbols of property in them; because the principal cannot give that notice on the face of the goods, so as to prevent the factor from pledging them in his own name, which he can upon the documents. The real owner ought, therefore, to have an opportunity of putting his title upon every document, and of giving notice thereof by it, if he chooses. Here it was impossible that the plaintiffs could have thus protected themselves. [Alderson, B. That construction would go the length of saying, that in the case of a foreign consignor, no document could ever be pledged except the bill of lading.] He might give the factor an express authority, and so waive his legal right.

With regard to the case of *Close v. Holmes* (2 M. & Rob. 22), although there was no direct decision upon the point now in question, it evidently was the subject of discussion, and the learned judge appears to have formed an opinion upon it. The report states, that "his lordship expressed a clear opinion that the statute gave validity only to pledges by a [590] factor of documents with which the real owner had previously intrusted him, and that it did not extend to the pledge of documents created by the factor himself." [Alderson, B. I think the word "previously" goes beyond my meaning.] The latter words are sufficient to support the argument for the present plaintiffs. [Alderson, B. If your argument be correct, that the owner ought to have an opportunity of indorsing his title on the document, that would give effect to the word "previously," although I dare say that was not in my mind at the time.]

Secondly, the contract as to the cargo of the "Amelia" was not such a contract of loan as would fall within this statute: in the first place, because there was a binding agreement between the parties, whereby the defendants were positively bound to advance £20,000 on the freight of other cargoes, not belonging to the plaintiffs, the non-performance of which would give Warwick a right of action. What was afterwards done had relation back to that agreement upon which it was done, and there was no consideration for a new loan on the security of the plaintiffs' cargo. In reality, that advance was under the old contract, and the defendants wrongfully and without consideration extorted these dock-warrants from Warwick, before they would do that which they were bound in law to do by virtue of their prior agreement. In the next place, this was a pledge of the plaintiffs' and of other property together, and it was part of the contract that at a certain price any part of the property might be taken out of the pledge: and thereby the party, whose property is wrongfully pledged, loses the right he would otherwise have had, of having the property that was well pledged first applied to the satisfaction of the debt. It is clear, that where a factor pledges his own and his principal's property, the former must be first applied, at least in equity, and it is apprehended in law also, to the satisfaction of the pledge. [Parke, B. That, I think, was [591] settled in the case *In re Westzintus* (5 B. & Adol. 817; 2 Nev. & M. 644).] Such a pledge as this, therefore, was not a fair advance of money, within the meaning of the statute.

Lastly, as to the case of the "Mariposa." That also is a question of law on the construction of the statute, not a question of fact for the jury: namely, whether certain admitted facts amount to an advance of money, or of negotiable securities, within the meaning of the act. In order to constitute such an advance, there must be actually and bonâ fide a payment from the one party to the other at the time. Here, what moment was there at which the defendants advanced £14,400 to Warwick and Clagett on the faith of the dock-warrants, and also advanced £14,000 to Warwick on the faith of the Louisiana bonds? The real effect of the transaction is, that Warwick remained liable for the old debt until the sale of the cargo of the "Mariposa," and that the plaintiffs' goods have been taken to pay the £14,000 advanced to him on the 17th of September. The object of the factor in all such cases is, to obtain a present advance of money—to be put in funds; but here all that Warwick and Clagett obtain (even upon the argument for the defendants) is a trifling balance in cash, with a liability to pay a new debt of an equal amount with the old one. Suppose A. to have

given bills as a security, which were renewed from time to time, and at length he gives a bill together with B.; can it be said that is an advance to A. and B., within the statute? It is said this was in effect payment to Warwick and Clagett; but it was not a payment of the kind contemplated by this act of Parliament—an advance of money, such as to affect the rights of third parties. But at all events, it must be shewn that the effect of it was the discharge of the old debt, of which there is no evidence whatever. [Alderson, B. It was not shewn [592] even to have been written off in account.] There was nothing in evidence but the written agreement, and the payment of the £122. In *Ross v. Willis* (Dans. & Lloyd's Merc. Cases, 19), a factor, before the passing of the 6 Geo. 4, c. 94, pledged East India warrants with a banker as a security. After the passing of the act, a substitution of new bills for old took place between the factor and the banker, and the latter claimed to hold the warrants as a security for a bill of £10,000 then discounted for the factor, the cash being placed to the factor's account. It was held that this transaction was not protected by the second section of the statute. Holroyd, J., says: "I look upon the transaction as a mere renewal of the former securities;" and Lord Tenterden says—"I do not consider what was done with respect to this bill a new agreement."

With regard to the argument as to the third section of the statute, it seems to amount to this: that because the defendants are not in a situation to avail themselves of the minor remedy given by that section, they must of necessity come in under the major remedy of the second. It may be that the third section does not apply to a case where the antecedent debt was not the debt of the same person who afterwards makes the new pledge; but it is a strange inference to say, that because the case is not strong enough to be included in the enactment which gives a more limited remedy, the party is therefore entitled to the more extensive one.

Cur. adv. vult

In the present term, the judgment of the Court was delivered by

PARKE, B. This case stood over for consideration, on account of the great importance of the principal question which was discussed, as well to the parties as to the public; [593] this being the first occasion on which one of the clauses in the Factors' Act, of frequent practical application, has required the exposition of any of the courts in Westminster Hall. My learned Brothers and myself, who heard the argument on shewing cause against a rule for a new trial, were all then satisfied that it was fit that the case should be again submitted to a jury; but we wished to have an opportunity of giving the subject our full consideration, in order that the meaning of the statute might be distinctly defined, and the law as applicable to the question in the cause correctly laid down.

The action was brought to recover the proceeds of two cargoes of tobacco sold by the defendants. The undisputed facts of the case were these. The plaintiffs were the owners of these two cargoes, one by the "Amelia," and the other by the "Mariposa"; the former of which vessels arrived in the London Docks on the 24th of September, the latter on the 11th of October. Shortly after the arrival of these ships respectively, the plaintiffs placed the bills of lading of the cargo of the "Amelia" in the hands of Mr. Warwick, an extensive tobacco merchant and broker, and that of the "Mariposa" in the hands of Warwick and his then partner Clagett, carrying on the same business, as their factors respectively, for the sale thereof. Both bills of lading were indorsed in blank. The cargoes were entered by Warwick, and Warwick & Clagett, at the Custom-house, in their names, which enabled them to obtain dock-warrants also in their names. On the 30th of September, 1836, Warwick obtained one for the cargo of the "Amelia" in his name; on the 7th of November, Warwick & Clagett obtained another in their names, for that of the "Mariposa." It was proved that the sampling and weighing does not usually commence until a month or more after the arrival, as the tobacco undergoes some fermentation, and is not fit for weighing until that has sub-[594]-sided, and it is afterwards sold according to the weight at the King's beam.

The weighing of the tobacco by the "Amelia" commenced on the 8th of November, and ended the 20th of December, 1836. That by the "Mariposa," commenced on the 13th of October 1836, and ended the 30th of January, 1837. This was not known to the plaintiffs, who frequently applied to Warwick & Clagett for samples and weights, and about the middle of January directed that the warrants, when obtained, should be in their own names. On the 8th of February Warwick & Clagett stopped payment.

It then came out that the cargoes of both vessels had been pledged to the defendants by Warwick, and Warwick & Clagett. It is not necessary to advert to either of these transactions in much detail.

The warrants for the cargo of the "Amelia" were pledged by Warwick, under these circumstances. He had on the 17th of September, 1836, agreed to make a deposit of tobacco-warrants of his own, for a loan of £20,000 to be made to him by the defendants. When Warwick applied for the £20,000, the defendants insisted that the warrants were not a sufficient security, and would advance £12,000 only. On the 30th of September, Warwick procured the dock-warrant for the cargo of the "Amelia," and immediately pledged it with the defendants, and obtained an advance of £8000 on the security of all the warrants. The warrant of the cargo of the "Mariposa" was pledged by Warwick & Clagett on the 7th of November, 1836, under these circumstances. Warwick had already had an advance of £14,000 on the 17th of September, on a deposit of American State Bonds, such advance having been made by discounting Warwick's acceptances. On the 7th of November, an agreement was entered into in writing, for a discount of Warwick & Clagett's acceptances for £14,400, on a deposit by way of security of the warrant of the [595] "Mariposa's" cargo, and another of Warwick & Clagett's own. The American bonds were given up, interest calculated on the former advance of £14,000 to the debit of Warwick, and credit given for the £14,400, less discount, and a balance of £122 paid by the defendants to Warwick & Clagett. Evidence was given of the mode in which sales of tobacco were effected. It was sometimes by delivery orders, sometimes by warrant, which was not convenient, when less than the whole cargo was sold. No established usage of trade was proved. The defendants sold both cargoes, and paid into Court the balance after deducting the amount of their advances. Under these circumstances, the plaintiff's counsel insisted that the advances could not be retained under the Factors' Act, because, first, the warrants of neither cargo were intrusted to the factors, within the meaning of the act; secondly, because no advance was made on the pledge of the warrant of the cargo of the "Amelia," such as would authorize the defendants to retain the proceeds of that cargo; thirdly, because there was no advance of any sum beyond the £122, on the transaction relative to the warrant of the "Mariposa."

My Brother Gurney, expressing his opinion that to give a lien under the act, there must be a pledge of some document intrusted to the broker by the owner, not one which he had himself obtained, in order to commit a fraud, left these questions to the jury as questions of fact:—

1st, Whether the plaintiffs had intrusted these warrants, or either of them, to Warwick, or Warwick & Clagett?

2ndly, Whether the defendant made advances upon the warrants of the "Amelia" and "Mariposa"?

The jury found both these questions in the affirmative. They also found that the defendants believed that Warwick, and Warwick & Clagett, were the true owners; and to the propriety of the finding on that point there was no objection.

[596] A rule nisi was obtained for a new trial, on the ground both of the verdict being against evidence, and for a misdirection, or rather the want of a sufficient direction in point of law.

The principal question is, as to the meaning of the 2nd section of the 6 Geo. 4, c. 94, commonly called the Factors' Act.

Before the passing of this act, or rather the previous Factors' Act, the 4 Geo. 4, c. 83, it was clearly settled, that a factor, or agent for sale, had no power to pledge, whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading, in which he was the consignee or indorsee. This was in accordance with the general rule, that he who deals with one acting *ex mandato*, can obtain from him no better title than his mandate enables him to bestow.

But this rule was thought by some to be attended with hardship on merchants and others dealing with factors, on the faith of their being principals; and the legislature, by the 4 Geo. 4, first relaxed this rule, and by the 6 Geo. 4 extended that relaxation. It does not appear to be necessary to advert to the former act, as the case is not within the terms of it, nor does it throw any light on the construction of

the latter statute, except that the 1st section shews that the word "intrusted" was not unimportant, and advisedly introduced; for it provides, that the person in whose name goods shall be shipped shall be deemed to be "intrusted therewith for the purposes of the act, unless the contrary thereof shall appear or be shewn in evidence by the person disputing the fact." The question turns upon the 2nd section of the 6 Geo. 4; it provides, "that any person intrusted with and in possession of any bill of lading, dock-warrant, &c., shall be deemed and taken to be the true owner of the goods de-[597]-scribed and mentioned in those documents, so far as to give validity to any contract or agreement entered into by the person so intrusted and in possession, with any other person, for the sale, disposition, deposit, or pledge of such goods, a security for any money, or negotiable instrument, advanced or given by such other person, on the faith of such document, provided he shall not have notice by the document or otherwise that the person so intrusted shall not be the true owner."

It is very clear, that this section relaxes the rule of the common law, only with respect to those who deal with persons who are not merely in possession of, but are also intrusted with, the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the indicia of property in himself, still the statute does not apply, and they can acquire no title by virtue of it, unless the document has been intrusted to that person. If the legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be intrusted as well as in possession, the inconvenience is obviated. The statute applies only to written documents relating to goods, and not to goods themselves; and for this reason,—these documents may be made to designate the owner's name, which the goods themselves, generally speaking, cannot; and it is clear that the legislature intended that those persons only should suffer by the frauds of their agents, who have intrusted them with the evidence of title, and omitted to take those precautions which might have prevented them from deceiving others.

[598] It is therefore necessary, in order to give effect to this clause, that the owner should have "intrusted" the factor with the document; not that it is necessary that the owner should have had personal possession of the document, so as to be able to mark it with his name, and himself delivered it to the factor; for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is "intrusted" by the owner with it, within the meaning of the act. But in order to constitute an intrusting of such a document, it is necessary that the owner should have intended the factor to possess it in that form, at the time when he had the possession. Intrusting with the document is essentially different from enabling a person to become possessed of it—from giving him the means of obtaining it. An instance of the difference was well put in the argument, when it was said by Mr. Crompton, that one who gives another the key of his bureau to get out one paper, may enable him to procure any other that he pleases to take, but does not intrust him with it. It is not enough, therefore, to shew that the plaintiffs impowered Warwick, or Warwick & Clagett, to possess themselves of the warrants whenever they chose; it must be shewn that the plaintiffs really intended that the factors should be possessed of them at the time they pledged them, or it must be shewn that the plaintiffs meant them not merely to have the power which the possession of the bill of lading would give—of getting the warrants when they liked, but to exercise that power by obtaining it whenever they in their discretion might think fit. If either of these intentions were proved, it would be sufficient; but if the factors were proved to be in possession of the warrants, under such circumstances as that the plaintiffs, if they had been informed of that fact, might justly have said, "we never meant this," it is impossible to say that they in [599]-trusted the factors with these warrants. The principals can never be deemed to have intrusted the agents with a document which the agents obtained in breach of their trust, against the intention of their principals, in violation of their duty towards them, and which document never would have existed at all, if it had not been for the fraud of the agents against their employers. It was well

observed by Mr. Crompton, that it is impossible to suppose a confidence reposed by the employer with respect to a document, the very existence of which is a fraud upon him.

It is, no doubt, true that the fact of the delivery of the bills of lading for the purposes of entering the cargoes, which furnished the means of obtaining the warrants, is, as was insisted by the Attorney-General, some evidence of the intention of the plaintiffs that the factors should have those warrants at some time, or that the plaintiffs meant them to take them when they pleased; but it is evidence merely; and independently of the objection insisted upon on the part of the plaintiffs, that the construction of the act of Parliament ought to have been more fully explained to the jury, we think that if it had been, the finding of the jury upon that evidence in this case is not satisfactory.

If it had been the established usage of trade to sell by dock-warrants only, and to obtain them at the time these were obtained, doubtless there would be a strong case for the jury; for the plaintiffs might fairly be considered, in the absence of express instructions to the contrary, as having intended that the factors should pursue the ordinary and usual course. There was no such proof of its being the usual course, but the contrary; and we think that no inference of intention can be drawn from the mere fact of the delivery of the bills of lading, as to obtaining the warrants, except that the factors should obtain them, if those documents should be reasonably required for the purposes [600] of sale, and at the time when they should be so required: and upon the facts in this case, it is clear that these documents were obtained long before there was any occasion for them, and even before the cargoes were weighed and sampled. It may be added, that there was no evidence of a general agency in Warwick, or Warwick & Clagett, or of any general discretion being given to them, to act as they thought fit, with respect to the obtaining warrants. Indeed, it is not pretended that they stood in any other relation than that which ordinary factors for sale bear to ordinary principals, in which case all that the principal intends is, that a sale should be made, and every step taken which is reasonably required for the accomplishment of that purpose and no other.

Upon these grounds, therefore, we are of opinion that there ought to be a new trial.

It will not be improper to add, that if there was an intrusting of the warrant of the "Amelia's," cargo, in this case, we think it was properly pledged to the extent of £8000; for, although the defendants might be bound by this contract to advance the remaining £8000, residue of the £20,000, on the security of Warwick's own property, yet they refused to do so; and if instead of suing the defendants on their contract, Warwick chose to pledge fresh property for an immediate advance, such pledge would be good.

As to the alleged advance on the 7th of November, 1836, of £14,400, we think that the true question is, whether, according to the intention of both parties to that transaction, the £ 4,400 was meant to be placed entirely at the disposition of Warwick & Clagett, so that they might, without any breach of the understanding with the defendants, having applied the amount to any purpose of their own. If they might, and they directed the amount to be paid to the defendants in account, to satisfy the old debt due from Warwick, instead of receiving the money and [601] handing it back, there would, we think, be an advance. But if the real meaning of the parties was, that the new advance, by discounting the new acceptances of Warwick & Clagett, was only to take up the former acceptances of Warwick, and would not have been made except on the understanding that the amount should be so applied, and it would have been a breach of the agreement to have done otherwise, then we think there would have been no advance within the meaning of the statute.

The rule must therefore be absolute.

Rule absolute.

End of Easter Term.

[602] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER AND EXCHEQUER CHAMBER, TRINITY TERM, 3 VICTORIÆ.

REGULA GENERALIS.

It is resolved by the Judges, that when a Judge's Order is made a Rule of Court, it shall be a part of the Rule of Court, that the costs of making the Order a rule of Court shall be paid by the party against whom the Order is made: Provided an affidavit be made and filed, that the Order has been served on the party or his attorney, and disobeyed (see the case next reported).

27th May, 1840.

[603] REGINA v. GAMESON. Exch. of Pleas. 1840.—Upon a Judge's order, discharging a summons with costs, the costs were taxed and demanded, and not being paid or tendered, the order was made a rule of Court. The costs of making it a rule of Court were also taxed, and both sums were separately demanded. The party tendered the former amount, but refused payment of the latter:—Held, that he was not liable to an attachment, the costs of making the order a rule of Court not being costs within the meaning of the order and rule.

[S. C. 8 Dowl. P. C. 795; 9 L. J. Ex. 322.]

This was a rule calling upon the plaintiff to shew cause why an attachment, issued against the defendant for non-payment of two several sums of 11. 8s. 7d. and 2l. 18s. 2d., pursuant to the Master's allocatur, should not be set aside. In Hilary Term, Crowder shewed cause against the rule, and Hoggins was heard in support of it. The question in the case was, whether the costs of making a Judge's order, for discharging a summons with costs, a rule of Court, were costs within the meaning of the order and rule, so as to bring the defendant into contempt for nonpayment of them. The Court took time to consult the Judges of the other Court, and in this term judgment was delivered by

PARKE, B. On the 5th of February, 1839, I made an order, dismissing with costs a summons to amend the declaration, by inserting the defendant's true name at the plaintiff's costs. The costs of this order were taxed at 11. 7s., and an allocatur given for that amount. Whether this order was served appears doubtful on the affidavits, but the defendant's agent attended the taxation of costs thereon. On the 14th of February, my Brother Alderson ordered all proceedings in the action to be stayed, on payment of debt without costs, on the ground that it was under £5, and recoverable in a Court of Requests.

The plaintiff afterwards applied (after giving notice to the defendant) to my Brother Alderson to amend his order, by saving to the plaintiff the costs payable to the plaintiff under my order; and my Brother Alderson did so, by order dated the 20th of February, 1839, which order was served on the defendant.

No tender of the 11. 7s. was made, and the plaintiff [604] proceeded, on the 30th of May, 1839, to make my order and allocatur a rule of Court.

On this rule an appointment was obtained to tax further costs, and an allocatur given for 1. 18s. 2d., being the costs of making my order a rule of Court.

On the 1st of November, 1839, the plaintiff demanded the costs from the defendant; the demand was made severally of the 11. 7s. and the 2l. 18s. 2d.; and copies of the rule and allocatur thereon were served. The affidavit does not state a refusal to pay these sums, or either of them, but simply that they had not been received. On the defendant's affidavit, it appears that he offered to pay the 11. 7s. on such demand being made, which the plaintiff refused to receive.

The plaintiff nevertheless moved for and obtained a writ of attachment against the defendant, and it was issued on the 6th of November, and the defendant taken under it. The attachment was indorsed by order of the Court, dated 4th of November, 1839, at the instance of Wyatt, for nonpayment of 11. 7s. and 2l. 18s. 2d.

An application was made to set it aside in the last term, and a rule nisi obtained; and we think the rule must be absolute.

An attachment is granted, not for disobedience of a Judge's order, but of a rule of

Court: and all the rule of Court does in this case is to make my order a rule of Court, which is constructively, to order that which it orders, viz. the payment of 11. 7s. The result is, that, according to this form of order and rule, if the defendant postpones the payment of the sum ordered to be paid until the plaintiff has incurred the further costs of making the order a rule of Court, and then tenders the amount, he may put the plaintiff to an expense for which he has no remedy. To obviate this for the future, there should be a rule nisi for the payment of the costs occasioned by making the [605] order a rule of court, which may be incorporated with the rule for making the order a rule of Court.

Rule absolute.(a)

MAYER v. ISAAC. Exch. of Pleas. 1840.—“In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200:”—Held, a continuing guarantee, and that the defendant was liable upon it, although, after it was given, goods to a greater amount than £200 had been supplied to and paid for by V.

[S. C. 9 L. J. Ex. 225; 4 Jur. 437. Approved, *Horlor v. Carpenter*, 1858, 3 C. B. (N. S.) 172.]

Assumpsit. The declaration stated, that theretofore, to wit, on the 30th of November, 1838, in consideration that the plaintiff, at the request of the defendant, would sell and deliver to the defendant's nephew, one A. L. Vogel, china and earthenware, he the defendant promised and guaranteed to the plaintiff the payment of any bills the plaintiff might draw on account thereof, to the amount of £200. The declaration then averred, that the plaintiff, confiding, &c., did sell and deliver to the said A. L. Vogel, and the said A. L. Vogel bought of him, divers large quantities of china and earthenware, at prices amounting in the whole to a large sum of money, to wit, £2000: that the plaintiff afterwards, to wit, on the 10th of May, 1839, drew a bill of exchange on A. L. Vogel, at four months' date, for £200; that Vogel accepted the same for and on account of the sum of £200 due and owing from him to the plaintiff for the said prices of the said china and earthenware so sold and delivered to him, but that he did not pay the bill when due, &c.: Breach, that the defendant has not guaranteed to the plaintiff the payment of, or paid him, the said bill, or any part thereof, &c.

Pleas—first, non assumpsit: secondly, that the plaintiff did not sell and deliver to the said A. L. Vogel, nor did the said A. L. Vogel buy of him, the said quantities of china and earthenware, or any part thereof, in manner and [606] form, &c.: thirdly, that the plaintiff did not draw, nor did the said A. L. Vogel accept, the said bill in the declaration mentioned, for the sum of £200, due and owing from the said A. L. Vogel to the plaintiff for the said prices of the said china and earthenware, &c. in manner and form, &c.: fourthly, that after the said china and earthenware had been so sold and delivered by the plaintiff to the said A. L. Vogel as aforesaid, and whilst the said A. L. Vogel was indebted to the plaintiff for the same, and before the said bill became due, to wit, on the 10th of May, 1839, it was agreed by and between the plaintiff and the said A. L. Vogel, without the consent, leave, or license of the defendant, for a good and valuable consideration in that behalf to the defendant unknown, that the plaintiff should give to the said A. L. Vogel time, and forbear to sue him for a certain time in that behalf agreed on between them, to wit, for two months, for the payment of a large sum, to wit, £200, parcel of the sums in which the said A. L. Vogel was indebted to the plaintiff for the said china and earthenware; the said time and forbearance being for a longer time and a longer forbearance than the time and forbearance or credit which the plaintiff ought to have given the said A. L. Vogel for the payment of the said sum of £200, according to, and in pursuance and within the meaning of the said guarantee. Verification. Fifthly, that after the making of the promise in the declaration mentioned, and before the commencement of this suit, to wit, on the 9th of May, 1839, the said A. L. Vogel delivered to the plaintiff, and the plaintiff then accepted of him, divers bills of exchange and monies, amounting in the

(a) See now the rule of Court, ante, p. 602.

whole, to wit, to £2000, in full satisfaction and discharge of the said promise, damages, and causes of action in the declaration mentioned. Verification.

The plaintiff took issue on the three first pleas: to the fourth he replied, denying the agreement in that plea mentioned; and to the fifth, that A. L. Vogel did not deliver to the plaintiff, nor did the plaintiff accept of him, the said bills of exchange and monies in the said plea alleged as amounting in the whole to £2000, in full satisfaction and discharge, &c., as in that plea alleged. On these replications also issues were joined.

At the trial before Gurney, B., at the Middlesex Sittings after Hilary Term, it appeared that in June 1838, the plaintiff, a manufacturer of earthenware in Staffordshire, began to supply Vogel, the defendant's nephew, who carried on business at Brussels, and was introduced to him by the defendant, with china and earthenware. The plaintiff applied to the defendant for a guarantee of Vogel's payments, and the defendant gave him, in the first instance, a guarantee to the amount of £100. The plaintiff supplied Vogel, down to November 1838, with goods to the amount of £300: he then applied to the defendant for a further guarantee for £200, and received from him the guarantee declared on, which was as follows:—

“London, 30th Nov., 1838.

“Sir,—In consideration of your supplying my nephew, A. L. Vogel, with china and earthenware, I hereby guarantee the payment of any bills you may draw upon him on account thereof, to the amount of £200.

“G. ISAAC.”

After this guarantee was given, the plaintiff went on supplying goods to Vogel, to the amount in the whole of upwards of £1000, down to the beginning of April 1839, and during the same period he received from Vogel bills to the amount of upwards of £700, which were satisfied before the commencement of this action.

For the defendant it was objected, that this was not a continuing guarantee, and that it was at an end as soon as the plaintiff had supplied goods under it to Vogel, and received payment to the amount of £200. The learned [608] Judge reserved the point, and a verdict was given for the plaintiff, damages £200, leave being reserved to the defendant to move to enter a nonsuit.

Whateley having obtained a rule nisi accordingly, citing *Bovill v. Turner* (2 Chit. 205), *Melville v. Hayden* (3 B. & Ald. 593), and *Nicholson v. Paget* (1 C. & M. 68; 3 Tyr. 164),

Erle and Knowles now shewed cause. First, this is a continuing guarantee: but secondly, if it be not, there is no plea on the record under which the defendant can take advantage of the objection. Although the line of distinction between what does or does not amount to a continuing guarantee, is not very clear, the authorities are in favour of this being so considered. It is not limited to any one individual supply, but contemplates a continuance of the dealings, and a course of bills that may be afterwards drawn, and the defendant makes himself liable for any bills among those so drawn, to the extent of £200. Where the words of the instrument will reasonably bear the construction of a continuing guarantee, they will be construed most strongly against the maker. The cases relied on for the defendant are all distinguishable. In *Bovill v. Turner*, the guarantee clearly contemplated one supply only, to the amount of £50. In *Melville v. Hayden*, the guarantee was “of the payments of A. M. to the extent of £60, at quarterly account, bill two months, for goods to be purchased by him” of the plaintiff's. There there was no reference to any continued course of dealing, unless the words “at quarterly account” could be so construed, which the Court held they could not. So also, in *Nicholson v. Paget*, where the words were, “I hereby agree to be answerable for the payment of £50 for F. L., in case F. L. does not pay for the gin, &c., which he receives from you,” one supply only was [609] necessarily pointed at. [Alderson, B. Mr. Baron Bayley there lays down the principle, that it is the duty of the party who takes a guarantee “to see that it is couched in such words as that the party giving it may distinctly understand to what extent he is binding himself.”] That is a principle contrary to the general maxim of law—*verba fortius accipiuntur contra proferentem*—and to the opinions of other judges. In *Mason v. Pritchard* (12 East, 227), where the defendant gave the plaintiff a guarantee “for any goods he hath or may supply W. P. with, to the amount of £100,” it was held a continuing security for goods supplied at any time to W. P.

until the credit was recalled, although goods to more than £100 had been first supplied and paid for: and there the Court stated distinctly, that "the words were to be taken as strongly against the party giving the guarantee, as the sense of them would admit of." This is even a stronger case than that, because here the parties contemplate a course of bills to be drawn for the goods. The same doctrine was laid down by Lord Ellenborough, in *Merle v. Wells* (2 Camp. 412). *Simpson v. Manley* (2 C. & J. 13), *Hargreave v. Snee* (6 Bing. 244; 3 M. & P. 573), and *Allan v. Kenning* (9 Bing. 618; 2 M. & Scott, 762), are additional authorities for the plaintiff. In *Bastow v. Bennett* (3 Camp. 220), an undertaking to be answerable for any tallow or soap supplied by A. to B., was held to remain in force as long as A. supplied goods to B. on the same footing, by reason of the indefinite nature of the word "any." It must be conceded that this is a continuing guarantee up to a certain point, viz. until the £200 is mentioned; and that part is added only to limit the amount, not to limit the transactions to which the guarantee refers. [Alderson, B. That part may be left out of consideration al-[610]-together, because it is applicable to either view of the case.] If it be, there are no words whatever to limit either time or amount. [Parke, B. If the defendant only intended to pay for the first goods supplied, he would equally require a limit of amount.] The limit he does impose refers only to the amount of the default at any time.

But secondly, there is no plea under which the point can be raised. It clearly can be only under the fifth plea; and that does not allege in form that the guarantee has been satisfied.

Kelly and Whateley, in support of the rule. The general principle of law, that *verba fortius accipiuntur contra proferentem*, is not without exceptions; and certainly, if any exception be admitted, it ought to be in the case of a party who is binding himself as surety for another. In *Nicholson v. Paget*, Bayley, B., in delivering the judgment of the Court, laid down the following principles:—"A guarantee is a contract of a peculiar description; it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf, but it is a contract which he is entering into for a third person; and we think it is the duty of the party who takes such a security, to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. . . . It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee, the extent to which he expects that the liability is to be carried." [Parke, B. Do you find any other authority to support the rule of construction there laid down? It certainly is at variance with the general rule of the common law, that the words of an instrument are to be taken most strongly against the party using them. A guarantee is one of that class of obligations which is binding only on [611] one of the parties, until the other chooses by his own act to make it binding on him also. This instrument does not contain the words of both parties, but of one only, the defendant; the plaintiff agrees to nothing on the face of it.] The weight of authority would appear to be in favour of the last decision of the Court. But upon the fair and reasonable construction of the instrument, this is not a continuing guarantee. In all the cases cited on the other side, there were some words directly denoting the continuance of the instrument as a security, or the intention to be liable beyond the first supply. In *Allan v. Kenning*, the guarantee was given for the very purpose of inducing the plaintiff to continue his dealings with the party guaranteed. In *Bastow v. Bennett*, which is the strongest case for the plaintiff, the guarantee was for "any goods" to be supplied. Here, where the goods are mentioned, the word "any" is omitted; and there is nothing to shew that more was contemplated than one supply, or a series of supplies, to the extent of £200, for which payment should be made by bills. In *Mason v. Pritchard*, again, (which was remarked on in *Melville v. Hayden*, as having gone "as far as possible,") the words were, "any goods he hath or may supply:" in *Merle v. Wells*, "any debt he may contract." In *Hargreave v. Snee*, it was a guarantee for goods to be delivered according to the custom of trading between the parties, and therefore evidently contemplated a continuance of the same course of dealing. There is no case in which the guarantee has been held continuing, unless it contained some words applying to the goods themselves, (not to the manner in which they were to be paid for), shewing the contemplation of a continuous supply. The introduction of the mode of payment by bills can

make no difference in the construction of the instrument. Then, would this guarantee be held a continuing one, if it had run thus—"In consideration of your supplying Vogel with China and earthenware, I guarantee the payment thereof to the [612] amount of £200!" Clearly not, according to the authority of *Bovill v. Turner*, and *Melville v. Hayden*.

The point is clearly raiseable under the last plea, which alleges payment by Vogel in discharge of the promises and causes of action in the declaration mentioned.

ALDERSON, B.(a) It is not necessary to give any opinion on the latter point, because we have come to the conclusion that this must be considered a continuing guarantee. There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision: some laying it down that a liberal construction ought to be put upon the instrument in favour of the person giving the guarantee, as in *Nicholson v. Paget*; others that it ought to be strictly construed, as in *Mason v. Pritchard*. Undoubtedly, the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of Bayley, B., in *Nicholson v. Paget*. It was not, however, at all necessary for the decision in the case of *Nicholson v. Paget*, that it should depend upon the principle so stated. There the words of the guarantee were—"I hereby agree to be answerable for the payment [613] of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin, &c., he receives from you, and I will pay the amount." Taking that according to its plain meaning, it refers to some particular amount of gin which the party was to receive from the plaintiff: but here the words are more general; the defendant says, "In consideration of your supplying my nephew Vogel with china and earthenware, I hereby guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200;" that is, according to the plain and natural meaning of the words, "In consideration of your supplying my nephew generally with china and earthenware,—not any particular goods, but any china and earthenware,—I hereby guarantee you the payment of any bills you may draw on him on account of that general supply to be made to him." If that be so, it cannot be doubted that this is a continuing guarantee: it contemplates the continuance of a supply on the one side, and on the other a liability for any default during that supply; and then it defines the extent to which the defendant will be bound upon this continuing or running guarantee, viz. £200. According to the plain construction of the document, it is a continuing security, and falls within the decision in *Mason v. Pritchard* and the other cases referred to in the argument. It is not necessary, therefore, on the present occasion, to inquire into the principle of construction to be applied to instruments of this kind; because, according to the plain meaning of the words, as they would be understood by mercantile men, this is a continuing guarantee. The plaintiff is therefore entitled to retain his verdict.

GURNEY, B. I am of opinion, that on the fair import of this document, it is a continuing guarantee. No doubt such was the intention of the parties; and I think the words fully warrant us in carrying out that intention.

[614] ROLFE, B. I am of the same opinion. It is conceded by the defendant's counsel, that if the promise had been in consideration of the supply of "any china and earthenware," the plaintiff would be entitled to recover; but it is said the case is different, because the guarantee is not given in respect of any china and earthenware, but "any bills," i.e. as it is argued, any bills drawn for the first supply of china and earthenware. I cannot agree to that construction. What is guaranteed is, payment of any bills drawn on Vogel for the price of the goods supplied to him. *Mason v. Pritchard* decides, that where it is for any goods supplied, it is a continuing guarantee; and I cannot appreciate the distinction taken between that case and the present. On the contrary, I think the instrument is more clearly continuing when given in respect of

(a) Parke, B., had left the Court during the argument

any bills; and for this reason, that it cannot be said that it is limited to the first lot of goods actually supplied, but only to the first supplied which is paid for by bills. I think the parties could not contemplate so strange a course of dealing, and therefore that the only reasonable construction is, that the defendant was to be answerable for any goods to be supplied, provided only that his liability should not extend beyond the £200.

ALDERSON, B. My Brother Parke, before he left the Court, expressed to us his entire concurrence in the opinion we have delivered.

Rule discharged.

[615] LAMONT v. CROOK. Exch. of Pleas. 1840.—In an action against a party for not appearing to give evidence in obedience to a writ of subpoena ad testificandum, it is not necessary to shew that the defendant was called on his subpoena by the officer of the Court, if it be shewn by other satisfactory evidence that he was not present at the proper time and place when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence. And in such case it is not necessary that the jury should have been sworn and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness.

[S. C. 8 Dowl. P. C. 737; 9 L. J. Ex. 253; 4 Jur. 489.]

This was an action on the case against the defendant for a breach of duty, in not being in attendance to give evidence in obedience to a writ of subpoena ad testificandum. The declaration was in the usual form, except that it did not allege that the defendant was called on his subpoena. Plea, not guilty. At the trial before Lord Abinger, C. B., at the Sittings after Hilary Term, the plaintiff's counsel opened the following facts. A writ of subpoena ad testificandum in the usual form had been served on the defendant, requiring him to attend and give evidence for the plaintiff in a certain action, in which the now plaintiff was the plaintiff, and one R. Southall was the defendant. When the cause was about to be called, the plaintiff's attorney ascertained that the now defendant was not in attendance; and being advised by his counsel that it was unwise to proceed to trial without his evidence, he withdrew the record. The defendant had not been called on his subpoena by the officer of the Court; but satisfactory proof would be given that he was not in attendance, and that his attendance could not have been procured in time. Upon this statement, the Lord Chief Baron interposed, and said that the plaintiff must be nonsuited, inasmuch as, in his opinion, in order to entitle the plaintiff to recover in an action of this kind, it must be shewn that the witness was called on his subpoena. On this expression of his Lordship's opinion, the plaintiff's counsel did not offer any evidence, and the plaintiff was accordingly nonsuited.

Thesiger having obtained a rule nisi for a new trial, citing *Barrow v. Humphreys* (3 B. & Ald. 598), *Rex v. Stretch* (3 Ad. & Ell 503), *Mullett v. Hunt* (1 C. & M. 752; 3 Tyr. 875), and *Davis v. Lovell* (4 M. & W. 679).

[616] Crowder and Swann now shewed cause. The plea of not guilty puts in issue all the facts alleged in the declaration, which are necessary to shew that there was a breach of duty in the defendant. If then it be necessary, before he could be guilty of any breach of duty, that he should have been called upon his subpoena, that fact is in issue on these pleadings. If he was not so called, and it is necessary that he should be, he did not neglect or refuse to attend, in the terms of the declaration. [Parke, B. If your argument be good, the question is, whether there may not be an objection to the declaration, for not averring that the defendant was called. Alderson, B. The first question is, whether, on this record, it is necessary to prove the calling of the defendant; the second, whether it be in all cases necessary to call the witness, even if he be not there.] *Malcolm v. Ray* (3 B. Moore, 222) appears to be a decision directly in favour of the defendant, although it must be admitted that its authority is shaken by subsequent cases. It was there held, that an affidavit in support of an application for an attachment against a witness for disobedience to a subpoena, was defective for not stating that he was duly called at the trial. The precedents, also, all allege that the defendant was called (see 2 Chit. Pl. 531; 9 East,

473; 8 Bing. 224; 1 C. & M. 752). In *Mullett v. Hunt*, the present question did not arise. There the defendant was in fact called on his subpoena, and it was so averred in the declaration: and the necessity of calling him seems to have been assumed by the Court. Bayley, B., says, "If the Judge suffers the witness to be called on his subpoena, without the jury being sworn, and the witness does not appear, I think the plaintiff has a right to withdraw his record." In *Dixon v. Lee* (1 C. M. & R. 645), Alderson, B., certainly intimated an opinion, that when the witness is not in fact in attendance, it cannot be necessary, because [617] it would be useless, to call him on his subpoena; but there also, the decision proceeded on another ground. In *Barrow v. Humphreys* (B. & Ald. 598), the Court only expressed an inclination of opinion, (as was afterwards decided in *Mullett v. Hunt*), that the witness was in contempt by neglecting to attend, although the cause was not called on for trial, he having been called on his subpoena. In *Rex v. Stretch* (3 Ad. & E. 503), the Court expressly declined to decide the question now in discussion. [Lord Abinger, C. B. The subpoena binds the witness to be there from day to day, until the cause is tried.] But he cannot appear in the box as a witness, until called for that purpose; until he be so called, therefore, it can hardly be said that he has disobeyed the injunction of the writ, "to appear to testify the truth."

Thesiger and Busby, contra. The circumstances opened in this case sufficiently shewed a breach of duty in the defendant. There may well be a distinction between the case where the witness is in fact in attendance upon the Court, and where, as in the present case, he was altogether absent, and no object could have been answered by calling him on his subpoena. It is a matter, not of the essence of the case, but of evidence, whether the calling of him was necessary or not: and that is the distinction taken by Alderson, B., in *Dixon v. Lee*, and also by Patteson, J., in *Rex v. Stretch*. There is no rule of law which compels a plaintiff, who obtains a subpoena ad testificandum, to do more than duly to serve the party with the writ; it is a common-law writ, and the party is bound to obey it at his peril: *Amy v. Long* (9 East, 473), *Mullett v. Hunt*. The requisition of the writ is, that "all other things being set aside, and ceasing every excuse," he shall appear in Court on a day named therein, "and from day to day until the cause is tried." The requisition is absolute, not conditional. The proposition [618] contended for on the other side is in effect this, that the witness may absent himself until the instant when he is formally called on by the officer of the Court: but that is wholly at variance with the large and general requisition of the writ. The legal effect and obligation of the writ of subpoena was much considered in *Collins v. Godefroy* (1 B. & Adol. 950). Lord Tenterden says—"If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law." The writ itself does not require the witness to be called. The question is not whether that be a convenient practice or not: the onus lies on the defendant to shew that it is the law. There is no obligation on the plaintiff to dehorn the writ, and the writ imposes no such duty.

LORD ABINGER, C. B. We think this rule must be made absolute for a new trial, although we do not intend therefore to be understood as laying down any rule that a party may sustain an action against every person summoned by him as a witness, who is not present at each particular moment of the assizes or sittings for which he is summoned: for although to be present there is a duty which the witness owes to the Court, yet he sufficiently discharges his duty to the party who summons him, if he be there when his evidence is wanted, and he is called upon ad testificandum. Here the cause of *Lamont v. Southall* was actually called on in its turn, and the period had arrived when the presence of the defendant as a witness was essential to the discharge of his duty to the plaintiff. The case of *Mullett v. Hunt* has decided, that in order to render the witness liable to an action for disobedience [619] to the subpoena, it is not necessary that the jury should have been sworn in the cause, but it is enough if the party, being in other respects ready to try, have foreborne to swear the jury in consequence of the absence of the witness, and have called him on his subpoena before withdrawing the record. I do not apprehend, however, that on an examination of the principles upon which that case was decided, it will be found to have been held essential that the witness should be called on his subpoena at all. I adopt the argument of Mr. Thesiger, that it is a matter not of essence, but of

evidence; although it is a species of evidence which it is most important should be obtained, and I should in general be much disposed to indulge the propensities of jurymen to find for the defendant in actions of this nature, whenever it appeared that the witness had not been called on his subpoena; because, in general, until he be so called, how can any one undertake to say that he was not or might not be present? There may, however, be cases where the calling of him would be merely an idle ceremony; as if it were shewn that he had gone to France two days before the trial, or the like. Therefore it appears to me, on the principle laid down in *Mullett v. Hunt*, we are safe in deciding that in the present case the plaintiff ought to be at liberty to shew, that when the record was called on to be tried, the witness was in such a place that he could not possibly come to obey the subpoena: and that that is a sufficient breach of duty to the plaintiff to ground an action of this nature. That is the opinion to which the Court are at present inclined, and therefore I admit that I was wrong in my ruling at Nisi Prius, when I said that I would adhere to the old practice of requiring it to be proved that the witness was called on his subpoena. But although we are inclined to that opinion, it is now for the first time decided that this action may be maintained for disobeying a subpoena, although the party was not called upon it at any time. The rule will be made [620] absolute for a new trial, and the defendant may then, if he think fit, raise the question of law by tendering a bill of exceptions.

PARKE, B. I also think that this rule ought to be made absolute. According to the exigency of the writ of subpoena, the party is commanded to be in attendance before a certain tribunal, at a certain place and on a certain day, and so on from day to day until the cause is tried, in order to testify and give evidence in a certain cause. So far as regards the party suing out the subpoena, the only obligation imposed upon the witness is, that he shall be present and forthcoming when he is wanted for the purpose of giving evidence in that cause; and the precise moment is, when the counsel who conducts the cause requires his presence. Now the case of *Mullett v. Hunt* has decided, that if the witness be absent when the cause is called on for trial, and it is then clear that he will not be forthcoming when his evidence will be required, the plaintiff is not bound to swear the jury, but may withdraw the record, and maintain an action against him. In that decision I quite concur. It is enough, therefore, if the plaintiff shew that the defendant was at that time absent, and under such circumstances, that when the moment should arrive at which he would be called on to give evidence, he would not be forthcoming. Then the question is, how is this state of things to be proved? Is it only by proof that the witness was called on his subpoena, and is no other evidence admissible for the purpose? Now I agree that the question is open on this record; but it seems to me, that although the calling of the witness on his subpoena is one, and a very satisfactory species of evidence by which the fact of his absence may be established, it is not the only species. It would surely be sufficient, if it were shewn that the witness was a hundred miles off during the whole period of the assizes. In fact, the practice of call[621]-ing the witness on his subpoena, when strictly examined, is out of place; because, properly speaking, the calling of him should be at the moment when he is wanted to give evidence: but it is a useful practice, as furnishing good evidence of his absence at the required time and place. Still it is not the only kind of evidence by which his absence can be substantiated, and it is not essential to the plaintiff's case to shew that that form was gone through. For these reasons, I think that the Lord Chief Baron was wrong in withdrawing this case from the jury, and that the rule must be absolute for a new trial.

ALDERSON, B. I entirely concur in what has been said. It is not necessary to call a witness on his subpoena, if by clear evidence you can shew that he is absent altogether, so as to be unable to come and give evidence, and therefore that the calling him would be a mere useless ceremony. If he be absent altogether, he has disobeyed the subpoena, which requires him to attend to testify. I think, however, that there is much convenience in the practice; if there be contradictory evidence as to the fact of the witness having been absent, it is a useful mode of establishing the truth, and ought, perhaps, to turn the scale.

ROLFE, B. I am of the same opinion. The writ of subpoena commands the party to appear before the Court to give evidence in the cause. There is nothing in it which says that he is to appear there when called on by the officer of the Court. The

question is, has he appeared at the proper and necessary time? If he be proved, by whatever species of evidence, to have been then absent, that is a breach of his duty, and entitles the plaintiff to recover.

Rule absolute.

[622] HUMPHREYS v. THE EARL OF WALDEGRAVE. Exch. of Pleas. 1840.—A plea to an action by the holder of a cheque, that the consideration for the making of it was money won by a third party of the defendant at hazard, in a common gaming-house, is not an issuable plea, within the meaning of an order to plead issuably.

[S. C. 8 Dowl. P. C. 768; 9 L. J. Ex. 244; 4 Jur. 466.]

This was an action by the holder of a cheque for £300 made by the defendant, payable to bearer. The defendant, being under terms to plead issuably, obtained a Judge's order to plead several pleas, the 4th of which was (in substance) that the sole consideration for the making of the cheque was money won of the defendant by one Barnett, at a common gaming-house, at the game of hazard, contrary to the statute, &c. The plaintiff having signed judgment as for want of a plea, a rule nisi was obtained to set it aside for irregularity, against which

Wightman shewed cause. The question is, whether the pleas pleaded by the defendant are issuable pleas, within the meaning of the rule of Court. It will be said that the fourth plea is an issuable plea: but it does not try the merits of the action; even if true, it is no defence against the present plaintiff. The meaning of an issuable plea is, such a one as that if an issue be taken on it, it decides the merits of the cause. [Parke, B. This would have been a good plea before the recent statute, 5 & 6 Will. 4, c. 21, but not since. The plaintiff would clearly be entitled to judgment non obstante veredicto. If it be not an issuable plea, the defendant cannot set aside the judgment without an affidavit of merits.]

Humphrey, contra was then called on. The question here is not whether the plaintiff might have judgment non obstante veredicto, but whether a distinct issue of fact can be taken on the plea. The rule laid down in *Sawtell v. Gillard* (5 Dowl. & R. 620) is, "that where a party has obtained time on the terms of pleading issuably, and by his pleading fails to [623] bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue, he does not comply with the conditions of the order." [Parke, B. That must mean some question of fact which may determine the cause of action.] If so, the qualification there introduced would be unnecessary, because the first branch of the proposition would include that case. [Alderson, B. The last clause in that paragraph applies to a general demurrer: the other words mean the pleading of some matter of fact on which the plaintiff may go to trial, and determine the cause of action, without being driven to a demurrer. Parke, B. Mr. Tidd states the rule thus (9th edit. p. 471): "An issuable plea is a plea in chief to the merits, upon which the plaintiff may take issue and go to trial." There must be an issue tendered on some plea, which, if true, would be an answer to the action.] At all events, the plaintiff ought to have moved to set aside the Judge's order allowing these pleas, and not to have signed judgment. [Parke, B. No—all that the judge decides is, that they may be pleaded together, without deciding whether they are issuable or not. The Judge's order only does away with the objection of double pleading.]

Per Curiam. Rule discharged, with costs.(b)

[624] DAVIS v. COLE. Exch. of Pleas. 1840.—Where, in an action for assault and battery, the plaintiff recovered less than 40s. damages, and the Judge, at the trial, intimated his intention of certifying to deprive the plaintiff of costs, under the 43 Eliz. c. 6, but after four days the plaintiff obtained the record from the associate, no certificate being indorsed on it, and signed judgment, and the Master, on production of the record, taxed the plaintiff his costs: the Court

(b) See *Staples v. Holdsworth*, 4 Bing. N. C. 144; 5 Scott, 432; *Wettenhall v. Graham*, 4 Bing. N. C. 714; 6 Scott, 603.

confirmed an order of the Judge, for producing the record before him, in order to indorse the certificate upon it, and for setting aside the judgment and taxation.

[S. C. 8 Dowl. P. C. 732; 9 L. J. Ex. 258.]

This was an action for assault, battery, and false imprisonment, to which the defendant pleaded not guilty only. At the trial, before Gurney, B., on the 6th of May, the plaintiff recovered a verdict with 1s. damages, and the learned Judge, on the application of the defendant's counsel, expressed his intention of certifying to deprive the plaintiff of his costs, under the 43 Eliz. c. 6. After the expiration of four days from the trial, the plaintiff obtained the Nisi Prius record from the associate, no certificate being then indorsed on it. On the 14th of May the plaintiff signed final judgment, and gave notice of taxation on the 15th, when the defendant's attorney accordingly attended, and objected to the taxation being proceeded with, on the ground that the learned Judge had intimated his intention to certify. The Master, however, thought that as the record produced before him bore no such certificate, he had no option but to proceed, and he therefore taxed the plaintiff his full costs, and made out his allocatur accordingly for 29l. 1s., which the defendant's attorney paid under protest. The defendant then applied to Gurney, B., for a summons to produce the record before him, for the purpose of indorsing the certificate upon it; and his Lordship, on the 16th of May, made an order upon the plaintiff to produce the Nisi Prius record and postea for that purpose, and also to set aside the taxation, and alter the judgment as to the amount of costs. On the 22nd, the learned Judge made another order confirming the former, except that it directed the payment by the defendant of such costs as the plaintiff had incurred, by reason of the defendant not having applied to the associate to draw up the order before the judgment was signed and costs taxed.

Mansel now moved to set aside these orders. A Judge [625] is bound to certify under the statute of Elizabeth before judgment is signed, or at least before the costs are taxed. Perhaps it might be competent for him to enter upon the record a minute or memorandum of his intention to do so, but a mere verbal intimation can have no effect. *Godson v. Lloyd* (4 Dowl. P. C. 157), *Whalley v. Williamson* (5 Bing. N. C. 200; 7 Scott, 135; 7 Dowl. P. C. 253). The defendant ought to have obtained the certificate, and produced it before the Master on taxation; it was for him to take the necessary steps to carry out the intention of the Judge.

Cole appeared to shew cause in the first instance, but was stopped by the Court.

LORD ABINGER, C. B. The fault rested with the officer of the Court, who ought not to have delivered the record to the plaintiff without the certificate. The possession of the record by the clerk is the possession of the Judge; he holds it as his officer, and when he gives it out to the party, it is under a presumed authority from the Judge for that purpose. If the Judge himself had been applied to by the plaintiff, it is plain his answer would have been, that he would not let it go until he had indorsed his certificate.

PARKE, B. Here the Judge certified by word of mouth at the trial, and it was the misprision of the clerk in not setting down the certificate formally on the record, and presenting it to the Judge for his signature.

Rule refused

Cole then moved for and obtained a rule nisi for setting aside the second order of Gurney, B., citing *Forall v. Banks* (5 B. & Ald. 536): which rule, after argument on a subsequent day, was made absolute.

[626] DORE v. HAYDEN. Exch. of Pleas. 1840.—Issue joined, in a country cause, in Michaelmas Vacation, and no notice of trial given. A motion for judgment as in case of a nonsuit, in Trinity Term, is too soon: for the issue joined in vacation is referred to the subsequent term.

[S. C. 9 L. J. Ex. 323; 4 Jur. 467.]

This was a country cause: issue was joined on the 1st of January, 1840, (the affidavit stated, "as of the preceding term"), and no notice of trial given. The plaintiff not having proceeded to trial,

Locke now moved for judgment as in case of a nonsuit, and cited *Williams v. Edwards* (1 C. M. & R. 583) and *Lister v. Ventom* (7 Dowl. P. C. 691), as authorities to shew that the motion was not made too soon.

Per Curiam. The decision in *Lister v. Ventom* proceeded upon a mistake. When issue is joined in vacation, it must be considered as being joined of the next following term, and the mere statement in the affidavit that it was joined as of the preceding term, can make no difference. Here, therefore, the issue must be taken to have been joined in Hilary Term, and consequently, according to the recent decisions, the motion is premature.^(c)

Rule refused.

IBOTSON v. PHELPS. Exch. of Pleas. 1840.—Service of a rule by giving it to the defendant's servant at his warehouse, that being his usual place of business, held insufficient.

[S. C. 8 Dowl. P. C. 770; 9 L. J. Ex. 232; 4 Jur. 467.]

Streeten moved to make absolute a rule to compute principal and interest on a bill of exchange. The affidavit [627] stated the rule nisi to have been served, by leaving it with the defendant's warehouseman at his warehouse, No. 4, Mark Lane, which was stated to be his usual place of business.

Per Curiam. That is not sufficient; if it had been upon a domestic servant at the defendant's residence, it would have been different.

Rule refused.

PALMER v. POWELL. Exch. of Pleas. 1840.—By a local act of Parliament, 56 Geo. 3, a Court of Requests was created at Bristol, and certain fees, according to a table therein contained, were fixed to be paid to the assessor and officers of the Court, with power for the justices of the peace for the said city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 W. 4, c. 105, s. 8, it is enacted, "that every thing provided in any local act of Parliament, to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some court of general or quarter sessions assembled, and which does not relate to the business of a court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The town council of Bristol, acting under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 124, and 6 & 7 W. 4, c. 105, s. 8, by an order of council, reduced the fees payable to the assessor and clerk of the Court:—Held, that the regulation of the fees of the Court of Requests was a matter relating to the business of a court of civil judicature, and that the town council had no authority to interfere with it.

[S. C. 9 L. J. Ex. 209; 4 Jur. 825.]

This was an action brought by the plaintiff, as barrister and assessor to the Commissioners of the Court of Requests at Bristol, against the defendant, whom he had appointed, at his request, and for certain rewards to him payable in that behalf, to collect the fees which should become due to him as such assessor, and in consideration of which, he the defendant undertook and promised to collect the same according to their full legal amount. The declaration alleged that divers fees had become due to the plaintiff from divers persons, and on divers occasions, and alleged as a breach, that the defendant collected as the fees on those occasions, fees of lower amount than were by law due to him.

The defendant, by his plea, admitted that he had collected the fees, but alleged that they were not of lower amount than was by law due to the plaintiff; upon which

(c) See *Evans v. Barnard*, 3 M. & W. 376; 6 Dowl. P. C. 367; *Williams v. Davis*, 5 Bing. N. C. 227; 7 Scott, 158; 7 Dowl. P. C. 246; *Harrison v. Williams*, 6 Dowl. P. C. 772; *Apperley v. Morse*, 6 Dowl. P. C. 505; *Heath v. Boxall*, 7 Dowl. P. C. 19. The same point was decided in this court a few days subsequently in *Douglas v. Darlaston*.

issue was joined : and afterwards, by consent, the following [628] case was agreed to, under a Judge's order, for the opinion of this Court.

The city of Bristol, and county of the same city, has a mayor, alderman, recorder, justices and town councillors, and a Court of quarter sessions, under the statute 5 & 6 W. 4, c. 76 (the Municipal Corporation Act); and prior to that act it had a mayor, alderman, and recorder, (who were justices), and a Court of quarter sessions by charter.

Previous to the said statute 5 & 6 W. 4, c. 76, by an act passed in the 56th year of the reign of his late Majesty King George 3rd, intituled, "An Act for the more speedy and easy recovery of small debts in the city and county of the city of Bristol, and in the liberties thereof, and in the several parishes and places therein mentioned, in the counties of Gloucester and Somerset," the mayor, aldermen, and common council for the said city of Bristol for the time being were empowered to appoint commissioners for the recovery of small debts above 40s., and not amounting to any sum for which an arrest on mesne process may by law take place, within the said city and county of the said city, and the liberties thereof, and in the several parishes therein mentioned; and the said commissioners and their successors are, by the said last-mentioned act, constituted a court of justice, by the name of the Court of Requests for the city and county of the city of Bristol, and the liberties thereof, and the several parishes &c.; and the said commissioners are by the said last-mentioned act empowered and required to meet and to hold the said Court on every Tuesday in the guildhall of the said city, or any of the rooms and apartments thereto adjacent, or in some other convenient place within the same city, to be appointed by the mayor, aldermen, and common council for that purpose. By the 2nd section of the act, the mayor, aldermen, and common council of the said city for the time being, are empowered to nominate and appoint a practising barrister-at-law, who shall have been called to the [629] bar for the space of six years at the least, and who shall have actually practised as a barrister for the space of six years at the least, as assessor to the said commissioners, and such barrister, or in the case of his absence, a like barrister to be substituted by him for each particular occasion, and to be approved by the chairman of the said commissioners for the time being, shall sit at every court.

By the 29th section of the said last-mentioned act, it is enacted, "that the several fees therein and hereinafter limited and expressed, (exclusive of stamps), shall be taken by the said barrister, and by the clerk, serjeant, and crier of the said court, for their several and respective services, in the execution of the said act for the recovery of all sums not amounting to £15, viz. [setting out a schedule of fees for summonses, hearings on trial, orders, decrees, or judgments, paying money into Court, references, attachments, nonsuits, &c.] And the said commissioners shall, and they are by the said last-mentioned act required, to hang up and affix, or cause to be hung up and affixed, a table of all such fees in some conspicuous place of the said Court, or place of meeting of the said commissioners, in order that all persons concerned may be enabled to peruse the same."

By the 30th section of the said last-mentioned act, it is enacted, "that it shall and may be lawful to and for the justices of the peace in and for the said city and county of Bristol, at any general quarter sessions of the peace, or any adjournment thereof to be held after some preceding Court of quarter sessions, shall have determined that it would be advisable so to do, to lessen or reduce all or any of the fees limited and allowed to be demanded as aforesaid, and afterwards from time to time, in the same manner, to advance all or any of the said fees so lessened or reduced, to any sum not exceeding the several and respective sums hereinbefore mentioned and specified."

Soon after the passing of the last-mentioned act, the table of fees in the same act, and hereinbefore particularly [630] set forth, was duly hung up and affixed in a conspicuous part of the said Court or place of meeting, and the fees thereby authorized to be taken were in fact taken by all the different officers of such Court, according to the amounts in the same act set forth, until the making of the orders of council herein-after mentioned.

By the statute 6 & 7 W. 4, c. 105, s. 8, it is enacted, "that every thing provided under any local act of Parliament, to be done exclusively by any particular or limited number, class, or description of the members of any body corporate named in the schedules A. & B., annexed to the said act for regulating corporations, the continuance of which is not inconsistent with the provisions of the said act, and also every-

thing provided in any such local act to be done by the justices, or by some particular class or description of members of such body corporate, being justices of some Court at general or quarter sessions assembled, and which does not relate to the business of a Court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council, or by some committee of the council, or any three or more of such committee, to be appointed at a quarterly meeting of the council, provided that every thing herein authorized to be done at a quarterly meeting of the council may be done at a meeting of the council, to be specially summoned for that purpose, as soon as may be after the passing of this act: Provided also, that no recorder, by virtue of his office, shall have power to allow or apportion, make or levy, or do any act whatsoever with relation to the allowance, apportionment, making, or levying of any rate whatsoever."

The case then stated, that at a quarterly meeting of the council of the city of Bristol, held on the 2nd of May, 1838, an order of council was made, (a copy of which was set out), which, after reciting the clauses of the several acts of Parliament before mentioned, concluded as follows:—"And whereas the council at this quarterly meeting, having taken into consideration the fees payable to the barrister and [631] clerk of the said Court, for their several and respective services in the execution of the first recited act, do determine that it will be advisable to lessen and reduce such of the fees payable to the barrister and clerk of the said Court, as are set out in the under-written schedule, agreeably to the scale mentioned and set forth in the said schedule." Then the schedule was set out.

And at a certain other meeting of the council of the said city, held on the 1st of August, 1838, the following order of council was made—(setting out the order)—by which the council at that meeting, being the quarterly meeting next after the said meeting of the 2nd of May last, having taken into consideration their said resolution, did thereby confirm the same, and did accordingly reduce and lessen such of the fees to be taken by the barrister and clerk of the said Court as are set out in the said schedule, &c.

The case then stated, that the said Court of Requests had been always, and still was, regularly held, since the statute 56 Geo. 3, on every Tuesday, at the Guildhall of the said city. That the plaintiff is now, and for some time before the commencement of this action was, the barrister and assessor of the said Court of Requests, having been duly appointed thereto on the 6th day of February, 1839, and hath from the time of his said appointment performed the duties of such office, but hath never taken the fees mentioned in the reduced table directed by the said orders of council, or in any manner consented to or acquiesced in such reductions.

The defendant, on the 9th day of November, 1839, was appointed by the plaintiff, (so being such barrister and assessor as aforesaid), for a pecuniary consideration, to collect fees due to the plaintiff as such barrister and assessor as aforesaid from thenceforth until further order, which employment the defendant accepted accordingly, and engaged to collect the same according to their full legal amounts respectively, and in fact collected fees for the plaintiff on all [632] occasions on which fees became due to him as such barrister or assessor, before the commencement of this action; but collected the same according to the reduced table directed by the said orders of council, and not according to the table set forth in the said act of the 56 Geo. 3.

The question for the opinion of the Court is, whether the fees legally due to the plaintiff as such barrister or assessor on the occasions aforesaid, were according to the original table in the said act of the 56 Geo. 3 set forth, or according to the reduced table directed by the said orders of council.

The Attorney-General, for the plaintiff. It is quite clear that the plaintiff was entitled to the fees according to the original table, unless they were properly reduced by the town council. And the town council had no power to reduce them, unless they had such power under the 6 & 7 W. 4, c 105, s. 8. That section enacts, that every thing provided in any local act of Parliament to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some Court of general or quarter sessions assembled, and which does not relate to the business of a Court of criminal or civil judicature, shall and may be done by the council." Now, does not the regulation of these fees relate to the business of a Court of civil judicature, within the meaning of that exception? It most clearly does. If these are fees which the suitors are to pay for business done in the Court, it is a

subject relating to the business of the Court; and it is clear that it is a Court of civil judicature. The town council were, therefore, expressly excluded from acting in the matter, and had no authority to reduce them. If, however, it were a *casus omissus*, and the power which belonged to the justices under the 56 Geo. 3, remained, the town council would have had no such authority. But the power which formerly belonged to [633] the justices is now vested in the recorder, by 5 & 6 W. 4, c. 76, s. 105. By that section it is enacted, "that the recorder of every borough shall hold once in every quarter of a year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a Court of quarter sessions of the peace in and for such borough, of which the recorder of such borough shall sit as the sole judge: and such Court of quarter sessions of the peace shall be a Court of record, and shall have cognizance of all crimes, offences, and matters whatsoever, cognizable by any Court of quarter sessions of the peace for the counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole Judge, as fully as any such last-mentioned Court:" with an exception as to making and levying any county rate, and granting licenses, &c. So that the recorder may do all things, with that exception, that could formerly be done by a Court of quarter sessions. That section has received a construction in the case of *The Queen v. The Recorder of Hull* (8 Ad. & Ell. 638; 3 Nev. & P. 595), where it was held, that the recorder, by that section, had the powers relating to inspectors of weights and measures, given by s. 17 of the stat. 5 & 6 W. 4, c. 63, to the magistrates in quarter sessions assembled. Then if the recorder has jurisdiction over weights and measures, over which before that act the justices in quarter sessions had jurisdiction, in like manner the powers given by the 56 Geo. 3 to the justices in quarter sessions, are transferred to the recorder. But even if they be not, the Court must be satisfied that the power is vested in the town council. The words, "a Court of criminal or civil judicature," do not apply solely to a Court of quarter sessions, but extend to any Court having civil or criminal business. The Court of Requests is a Court [634] of civil judicature, and the reception of the fees for business done in it relates to the business of a Court of civil judicature, with which the town council are excluded from interfering.

Sir F. Pollock, *contra*. The town council, under this act of Parliament, had authority to reduce the fees payable to the assessor. The legislature intended to give to the recorder power over all matters of a civil or criminal nature within the borough, which came before him for decision; but to refer all other municipal business to the town council. It is plain, that by s. 124 of the stat. 5 & 6 W. 4, c. 76, the town council possess the power of regulating the fees payable to the clerk of the peace, the clerk to the justices, registrar, and officers of any Court of record in any borough. The words in the 8th section of 6 & 7 W. 4, c. 105, "which relate to the business of a Court of criminal or civil judicature," refer to the judicial business of the Court; but the regulation of the Court fees does not relate to such business. Whatever may be done at any Court of general or quarter sessions, which does not relate to the judicial or Court business of a Court of that nature, or to business of a criminal or civil nature, is to be done by the council; and as the regulation of the fees has no such relation, the town council had authority to reduce them. The legislature intended to make a distinction between business which is and that which is not of a judicial nature; all that involves the decision of the Court the town council are excluded from interfering with, but none other.

The Attorney-General replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. There was a case of *Palmer v. [635] Powell*, argued by the Attorney-General and Sir Frederick Pollock. It was an action brought to recover what was claimed to be due to the plaintiff for certain fees, to which he was entitled under an act of Parliament passed for forming a Court of Requests at Bristol. By way of defence it was contended, that by the act of the 6 & 7 Will. 4, c. 105, a power was given to the town council to reduce the fees, and they having in exercise of that power reduced the fees, and placed the reduced fees in a schedule, the defendant contended that the plaintiff was only entitled to recover according to that reduced scale. It appears that by the original act the fees were scheduled at certain fixed sums, and power was given to the justices of the peace in quarter sessions assembled

to reduce the fees, if they thought fit, by a new table; and they had also power given them to advance the fees so lessened or reduced, to any sums not exceeding the original amounts. Now if this reduction had taken place under the authority of that act by the justices of the peace, undoubtedly the plaintiff must be content with the reduced fees. The question is, whether by the last act of Parliament the town council were authorized to do that which the justices of the peace were authorized to do before; and that depends on the 8th section of the 6 Will. 4, c. 105, the material words of which are—"And be it enacted, that every thing provided under any local act of Parliament to be done exclusively by any particular or limited numbers, class, or description of the members of any body corporate named in the schedules annexed to the said act for regulating corporations, the continuance of which is not inconsistent with the provisions of this act, and every thing provided in such local act to be done by the justices, or by some particular class or description of members, or of such body corporate being justices, at some Court of general or quarter sessions assembled, and which does not relate to [636] the business of a Court of criminal or civil judicature, shall and may be done by the council at some quarterly meeting of the council." The council have reduced these fees at a quarterly meeting, and the question is, whether under these words they have a right to do so. After some consideration, we are all of opinion that the reduction of fees of the Court of Requests is a matter which relates to the business of a Court of civil judicature, and that this clause excludes from the council the power of interfering in any such case. It is impossible to say that this Court of Requests does not fall within the description of a "Court of civil judicature:" and there is nothing to limit the words, as was contended for on the part of the defendant, to that which is strictly the judicial business of such Court. We therefore think the plaintiff is entitled to judgment.

Judgment for the plaintiff

KIRK v. DOLBY. Exch. of Pleas. 1840.—Where a writ of summons was by mistake dated the 4th of April, the præcipe being dated the 4th of May:—Held, that a Judge had power to order an amendment of the writ, so as to make it correspond with the præcipe.

[S. C. 8 Dowl. P. C. 766; 9 L. J. Ex. 223; 4 Jur. 610.]

Martin had obtained a rule to shew cause why an order of Gurney, B., allowing the writ of summons in this cause to be amended, should not be rescinded. It appeared that the præcipe for the writ was dated the 4th of May, but the writ issued upon it was by mistake dated the 4th of April. A summons was taken out, calling upon the defendant to shew cause why the learned Judge should not be at liberty to amend the writ of summons, by substituting the word "May" for "April," so as to make it correspond with præcipe; and the learned Judge, after hearing the parties on both sides, ordered the amendment to be made. Against the above rule

[637] Humfrey now shewed cause. There is no reason why the learned Baron should not have power to make such an order as this. The rule of Michaelmas Term, 3 Will. 4, s. 10, expressly says, that where the plaintiff shall omit to insert in any writ or copy thereof any of the matters required to be inserted therein, such writ, &c., shall not be void, but may be set aside as irregular, upon application to the Court out of which the same shall issue, or to any Judge. If an application had been made to set aside the writ for irregularity, the Court would have allowed an amendment on payment of costs. The writ itself is not void, and it is difficult to see why a Judge should not have power to set it right by ordering an amendment. [Parke, B. After the passing of the Uniformity of Process Act, the Judges determined not to allow any amendment except in cases where, if the amendment were not allowed, the Statute of Limitations would be a bar to any new process, and so occasion a failure of justice.] It was on that ground, that in *Lakin v. Watson* (2 C. & M. 686), the Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff. In *Siboni v. Kirkman* (3 M. & W. 46), it was held that the omission of a similiter was amendable under the Statute of Amendments, 28 Hen. 8, c. 12, s. 2, as misprision of the clerk, even after final judgment, and after a writ of error had been brought, and omission assigned for error.

Martin, in support of the rule, referred to *Partridge v. Wallbank* (1 M. & W. 316), *Hodgkinson v. Hodgkinson* (1 Ad. & Ell. 533; 3 Nev. & M. 564), *Lakin v. Watson*,^(e) and *Byfield v. Street* (10 Bing. 227; 3 M. & Scott, 407). [Lord Abinger, C. B. [638] This being the first case in which the question has arisen as to the propriety of an amendment, where the præcipe is right and the writ wrong, we wish to consult the other Judges, in order that the practice may be uniform. Parke, B. It seems very hard that we should be more strict in this stage of the cause, while the proceedings are in paper, than after the proceedings are on the record, when, by the Statutes of Amendment, they may be amended at any period.]

Cur. ad. vult.

On a subsequent day, the judgment of the Court was delivered by

PARKE, B. In this case there was a variance between the writ of summons and the præcipe; the former being dated the 4th of April, and the præcipe the 4th of May. My brother Gurney, on application, had allowed an amendment to be made, so as to make the month in the writ correspond with the præcipe, which was correct. On a motion to rescind the above order, it was said in argument, that the courts had come to the conclusion not to allow amendments in cases of this kind, and that the only exception to that rule was in cases where, unless the amendment were made, the plaintiff would be without remedy, in consequence of the Statute of Limitations operating as a bar to a fresh action; but that the general rule was, that no amendment was to be made. We were disposed to think that this amendment might be made under the Statutes of Amendment, on the ground of its being a misprision of the clerk. We wished, however, to come to a uniformity of decision on the point, and have therefore consulted the Judges of the Courts of Queen's Bench and Common Pleas; and the result is, that we think this exception also may be introduced, that an amendment may [639] be made by which a writ of summons is made to correspond with the præcipe. The order of my Brother Gurney must therefore be sustained, and the rule be discharged.

Rule discharged.

SPRY, Clerk v. EMPEROR. Exch. of Pleas. 1840.—Before the passing of the stat. 51 Geo. 3, c. 151, the incumbent or minister of the parish of St. Marylebone, (which was a lay rectory), by himself or his curates, performed the duty on all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. By that act, the vestry of the parish were empowered to provide an additional cemetery for the parish, and erect a chapel thereon; and by sect. 41, the lay rector was empowered to appoint a burying minister, to officiate in burying the dead in the said cemetery; a reader to perform divine service, and preach in the chapel, and (if it should seem right to the vestry) another minister to be preacher in the chapel; such reader and preacher to receive for their salaries such sums as the vestry should appoint. By sect. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto. By a subsequent act, 1 & 2 Geo. 4, c. 2, (for effectuating the building of four district churches within the parish), it was enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes and the plaintiff was subsequently appointed rector of the parish. By the 6 Geo. 4, c. 124, (whereby the four districts were made district rectories for certain purposes), the district rectors were empowered (sect. 6) to solemnize marriages and baptisms, and take all fees for the same; but (by sect. 9) nothing therein contained was to alter or affect the law respecting burials or burial fees within the parish.—In 1824, W. was presented by the Crown (in whose hands the lay rectory then was) to the chapel built under the provisions of the 51 Geo. 3, c. 151, and thenceforth performed all the burials there, and received the burial fees, which he paid over to the plaintiff, the rector, until the year 1839; when the defendant, by direction of the vestry, received and

^(e) As reported in 4 Tyrw. 839, where the rule is laid down generally, without any qualification.

retained them:—Held, that the plaintiff was entitled to recover the amount of such fees, in an action for money had and received.

[See *Spry v. Gallop*, 1847, 16 M. & W. 716.]

This was an action for money had and received, to which the defendant pleaded non assumpsit, and issue being joined thereon, the parties agreed, under a Judge's order, to submit the following case for the opinion of this Court.

The plaintiff, the Rev. Dr. Spry, was, in the month of August, 1825, duly presented, instituted, and inducted rector of the parish of St. Marylebone, in the county of Middlesex, and from thence hitherto hath been and still is rector thereof, and minister of the new church of that parish, mentioned in the acts of Parliament hereinafter referred to. Several acts of Parliament for the building of churches and chapels in that parish, and for the creation [640] of a select vestry therein, have been passed, and upon the construction of the acts hereinafter mentioned, the present question arises.

By the 35 Geo. 3, c. 73, the vestrymen are appointed.

By the stat. 51 Geo. 3, c. 151, intituled "An act to enable the vestrymen of the parish of St. Marylebone, in the county of Middlesex, to build a new parish church and two or more chapels, and for other purposes relating thereto;" after reciting the statutes 10 Geo. 3, c. 112, and 12 Geo. 3, c. 40, and reciting the statute 46 Geo. 3, c. 124, intituled "An act to enable the vestrymen of the parish of St. Marylebone, in the county of Middlesex, to provide an additional cemetery or burial-ground for the said parish, and to erect a chapel therein, and also other buildings and conveniences for the residence of a clergyman, clerk, and sexton, and for other purposes relating thereto;" and reciting, that the said vestrymen had, in execution of the said last recited act, purchased a piece of ground, and enclosed the same, to be appropriated for an additional cemetery or burial-ground for the said parish, and erected a chapel therein, but that the said piece of ground had not been built upon, or a residence provided for a clergyman, clerk, or sexton, pursuant to the powers and provisions contained in the said recited acts, or any of them: and reciting, that it was expedient to repeal and consolidate the recited acts: it was enacted, by sect. 1, that the said recited act be repealed: and by sect. 2, it is enacted, that the vestry appointed by virtue of the statute 35 Geo. 3, c. 73, be empowered to carry that present act into operation.

By sect. 26, the said vestrymen are empowered to build a new parish church, and also two or more chapels, on the ground to be purchased by virtue of that act.

By sect. 29, it is enacted, that the said piece of ground so purchased by the said vestrymen, in pursuance of the 46 Geo. 3, c. 124, shall be vested in the vestrymen, sub-[641]ject to the provisions of the said act of the 51 Geo. 3, c. 151.

By sect. 31, the vestrymen are empowered to build a chapel on the said piece of ground so purchased as aforesaid for a burial-ground for the said parish, and also to build a house thereon for the residence of the minister to be appointed as thereafter mentioned, for the burying of the dead in the said cemetery or burial-ground, and another house for the use of the clerk or sexton.

By sect. 35, Dr. Heslop was declared to be the minister of the said new church, and that the Duke of Portland (then the patron of that living), or the person or persons for the time being entitled to the rectory of the said parish, and to the advowson of the church of the said parish, and having the right of nominating and appointing a minister or ministers to the said old church, should and might, upon every vacancy, appoint a fit person to be minister of the said new church, which person and persons, and his and their successors so to be nominated and appointed, should after such nomination and appointment be ministers successively of such new church, and should have and enjoy such oblations, mortuaries, Easter offerings, glebes, tithes, profits, commodities, and other ecclesiastical dues and duties arising within the said parish, as the present minister ought to have and enjoy, or as any of his predecessors (ministers of the said parish) ought to have had and enjoyed.

By sect. 41, it was enacted, that when the said piece of ground so purchased by the said vestrymen for a cemetery or burial-ground for the said parish, or for erecting a chapel thereon, should be consecrated as aforesaid, the said Duke of Portland, or the person or persons for the time being entitled as aforesaid, should from time to time nominate and appoint a minister of the Church of England, to officiate for life

or during pleasure, in burying the dead in the said intended cemetery or burial-ground, and vaults [642] underneath the same; and also, that when the said chapel to be erected on the said piece of ground should be finished and completed, and consecrated, the said Duke of Portland, or the person or persons so entitled as aforesaid, should appoint a reader to perform divine service and preach in the said chapel; and the said Duke of Portland, and the person or persons so entitled as aforesaid, was thereby empowered, in case it should seem right to the vestrymen, to appoint another minister to be preacher in the said chapel; and he was thereby empowered to appoint a clerk and sexton, with the consent and approbation of the said vestrymen; and it was thereby further enacted, that the said reader, preacher, clerk, and sexton should have and receive, for their respective salaries, such sum and sums of money yearly as the said vestrymen should think fit to appoint and direct.

By sect. 45, the duties of the ministers of the other chapels to be built are declared, and they are thereby directed to perform all the duties of a minister of the Church of England, except the solemnization of matrimony, and the publication of banns.

By sect. 46, every such last-mentioned minister is to receive such salary as the said vestrymen shall think fit to appoint and direct.

By sect. 49, the said vestrymen are empowered to settle and fix the rates and fees for burial of the dead in the vaults of the said intended new church, and of all and every the chapels to be erected and built in pursuance of that act, and in the said intended cemetery or burial-ground, and in the vaults under the same; and to make rules, orders, and regulations relative to the burials, and for keeping the said new church, chapels, and vaults, and the vaults of the said cemetery or burial-ground, in good and sufficient repair, and from time to time to alter and amend such rates and fees; and to make such other rules, orders, and regulations in and concerning the premises, as [643] to the said vestrymen should seem reasonable, necessary, and convenient.

By sect. 50, it is provided, that nothing in that act contained should enable the said vestrymen to reduce the rates or fees to be payable upon every burial in the vaults of the said new church and chapels, and in the said intended cemetery or burial-ground, or in the vaults under the same, to less sums than were then payable, according to the classes or divisions of the said vaults, cemetery, or burial-ground, for burials in the present cemeteries of the said parish; but the same should be due and payable to, and might be demanded and taken by, the person or persons entitled thereto, anything therein contained to the contrary thereof in anywise notwithstanding.

By sect. 52, the vestry are empowered to let the pews in the said intended new church and chapels, save and except pews to be appropriated to the poor, and to receive the pew-rents.

By sect. 61, the said vestrymen are empowered to make rates for the purposes of the act, not to exceed in the whole the sum of fourpence in the pound on the yearly rent or value of all lands, houses, &c., in the said parish.

By sect. 72, the said vestry are empowered to raise money for the purposes of that act by granting annuities.

By sect. 78, it is enacted, that all monies arising from such fees, rents, rates, or assessments, and all money that might be borrowed by the said vestrymen by the virtue of that act, should be applied towards carrying the several purposes of that act into execution.

By sect. 89, it is provided, that nothing therein contained shall operate to lessen or alter the right or title of the Duke of Portland, or the person or persons for the time being entitled to the said rectory and advowson, to the ecclesiastical dues, oblations, and obventions belonging thereto.

[644] A statute (1 & 2 Geo. 4, c. 21) was passed to enable the vestrymen of the said parish to effectuate the building of four district churches in the said parish, and for other purposes relating thereto; and it was thereby enacted, (sect. 1), that the said parish should remain and be one entire and undivided parish, for all ecclesiastical, civil, and other purposes, save as therein mentioned.

By the stat. 6 Geo. 4, c. 124, intituled "An Act for making the four districts in the parish of St. Marylebone, in the county of Middlesex, district rectories for certain purposes," it is enacted, (sect. 6), that after the time therein mentioned, it shall be lawful for the minister of the said district rectories to publish all banns and solemnize

all marriages, and administer baptisms, in the churches of the said respective districts, and to perform all other parochial functions of a minister, in the same manner as the incumbent, minister, or rector of St. Marylebone is now by law empowered to do, and also to take all fees for the same respectively, save and except as thereafter mentioned.

And by sect. 9 of the last-mentioned act, it is enacted, that nothing in that act contained shall be deemed, taken, or construed to alter or in any way affect the law respecting burials to be performed within the parish of St. Marylebone, and the burial fees thereof, as settled and declared by the aforesaid act, or by any other act or law now in force concerning the same.

On the piece of ground stated to have been purchased for a burial-ground in the preamble of the said statute of 51 Geo. 3, the vestrymen of the said parish built a chapel under the provisions of the said act, and the rest of the said ground was converted into a cemetery or burial-ground, under the provisions of the said acts, and that ground was duly consecrated as a burial-ground in the month of May, 1814. The chapel is named "St. John's Chapel, Marylebone:" the cemetery is called "The Burial-ground of St. John's Chapel." Before the passing of the said act of the [645] 51 Geo. 3, c. 151, the incumbent for the time being of the said parish, by himself or his curates, performed the duty upon all burials which took place in the said parish, and received the surplice fees for such burials for his use, and such fees formed part of the profits of that living.

Under the provisions of the said act, the vestrymen settled the amount to be received as surplice fees for the burial of the dead in the vaults of the parish church and chapels, and in the said cemetery or burial-ground, and the surplice fees paid for burials in the said ground called the "Burial-ground of St. John's Chapel" have been received by the plaintiff and his predecessor, minister of the parish, regularly since the consecration of the said ground, without any claim or objection on the part of the said vestrymen until the 1st of August, 1839, when the defendant, by the direction of the vestrymen and on their behalf, in defiance of notice not to do so from the plaintiff, received the surplice fees for burials of the dead in the said burying-ground.

In the year 1824, his late majesty King George the Fourth, who was then entitled to the rectory of the said parish, and to the advowson of the church of the said parish, having derived title thereto by conveyance from the Duke of Portland, (who at the time of passing of the above-mentioned statute, as mentioned in the said 41st section, was then entitled to the rectory and advowson), duly nominated and appointed the Rev. Thomas Wharton, by letters patent, of which the following is a copy:—

"George the Fourth, by the Grace of God, &c. &c. By virtue of these presents, We do nominate our trusty and well-beloved Thomas Wharton clerk to St. John's Wood Chapel, in the parish of St. Marylebone, in the county of Middlesex, and in your diocese, the same being now void by the death of the Rev. Gilbert Parke, and in our gift, in full right, commanding and requiring you, so far as it relates to you, to admit the said Thomas Wharton to St. [646] John's Wood Chapel aforesaid, and to institute him in the same, with all its rights, members, and appurtenances whatsoever thereto belonging, and you do expedite and perform with favour and effect all other things which belong to your pastoral office in this behalf. In witness" &c. And afterwards, in the month of February, 1825, the Bishop of London, within whose diocese the said chapel and burial-ground then were and are, duly licensed the said Thomas Wharton, upon the said nomination, by an instrument of which the following is a copy:—"Nominated to us by His Majesty George the Fourth, Patron thereof, in full right, in preaching the word of God, and in reading the Common Prayer, and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer; We do, by these presents, authorize you to receive and enjoy all and singular the stipend, profit, and advantage belonging to the said chapel." And the said Thomas Wharton hath from that time to the present read, and preached, and performed divine service in the said chapel, and officiated and performed the burial-service at all the burials which have taken place in the said cemetery or burial-ground, since his said nomination and appointment, and since he was so licensed as aforesaid; and the said plaintiff did not at any time, by himself or his curates, in any way officiate at such burials, or any of them, or perform, or assist in performing, the burial service at any of such burials.

The said surplice fees, so received by the defendant, amount to £125, which were

demanding by the plaintiff from the defendant before the commencement of this action.

The question for the opinion of the Court is, whether or not the plaintiff is entitled to recover in this action the amount of the surplice fees in question: if so, a judgment by confession is to be entered for the plaintiff for £125 [647] damages: if not, the judgment to be entered for the defendant.

Kelly, for the plaintiff. The question is, whether under the circumstances disclosed in this case, the plaintiff, as the rector of the parish of St. Marylebone, is entitled to the burial fees received at the chapel built under the stat. 51 Geo. 3, c. 151. It is found in the case, that ever since the year 1814, when this burial-ground was formed, the rector has received the fees, without any impeachment of his title to them until the last year, when the vestry have for the first time controverted it. By the 41st section of the act, the preacher nominated to the chapel is to have such salary as the vestrymen shall think fit to direct: but there is nothing in the act to give him the burial fees, or to impair the right of the rector thereto. It may perhaps be argued that section 49 includes the fees in question. That section empowers the vestry to settle and fix the rates and fees for burial of the dead in the vaults of the new church and chapel to be built in pursuance of that act, and in the intended cemetery, and the vaults under the same. But that applies only to the fees to be taken in respect of the burial-place itself, not to the surplice fees to be taken by the minister. That is clear from sect. 50, whereby the vestry are precluded from reducing such rates and fees below the sum then payable, according to the classes of the vaults &c., in the existing cemeteries of the parish. Where the legislature intended to take away any of the emoluments of the rector, they have done so by express words; as in the stat. 6 Geo. 4, c. 124, s. 6. And the 9th section of that act expressly provides, that nothing in the act contained shall be construed to alter or affect the existing law respecting burials and burial fees within the parish. Nor does it appear upon the case that the burial fees are claimed by the district rector, or by any other person than the plaintiff. In Gibson's Codex, p. 542, it is stated as established law, that a fee for burial belongs to the minister [648] of the parish in which the deceased heard divine service and received sacraments, notwithstanding the establishment of a chapel of ease within the parish: and reference is made to the case of *Topsal v. Ferrers* (Hob. 475), as having recognised that right. There is no legal authority for the position, that where there is a chapel of ease within a parish, to which a minister is appointed, who performs the ecclesiastical offices, he can be entitled to any of the fees due to the rector, except by contract with the rector, or by act of Parliament: and there is nothing in these acts of Parliament to give such a title.

Hill, for the defendant. It is material to consider the state of this parish at the time of the passing of the 51 Geo. 3, c. 151. It was a lay rectory, and there was no vicar or perpetual curate, but only a minister, removable at the pleasure of the rector. Then the 41st section gives the patron for the time being the right of nominating a minister to officiate in burying the dead in the intended burial-ground; a reader to perform divine service and preach in the chapel to be built thereon; and, if it should seem right to the vestry, another minister to be preacher in the chapel. No salary is thereby provided for the minister to be appointed for burying the dead; but the reader and preacher are to receive such salaries as the vestry shall appoint. And the only reason for this distinction appears to be, that there are no fees necessarily incident to reading and preaching, whereas the fees incident to the burying of the dead might be considered a sufficient remuneration for the performance of that office. How otherwise could he be remunerated before the chapel was built, and therefore before he could receive any salary as reader or preacher? It may be admitted that the rates and fees mentioned in section 49 are the burial fees payable to the [649] churchwardens for interment: that sufficiently appears from section 71, which gives the vestry a power of borrowing money on the burial fees. It is said, however, that a rector is entitled by law to all ecclesiastical fees accruing within the parish. If so, we are to see, first, what fees do accrue here, and secondly, whether they belong to the plaintiff, who was not made rector until after the stat. 1 & 2 Geo. 4, and then only sub modo. Now it is laid down in all the books, that at common law no fee is demandable for burial of the dead, except by custom; and no custom is found or suggested in this case. *Andrews v. Cawthorn* (Willes, 536). Bishop Gibson himself, in the place referred to, says that, "as to the incumbent for burying, the foundation

of the fee was voluntary, and the obligation or necessity of paying arises from custom." [Lord Abinger, C. B. If this were a special verdict, you would be right in saying that no custom, strictly so called, is found; but this is a special case, where the question between the parties is, not whether the fee is due by law or custom, but whether the fees which have been received shall be paid to the one party or the other.] Until the stat. 1 & 2 Geo. 4, c. 124, the incumbent was a person who could not have those fees attached to him by custom, being only a minister removable at pleasure; and the statement in the case is no more than this, that such minister has always performed the service, and received the fee. But even supposing a legal custom, before these acts of Parliament, to pay a burial fee, it was only payable in law *pro operâ et labore*, to the party performing the duty. *Burdeaux v. Dr. Lancaster* (Salk. 332; 12 Mod. 171). There is nothing found in the case upon which the plaintiff can say the fee is payable to him, whoever shall perform the duty; nor is the minister who does perform it appointed by him. According to the doctrine contended for on the other side, the rector of the [650] parish ought to receive the fees on marriages celebrated before the registrar, and on the burial of Jews and dissenters in their own burial-grounds. The right and the duty must be correlative; but here the duty is imposed by the act upon the minister appointed thereby, and the plaintiff would have been an intruder in performing it. The minister is in no respect an agent of the rector, nor is this a chapel existing by his license or authority, but created by act of Parliament, which defines the minister's duties. The mere circumstance of the vestry's having received the money does not alter the situation of the parties; *Boyle v. Dodsworth* (6 T. R. 681); it remains in the defendant's hands for the use of the party entitled to it, and if Mr. Wharton be entitled, he may sue the defendant at any time within six years.

Kelly, in reply. Mr. Wharton sets up no claim, and can have no interest; he receives a salary under the statute. Then, as to the other points. It is said the rector has no right except by custom. This is not a special verdict, and if there were any doubt on the case whether it stated a customary payment to the incumbent for the time being, that would be a fit ground for an amendment. It must be taken, however, upon the statement in the case, that he has always received the fees in question. But further, the rector does, by himself or his agents, perform the duty. A preacher has been appointed under the 51 Geo. 3, but a burying minister has never been appointed; and the only person having a legal right to bury in this cemetery is the rector. There is nothing in the 41st section which can give Mr. Wharton any right to the burial fees; and the case stands just as if that section had never been introduced, and as if this were an ordinary chapel of ease, built within the parish. The minister of [651] the parish is, in contemplation of law, the person who has done the duty; and the fees have accordingly been paid to and always received by him as of right.

LORD ABINGER, C. B. I am of opinion that the plaintiff is entitled to the judgment of the Court. The case states specially, although not in that strict form which a special verdict might do, certain facts, sufficient to enable the Court to form a judgment as to the right of the plaintiff to maintain his action. It is stated that he is the rector of the parish, his predecessors having been the regular ministers of the parish: that before the passing of the 51 Geo. 3, as well as since, the plaintiff and his predecessors have received the burial fees within the parish; that he has received fees arising from this very cemetery and burial-ground, and that until of late he has been accustomed to do so. I think that is a sufficient statement, particularly as against a party who has received those fees, of the right to the fees, and that they are not mere gratuities. If they were mere gratuities, not founded on a custom, I should have agreed with Mr. Hill, that there would be no right in any party to maintain an action for them; but we are not authorized so to treat them, they being fees stated to have been received before and after the passing of the act, and paid for all burials performed within the parish. I take that to be equivalent to an allegation, that by the custom of the parish, the rector or minister for the time being, whether he have the character of the vicar or the rector, was entitled to all fees and ecclesiastical dues for burial within the whole limits of the parish, with the exception of those fees that were expressly taken from him by the 6th section of the statute of the 1 & 2 Geo. 4, on the division of the parish into district rectories. Subject to that exception, the act of Parliament reserves to him all the ecclesiastical dues, of burials amongst the rest, which he was entitled to [652] before; and the case states,

that before this act of Parliament passed, he was entitled to all. The 41st section of the 51 Geo. 3, c. 151, authorizes the appointment of a minister of burials in the new cemetery; but it does not appear that any such minister was appointed, or that the minister actually appointed has taken the fees; nor does the act of Parliament give them to him if he had, for it reserves all his former rights to the rector: and if he had performed the burial service, it appears to me that he would have performed it as the agent of the rector for that purpose. However, we are not bound or called upon to speculate on the case, with a view to the right of the party appointed under the act, because the case does not state that any person was so appointed. It is clear that Mr. Wharton, whose right arises out of his appointment by the King, and institution by the Bishop of London, was not appointed as the burying minister. Then it appears, that no burying minister being so appointed, some person, if not the rector, has buried within this cemetery ever since it was constructed, and has paid over the fees to the plaintiff, until a certain portion of them has accumulated in the hands of the defendant, who refuses to account for them. Surely the plaintiff is *prima facie* entitled to them, unless some one be shewn who has a better title; and we must assume, as Mr. Kelly states, for the purpose of maintaining the action, that the fees were earned by somebody who acted under his authority. The case states, that the person receiving them always accounted for them to the rector, until within the last year; and my opinion is, that an account of them should be rendered to him again, unless the defendant shew a better title in some other person. By these acts of Parliament, they are not taken out of the hands of the rector; therefore I think he is entitled to them, and that the judgment of the Court should be entered for the plaintiff for the sum of £125.

[653] GURNEY, B. By the act of Parliament creating the rectory, it appears that the rector was a minister, who was appointed to the parish, and that he, as rector, was entitled to the clergyman's dues, in his character of rector or minister; and, among others, that he did receive surplice fees for burials within the parish; and by a subsequent act there is a reservation to him of all those fees which he before had. It is stated in the case, and must be assumed, that before the passing of the act of 51 Geo. 3, the incumbent for the time being of the parish, by himself or his curates, performed the duty on all burials taking place within the parish, and received the surplice fees for his own use, and that those fees formed part of the profits of the living. The act of Parliament afterwards empowers the vestrymen to purchase a piece of land for a cemetery, and to appoint a burying minister: whether they did so or not does not appear on this case. There is a power given also, under certain circumstances, to appoint a reader and preacher, but there is no provision made for or respecting any surplice fees whatever, but provision is made that such reader and preacher shall receive a salary, to be paid by the vestry of the parish. It appears, that under that act of Parliament, the Crown, which had acquired the rights of the Duke of Portland, the lay patron, appointed the minister of the chapel; he, being so nominated, is entitled to a salary, to be paid by the vestrymen of the parish: but there is no title conferred, or intended to be conferred, on him as to the receipt of any of the surplice fees. When district churches have been created, the rights of the minister of the parish are abridged by express words. Marriages have now been transferred to the district churches, and there are surplice fees given to the ministers of those churches; but no surplice fees are given to the minister of St. John's. In this case, therefore, these fees were of right in the incumbent [654]-bent of the parish, whether minister or rector, before these acts of Parliament passed; and that being the case, and there being nothing in the acts of Parliament to take them out of him, they have been received by a person who refuses now to account for them. It would be a very different question if this were an action for a surplice fee against the party; undoubtedly the plaintiff must shew what is his right against that party, so as to enable him to demand the fee; but here they have been received, and not as of right, but to be accounted for to the rector.

ROLFE, B. Although, in the first part of this argument, I certainly entertained some doubt, I have now arrived at the same conclusion as the rest of the Court. Before the stat. of the 51 Geo. 3, the incumbent for the time being, by himself and his curates, performed the duty on all burials which took place in the parish, and received the surplice fees for each of such burials. I think this amounts in effect to what is contended for, that this had been a customary fee, payable under the name of

a surplice fee, to the incumbent for the time being of the parish, by himself or his deputy performing the duty of burial. Then the question is, whether, in consequence of what was enacted in that act, and since its passing, it could be said that it was the duty of the incumbent himself to perform the duty in respect of which that fee was payable. Now though I had at first a doubt upon the subject, on looking more into it, I do not think that that doubt was well founded.

The 41st section of the stat. 51 Geo. 3, contains several provisions: First, "that when the burial-ground is complete, the Duke of Portland, or the person or persons for the time being so entitled as lay rector, shall from time to time nominate and appoint a minister of the Church of England, to officiate for life, or during pleasure, in [655] burying the dead in the said intended cemetery or burial-ground, and the vaults underneath the same." Now I had conceived (not attending strictly to what appears in the special case) that Mr. Wharton had been appointed under that provision, and I must guard myself from supposing at all to imply what would be my opinion in that case. I do not wish it to be understood as my opinion, that if the Crown, in exercising this power, had appointed a person for life to be a burying minister, under the provision of that section, it is at all clear then that he would not, in spite of the saving clause in this act, have been entitled to the surplice fees, and not the rector. It appears from Gibson's Codex, that the person entitled to surplice burial fees is not the rector of the parish, *quâ* rector, but the minister, whom I take to be the minister performing this duty of burials: and though there be a saving of rights to the minister of this parish, that would be a saving of his rights in the form in which they existed previously by law. But until there is a minister appointed for burying, it appears to me that the rector does make out that he, by himself or his deputies, performs the duty of burying; for until some power is given to some other person to bury in the cemetery of the parish, it is the right of the rector. Until something appears as to the mode in which Mr. Wharton exercises that right, I think we must take it that it is by the license and permission of the plaintiff; and that consequently the plaintiff is entitled to this fee, which he has been immemorially accustomed to receive. It is quite clear that Mr. Wharton was not appointed as burying minister under the 41st section: he was appointed under the subsequent part of the clause, to the chapel, and the license he obtains from the bishop is for reading the Book of Common Prayer. True, it goes on afterwards—"and for performing other ecclesiastical duties;" but that was void, if it was meant thereby that he [656] should perform any other ecclesiastical duties than that branch of the section authorized him to perform.

On these grounds, then, that the plaintiff does appear to me, either by himself or his curates, to have performed the duty in respect of which there has been immemorially a surplice fee payable to him and his predecessors, I think he is entitled to our judgment.

Judgment for the plaintiff.

GREEN v. JAMES. Exch of Pleas. 1840.—Declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B., and C., to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. Plea, that A., B., and C., from the time of the making the demise until the death of B., and A. and C. afterwards had a reversion for a longer term of years expectant on the lease, and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises. Replication, that A., B., and C., were not until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the demised premises, in manner and form as alleged in the plea:—Held bad, on demurrer, as being a departure from the declaration.

Covenant. The declaration stated, that, by indenture dated 5th May, 1812, made between the plaintiff, one John Oxley, since deceased, and one John Ferard, also since deceased, of the one part, and the defendant of the other part, [profert], the plaintiff, Oxley, and Ferard demised to the defendant a certain messuage or dwelling-house and premises, particularly mentioned and described in the said indenture, situate in the county of Middlesex, to hold the same, with the appurtenances, unto the defen-

dant, his executors, &c., from the 25th day of March then last past, for the term of eighteen years and a quarter, wanting ten days, at a certain rent payable by the defendant, as therein mentioned: And the defendant, by the said indenture, did for himself, his executors, &c., covenant and agree (amongst other things) to and with the plaintiff Oxley, and Ferard, their executors, &c. &c. [setting forth a general covenant to repair and leave in repair]. The declaration then averred the death of Oxley on the 27th of December, 1816, and of Ferard on the 9th of January, [657] 1834; and assigned breaches of the covenant by the defendant, in not repairing, and in leaving the premises out of repair, &c.

Third plea, that from the time of making the said supposed demise in the declaration mentioned, and until the death of the said John Oxley, the said John Oxley, the plaintiff, and the said John Ferard, were lawfully possessed of a certain reversion of and in the said demised premises, after the determination of the said supposed lease in the declaration mentioned, to wit, a reversion for the residue and remainder of a certain term of thirty-four years and three quarters of a year, commencing from the 29th day of September, 1795, and the plaintiff and the said John Ferard, from the death of the said John Oxley until the assignment hereinafter mentioned, were lawfully possessed of the said reversion; and being so possessed of the said reversion, heretofore, and before any of the said supposed breaches of covenant in the declaration mentioned, and during the said term by the said supposed indenture granted, and before the commencement of this suit, to wit, on the 1st of January, 1820, the said John Ferard and the plaintiff did, by a certain assignment duly made, assign, transfer, and set over unto one T. S. Benson, his executors, &c., the said reversion of and in the said demised premises: By virtue of which said assignment the said T. S. Benson afterwards, to wit, on the day and year aforesaid, became and was possessed of the said reversion of and in the said demised premises, and the said John Ferard and the plaintiff from thenceforward ceased to have any reversion or interest of and in the said demised premises. Verification.

Replication, that the said John Oxley and the plaintiff and the said John Ferard were not, from the time of the making of the said demise in the declaration mentioned, and until the death of the said John Oxley, nor at any time, possessed [658] of the said reversion of or in the said demised premises; in manner and form as in the said third plea alleged: concluding to the country.

Special demurrer, assigning for causes, that the replication is double, and attempts to raise two distinct issues: that it attempts to put in issue what is a conclusion of law: that it departs from, and is inconsistent with, the declaration, which alleges a demise to the defendant by Oxley, Ferard, and the plaintiff, of the premises in question; that it attempts to put in issue either an inference of law, or an immaterial issue of fact, in traversing that the said Ferard and the plaintiff were possessed of the reversion after the death of Oxley; because, if the reversion were in Ferard, Oxley, and the plaintiff, on the making of the demise, it is for the plaintiff to shew how it passed away, so as not to vest in Ferard and the plaintiff, after the death of Oxley; and this not being shewn, the legal inference is that it survived to them; and if the reversion was not in Oxley, Ferard, and the plaintiff, on the making of the demise, then it is sufficient to take the traverse on that allegation. That it passes over and admits the only traversable allegation of the plea, viz. that the plaintiff and Ferard, after the death of Oxley and before any of the alleged breaches of covenant, assigned the reversion to another, and thenceforth cease to be interested in law. Joinder in demurrer.

The defendant stated also, in the margin of the demurrer, the following additional points:—That the plaintiff is estopped from denying that the reversion incident to the demise was in Oxley, Ferard, and the plaintiff, immediately at and upon the making of the demise: and that the existence of such reversion in Oxley, Ferard, and the plaintiff, is an inference of law from the demise itself.

Cresswell, in support of the demurrer. The replication is bad for the reasons assigned. [Lord Abinger, C. B. [659] Surely it is a departure from the declaration; the parties had the reversion until it is shewn how they parted with it; or how can they support the demise?]. The Court then called upon

E. V. Williams, for the plaintiff. The real question is, whether the action should be brought in the name of the present plaintiff, or of Benson the assignee. Suppose the three lessors were partners, and had an equitable interest in the term of 34 $\frac{3}{4}$ years,

out of which they carved the lease in question; and afterwards, still having only an equitable estate, they assigned to Benson:—if the action were brought in his name, it would be necessary to state in the declaration that the original lessors were possessed of the term, that they made the lease to the defendant, and afterwards assigned the term: then the defendant would have pleaded that the three had no title to make the demise: and he would not be precluded, as against the assignee, from so pleading. Where assignors have only an equitable interest, the covenants are only in gross. In *Carriek v. Blagrove* (1 Brod. & B. 531), (where all the cases on this subject are collected), it was decided that in covenant by assignee of lessor against lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a certain term of years, is material and traversable. Dallas, C. J., says, “the lessee is under no engagement to any one who is not the legal assignee.” That case clearly establishes, that as against the assignee of the lessor, it is competent to the lessee to deny the allegation of the estate of the original lessor; because the plaintiff must shew it to have been an assignable estate. In *Whitton v. Peacock* (2 Bing. N. C. 411; 2 Scott, 630), a lessor, having then only an equitable estate in a field, demised a portion of it for ninety-nine years: afterwards, having acquired the legal estate, he demised the residue to the lessee for the same term, by an indenture which recited the former lease, and stipulated for its continuing in force, but provided that no additional rent should be paid: it was held, that the assignee of the reversion could not sue the assignee of the lessee on the covenants in the first lease, on the ground that, the lessor of that lease having only an equitable title, the covenants were covenants in gross, which did not run with the land, or convey any right of action to the assignee of the reversion. [Lord Abinger, C. B. Can we take notice in a Court of law of the fact that the interest of the lessor was equitable? The lease purports to be granted by a lessor having the legal estate. Alderson, B. The declaration states, in substance, that the parties had a reversion, for it states that they made a lease. How is the Court to know that they had no legal estate? Surely, the plaintiff is estopped from disclaiming the legal estate, if the defendant is from denying it?] Suppose such a lease, and that the lessor dies, and then the question arises whether the heir or the executor shall enforce the payment of rent: suppose the executor brings the action, and the defendant pleads a seisin in fee in the testator; could not that plea be traversed? [Lord Abinger, C. B. Yes; but the executor must shew, not merely that the testator was seised in fee, but that he had a term of years.] The contract raises the implication that he had some title, and it would be enough to shew that it was not a seisin in fee. [Lord Abinger, C. B. No; such a title must be shewn as would have passed to the executor. There is no presumption in favour of an executor more than of an heir; each must shew his title.] *Carriek v. Blagrove* shews that the lessee is not estopped from saying that the original lessor had no assignable estate; therefore neither is the lessor. So, a covenant with a mortgagor who has assigned his whole estate is in gross [661] only, and does not run with the land: *Webb v. Russell* (3 T. R. 393). The replication is therefore good, since it shews that the surviving lessor, and not the assignee, is entitled to sue upon the covenant.

Cresswell, contra. The plaintiff relies on the doctrine of estoppel as against the defendant; but it would be strange if the lessor were not equally estopped. The contract between the parties is for a legal estate. [Lord Abinger, C. B. Could the plaintiff have declared, that not being entitled at law, he nevertheless demised to the defendant, and the defendant covenanted?] No—that would be repugnant: he could not say that he had no estate, and yet that he demised an estate. Here, however, the demise is pleaded as an ordinary lease, and on the face of it is not an assignment. It professes to be a demise of a legal estate for so many years, and each party is estopped from disputing that. Being a demise, it imports a reversion in the plaintiff: the replication of no reversion is therefore a departure. *Carriek v. Blagrove* only shews that the tenant is not estopped from disputing that the plaintiff is not assignee; and *Whitton v. Peacock*, that the assignee of the legal estate cannot sue on a lease granted by the owner of the equitable estate only.

LORD ABINGER, C. B. I will not say that a declaration might not be framed on such a lease, as an assignment, which would support the action as on a personal covenant; nor will I say what might be the effect of shewing the covenant to be personal, by other facts, as by proof that the lessor had an equitable title only: but there is nothing of the kind here; the declaration is upon an ordinary lease, with acts to be

done by the lessee at the expiration or sooner determination of it. The plea sets up an assign-[662]ment of the reversion expectant on that lease. Then the replication which alleges that the plaintiff and the other demising parties had no such reversion, is a departure from the declaration. It does not follow that because the assignee cannot sue, the assignor can.

ALDERSON, B. I am of the same opinion. The declaration imports a giving up to the lessors at the end of the term? which implies a reversion. Mr. Williams argues that we are to infer that this was a mere equitable estate. There is nothing from which we can infer that; and if there were, still the estoppel must be mutual.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.

NEWHALL v. HOLT. Exch. of Pleas. 1840.—Debt for goods sold and delivered and on an account stated. The particulars claimed 9l. 17s. 6d. The defendant pleaded, as to all except two sums of 1l. 0s. 6d. and 8l. 17s., *nunquam indebitatus*; as to 1l. 0s. 6d., payable into Court; and as to 8l. 17s., a set-off. Issue on the first and third pleas; the plaintiff took out of Court the money paid in under the second. *Semble*, that upon this record the plaintiff had nothing to prove, and that the only issue was on the defendant.—In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods.—And (per Parke, B.) the defendant's own admission is always evidence against him, though it refers to the matter of a written agreement.

[S. C. 9 L. J. Ex. 293; 4 Jur. 610.]

Debt for lead sold and delivered, and on an account stated. The particulars claimed the sum of 9l. 17s. 6d. The defendant pleaded as to all the sum demanded, except two sums of 1l. 0s. 6d. and 8l. 17s., *nunquam indebitatus*; as to the sum of 1l. 0s. 6d., payment of that sum into Court; and as to 8l. 17s., a set-off. The plaintiff took out of Court the money paid in under the second plea, and joined issue on the other pleas. At the trial before the under-sheriff of Cheshire, the plaintiff (without objection) began, and having proved the delivery of a quantity of lead to the defendant, called a witness (the [663] plaintiff's attorney) to prove a conversation between him and the defendant, in which the defendant had admitted that he owed the plaintiff 9l. 17s. 6d. for lead. The witness, however, admitted on cross-examination, that there was an agreement in writing between the parties relating to the lead. It was thereupon objected for the defendant, that this agreement ought to be produced, and that in default thereof the plaintiff must be nonsuited. The under-sheriff refused to nonsuit, and the jury having found a verdict for the plaintiff for 1l. 17s. 6d., he reserved leave to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,

Crompton shewed cause. The sheriff could not nonsuit in this case, the issue being on the defendant. [Parke, B. The defendant has admitted on the record that 8l. 17s. remains due, which he claims to overtop by his set-off.] The amount is made material by its being separated from the rest of the demand by the plea; and there is here no general issue with which to distribute the plea of set-off, as in *Cousins v. Paddon* (2 C. M. & R. 547). The whole issue, therefore, was on the defendant: the plaintiff had nothing to prove, and it was therefore immaterial that there appeared to be a written agreement.

Busby, *contra*. There was an issue joined on the plea of *nunquam indebitatus*: the plaintiff, therefore, had something to prove, and was bound to begin; and the fact that there was an agreement in writing (with which the parol admission was consistent) appearing upon his own case, that was an objection for which he ought to have been nonsuited.

LORD ABINGER, C. B. The rule must be discharged. [664] An account stated may be proved by a parol admission, although the account itself might consist of many writings.

PARKE, B. There is an account stated, to which the admission applies. The under-sheriff clearly could not nonsuit, because the defendant admits on the record

that he owes the plaintiff 9l. 17s. 6d. But I apprehend also, that if a party states a sum to be due from him, although the debt arise out of a written agreement, it is evidence against him. What a defendant says is always evidence against him, although it may have arisen out of a written agreement (see the next case).

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

SLATTERIE v. POOLEY.(a)¹ Exch. of Pleas. 1840.—A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument: and even though its contents be directly in issue in the cause.

[S. C. 10 L. J. Ex. 8; 4 Jur. 103S.]

Covenant. The declaration stated, that the plaintiff having entered into a certain deed of composition with certain of his creditors, in which reference was made to a certain schedule annexed there, containing a list and statement of the debts then due and owing to and from the plaintiff, the defendant, in consideration of the assignment of a certain equitable interest which the plaintiff then had in certain premises, by indenture dated &c., covenanted with the plaintiff to indemnify him against all debts or demands due from the plaintiff to such of his cre-[665]-ditors as had not executed the said deed of composition: and alleged as a breach, that the defendant allowed and permitted one James Thomas, a creditor whose debt was entered in the said schedule, but who had not executed the said deed of composition, to bring an action and recover against the plaintiff the amount of his said debt, together with his costs, &c.

Pleas—first, non est factum; secondly, that the defendant was induced to enter into the said covenant and agreement by the fraud, covin, and misrepresentation of the plaintiff; and thirdly, that the said debt of the said James Thomas, for which the said action was brought against the plaintiff, as in the declaration mentioned, was not included in the said schedule annexed to the said deed of composition; on which issues were joined.

At the trial before Gurney, B., at the Middlesex Sittings in Trinity Term, the composition deed and schedule were produced in evidence for the plaintiff, but the latter not being duly stamped, was rejected: whereupon, for the purpose of proving the third issue, the plaintiff's counsel tendered in evidence a verbal admission by the defendant, that the debt mentioned in the declaration was the same with one entered in the schedule. This evidence was objected to, on the ground that the contents of a written instrument, which was itself inadmissible for want of a proper stamp, could not be proved by parol evidence of any kind: and the learned Judge being of that opinion, the plaintiff was nonsuited.

Erle having obtained a rule nisi for a new trial, on the ground that the evidence was improperly rejected (citing *Earle v. Picken* (5 C. & P. 542)),

Sir F. Pollock and Warren shewed cause in Michaelmas [666] Term. This evidence was not receivable. To admit a parol statement of the matter inserted in the schedule in this case, would be in direct violation of a settled principle of the law of evidence, viz. that the contents of a written instrument cannot be proved otherwise than by the instrument itself, unless satisfactory grounds be shewn for its non-production, in which case secondary evidence of its contents is receivable. The cases on this subject are collected in 1 Phill. Evid. 364 (8th edit.). It is established by several authorities,(a)² that the execution of a deed cannot be proved by the admission of a party to it. Here it was proposed to prove the very matter in issue, viz. the contents of the schedule, and that it included the debt in question, merely by the verbal admission of the defendant. *Blaxum v. Elsee* (Ry. & M. 187; 1 C. & P. 588) is a distinct authority against the reception of such evidence. That was an action by assignees of a bankrupt for the infringement of a patent granted to the bankrupt;

(a)¹ This case was decided in Michaelmas Term, 1840, but is inserted here as relating to the same subject as the last case.

(a)² *Abbot v. Plumbe*, 1 Dong. 216; *Johnson v. Mason*, 1 Esp. 89; *Cunliffe v. Sefton*, 2 East, 87; *Call v. Dunning*, 4 East, 53.

and the defendant's counsel having proposed to ask an adverse witness whether he had not heard the bankrupt say, that by a deed between him and one D. an interest in the patent belonged to D., Lord Tenterden interposed, saying emphatically—"I am clearly of opinion that no question can be asked as to what the bankrupt has said as to the contents of a written instrument, without the production of the instrument, or an account of its non-production; and I give my opinion distinctly, in order that it may be renewed by a bill of exceptions, or in any other mode the counsel for the defendant may think proper." That ruling does not appear to have been questioned, and no case appears to have been decided the other way, until that of *Earle v. Picken*, where Park, J., certainly laid it down as a general rule of law, that "what a [667] party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to anything else." There, however, the admission did not necessarily involve the contents of a written instrument, but only imported that the party to whom it referred had in some form or other made an agreement with the defendant for the purchase of an estate. [Parke, B. Other subsequent cases to the same effect are referred to in Phillipps on Evidence, vol. i., p. 364, and a reason is given for the admissibility of the evidence. In one sense, no doubt, the best evidence is the production of the instrument itself; but the question is, whether the admission by the party himself of its contents is not receivable, as affording a presumption of truth, whereas parol evidence of its contents aliunde, without its non-production being first accounted for, leads to a contrary presumption.] The admission of such evidence is of dangerous precedent, since thereby as well the rule which enjoins the calling of the subscribing witness, as also the reading of the instrument itself, is dispensed with. Of the cases cited in the place just referred to, *Sewell v. Stubbs* (1 C. & P. 73) was anterior to *Bloxam v. Elsee*, and probably gave occasion to Lord Tenterden's emphatic expression of his opinion to the contrary. *Doe d. Wanthman v. Miles* (4 Camp. 475; 1 Stark. N. P. 181), and *Doe d. Lowden v. Watson* (2 Stark. N. P. 230), also occurred before *Bloxam v. Elsee*. In *Newman v. Strelch* (Moo. & M. 338), the declarations of a bankrupt on his return, that he had absented himself to avoid a writ against him, were held sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded. But there the evidence was not necessarily used to prove the contents of the writ. The bankrupt might go away to avoid writs, though none were actually issued against him. But such evidence has in no [668] case been admitted, where the contents of the deed or written instrument were directly in issue. This is no doubt a point of great importance, and it is desirable that it should be settled by a distinct decision of the Court.

On a subsequent day, Erle and Busby appeared to support the rule, but

PARKE, B., said:—The Court do not think it necessary to trouble Mr. Erle in support of the rule in this case; as we who heard the argument (my Brother Alderson, who is absent, as well as ourselves) entertain no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for, with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs.

The authority of Lord Tenterden at Nisi Prius, in the case of *Bloxam v. Elsee*, is no doubt to the contrary: but since that case as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to, or from such person, or that such person filled the character of assignee, which could only be by deed, or the like (see *Dickinson v. Coward* (1 B. & Ald. 679)). Many of these cases are collected in the 1st vol. of Messrs. Phillipps & Amos, p. 364: and any one experienced in the conduct of causes at Nisi Prius, must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties [669] thrown in the way of almost every trial would be nearly insuperable.

The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the

presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary accordingly to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say, that the evidence is admissible.

LORD ABINGER, C. B., said he was not present at the argument, but concurred in what was said by Parke, B.; and stated that he had always considered it as clear law, that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute. (a)

[670] RALEIGH AND OTHERS, Assignees of Lawrence Rostrow, John Rostrow, and James Rostrow, Bankrupts v. ATKINSON. Exch. of Pleas. 1840.—Case. The declaration, by assignees of bankrupts, stated, that the defendant was a commission-agent at Montreal, and that the bankrupts, before their bankruptcy, delivered to him certain goods, which were not to be sold at less than invoice prices; that at the time of the bankruptcy a large quantity of these goods remained in the defendant's hands unsold; that the plaintiffs, being assignees of the bankrupts, directed the defendant not to sell the goods at less than invoice prices, until he had rendered to them an account of the goods, and the plaintiffs had been enabled to judge, and had determined and given the defendant notice, whether they would redeem the goods without sale or not. Breach, that the defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although the defendant, after the rendering of the account, and before the sale, was required by the plaintiffs, and they gave him notice, to send the goods to England, and that they would redeem them without sale. The defendant pleaded, that after the bankrupts had caused the goods to be delivered to him, and before and at and after their bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods; that the bankrupts, before their bankruptcy and after the delivery of the goods, in consideration of the advances by the defendant, agreed with the defendant that he should sell the goods at the best market prices, and realize thereon against his said advances; that the defendant, relying upon the authority to him to sell and realise against his said advances, permitted his advances to remain unpaid for a long time, to wit, until and at and after the bankruptcy; that after the bankruptcy, and after the defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did not tender or offer to pay the defendant his advances or lien, or to redeem the goods before the defendant should part with them, and the said goods so remaining on hand were then deteriorating, and depreciating in price, and the market getting worse; wherefore he the defendant, exercising his best judgment for the estate of the bankrupts, and the plaintiffs as assignees, and to realise his advances, after he was required to send the goods to London to be redeemed, sold the said goods at the best market prices, according to the said authority of the bankrupts to him in that behalf, using his best judgment therein, as he lawfully might: and after giving credit for the proceeds under such sale, there still remained due to the defendant a large sum of his advances, and the estate of the bankrupts, and the plaintiffs, as assignees, were still indebted in a large amount on account of the advances:—Held, first that the breach did not, by alleging that the plaintiffs gave the defendant notice to send the goods to England, render the declaration bad; secondly, that the plea was bad, as it shewed no

(a) See, besides the authorities referred to in argument, the following cases:—*Barleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Paul v. Meek*, 2 Y. & J. 116; *Woodward v. Lambert*, 3 Esp. 286; *Singleton v. Barrett*, 2 C. & J. 368; *Gibson v. Coggon*, 2 Camp. 188; *Doe d. Digby v. Steel*, 3 Camp. 115; *Greenway v. Hurdiss*, 4 Camp. 42; *Pasmore v. Bonsfield*, 1 Stark. N. P. 296; *Alderson v. Clay*, id. 405; *Harvey v. Kay*, 9 B. & C. 356; *Ashmore v. Hardy*, 7 C. & P. 501.

consideration for any agreement which deprived the bankrupts or the assignees of their right to revoke the authority to the defendant to sell.

[S. C. 9 L. J. Ex. 206. Applied, *Smart v. Sandars*, 1848, 5 C. B. 895.]

Case. The first count of the declaration stated, that the defendant before and at the time of committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is a trader and commission agent, and the trade and business of a commission agent used, exercised, and carried on, and still does use, exercise, and carry on, to wit, at Montreal, in Canada; and thereupon theretofore, and before the bankruptcy of the said L. Rostrow, J. Rostrow, and J. Rostrow, to wit, on the 1st of May, 1835, and on divers other days before that day and the said bankruptcy, they the said L. R., J. R., & J. R., caused to be delivered to the defendant, and the defendant then accepted and received of and from [671] the said L. R., J. R., & J. R. a large quantity of goods, to wit, of cotton and other goods, of great value, to wit, of the value of £25,000, to be by the defendant as such commission agent sold and disposed of at Montreal aforesaid, for the said L. R., J. R., & J. R., for certain commission and reward to the defendant, at prices not less than the prices mentioned in the several invoices of the said goods therewith sent, together with the costs and charges due and to become due in respect of the same; and the defendant then accepted and received the same goods upon the terms and considerations aforesaid. The count then averred that the invoice prices, together with the costs, amounted to 23,272l. 7s. 3d., and alleged, as a breach, that the defendant sold the goods for less than the invoice prices.

The second count stated, that before and at the time of committing the grievances therein after next mentioned, the defendant was and still is such trade and commission agent, and the said trade and business of a trader and commission agent used, exercised, and carried on as in the first count mentioned; and the said L. R., J. R., & J. R., before their said bankruptcy, to wit, at the days and times in the first count mentioned, had caused to be delivered to the defendant, and the defendant accepted and received of and from the said L. R., J. R., & J. R., divers goods, to wit, goods of the same quantity, quality, description, and value, as the goods in the first count mentioned, to be by him sold and disposed of upon the same terms and in the same manner as in that count mentioned: That afterwards, and at the time of the bankruptcy of the said L. R., J. R., & J. R., to wit, on the 21st day of January, 1836, a large quantity of the said goods remained in the hands of the defendant unsold and undisposed of; and the plaintiffs, so being assignees as aforesaid, then, to wit, on the day and year last aforesaid, directed the defendant not to sell the said goods so remaining in the hands of the defendant as aforesaid at less [672] than invoice prices, until he had rendered an account to the plaintiffs of the goods remaining in his hands which had been consigned to him as aforesaid, and the said plaintiffs had been enabled to judge, and had thereupon determined and given the defendant notice, whether they would redeem the said goods without sale or not: and it thereupon became and was the duty of the defendant, as such commission agent as aforesaid, not to sell or dispose of the said goods so remaining in his hands as aforesaid, at less than invoice prices, before such account had been delivered as aforesaid, and before the defendant had notice of the determination of the plaintiffs, whether they would redeem the goods without sale or not. And the plaintiffs aver, that the invoice prices of the said goods so remaining in the hands of the said defendant at the time of the said bankruptcy as aforesaid, amounted to a large sum, to wit, the sum of £10,000, whereof the defendant then had notice; yet the defendant afterwards, and after the said bankruptcy of the said L. R., J. R., & J. R., and after he had rendered an account of the goods in hand, to wit, on the 1st day of February in the year last aforesaid, and on divers other days and times between that day and the commencement of this suit, not regarding his duty in that behalf as aforesaid, sold and disposed of all the said goods so remaining in his hands at the time of the said bankruptcy as aforesaid, at far less than the invoice prices thereof, to wit, at prices £2000 less than the invoice prices thereof, although the defendant, after the rendering of the said account, and before the sale thereof, and within a reasonable time after the rendering of the said account, to wit, on the 1st day of February, 1836, as aforesaid, was required by the plaintiffs, and the plaintiffs then gave notice to the defendant, to send the said goods to England, and that the said plaintiffs would redeem them without sale: contrary to his duty as such

commission [673] agent, and to the great injury of the plaintiffs, as assignees as aforesaid.

The defendant pleaded, as to the second count of the declaration, that after the said L. R., J. R., & J. R. had caused to be delivered to the defendant the said goods as in that count mentioned, to be by him sold and disposed of as in that count mentioned, and before and at the time of, and after the bankruptcy of the said L. R., J. R., & J. R., as in that count mentioned, and whilst the said large quantities of goods remained in the hands of the defendant unsold and undisposed of, he the defendant, for advances before the said L. R., J. R., & J. R. became bankrupts, had a lien upon the said goods, according to the usage of business in that behalf, amounting to a large sum, to wit, £25,000; and the said L. R., J. R., & J. R., before they became bankrupt, and after the delivery of the said goods to the defendant as in the said second count mentioned, to wit, on the 1st day of January, 1836, in consideration of the said advances by the defendant, agreed with the defendant that he should use his knowledge and judgment of the market, and sell and dispose of the said goods then remaining in the hands of the defendant at the best market prices, having reference to the cost prices and charges of the said goods, and realize thereon against his said advances. And the defendant saith, that afterwards, relying on the said authority to him to sell and realize against his said advances, he the defendant permitted his said advances, amounting to the said large sum, to wit, of £25,000, to remain unpaid and owing to him for a long space of time, to wit, until and at and after the bankruptcy of the said L. R., J. R., & J. R.; and afterwards, and after the said L. R., J. R., & J. R. became bankrupts as aforesaid, and after he the defendant had rendered the said account of the goods in hand, and whilst the same were in hand unsold, the plaintiffs did not tender or offer to pay the [674] defendant his said advances and lien, or redeem the same before the defendant should part with the said goods, and the said goods so remaining on hand were then spoiling and deteriorating, and depreciating in price, and the market for the said goods was getting worse every day, and likely to be lost altogether; wherefore he the defendant, exercising his best knowledge and judgment for the estate and effects of the said L. R., J. R., & J. R., and for the plaintiffs, assignees as aforesaid, after they became bankrupts as aforesaid, and to realize upon the said goods against the said advances of the defendant thereupon, according to the usage of business in that particular, and the directions of the said L. R., J. R., & J. R. before they became bankrupts, and after he was required to send the goods to London to be redeemed, and under the circumstances as aforesaid, at the said time when &c., sold and disposed of the said remaining goods at the best market prices, having reference and regard to the cost prices and charges thereof, according to the said authority of the said L. R., J. R., & J. R. to the defendant in that behalf given, using his best judgment and information therein in the sale and disposal thereof, as he lawfully might for the cause aforesaid: And after giving credit for the proceeds under such sale, there still remains due to the defendant a large sum of his said advances, to wit, £2000, and the said estate of the said L. R., J. R., & J. R., and the plaintiffs as assignees as aforesaid, since they became bankrupts, are still indebted to the defendant, after credit given for the sale of the whole of the said goods, amounting to a large sum, to wit, £23,000, in the said large amount thereon, for and on account of the advances made as aforesaid, to wit, £2000. Verification.

Special demurrer, assigning for causes, that the plea affords no answer to the matters contained in the second count; but states as the ground of defence certain transactions [675] with the bankrupts before their bankruptcy, whereas the defendant is charged in the second count with a breach of duty after the bankruptcy, by selling the goods on hand at the time of the bankruptcy, after he had received the express directions of the plaintiffs not to do so, and after any authority given by the bankrupts had been revoked by their bankruptcy, and by the directions given by the plaintiffs, and without waiting until the expiration of a reasonable time for the plaintiffs to redeem: and also for that the said last plea is uncertain, multifarious, and repugnant. Joinder in demurrer.

The points marked for argument were as follows:—The plaintiffs contend that the defendant should not have sold the goods after the directions he had received to the contrary, or at least that he ought to have waited a reasonable time to ascertain whether they would redeem or not; and they rely on the special points as stated in the said demurrer.

The defendant contends that the plea is a good answer to the cause of action stated in the second count of the declaration.

The case was argued in Easter Term, by

Wightman, in support of the demurrer. The original authority given by the bankrupts to the defendant to sell the goods was a revocable authority, which it was competent to the bankrupts, or to their assignees after the bankruptcy, to alter or revoke. If the defendant had made advances to the bankrupts, and in consideration thereof, and of his waiting for the repayment of the advances, they gave him this authority to sell, the case might have been wholly different; but here the advances are made first, and there is no consideration stated for the bankrupts' foregoing any right they had at the time [676] they delivered the goods. [Parke, B. There is no doubt the bankrupts might countermand the order to sell the goods, unless there was an authority to sell, coupled with an interest; as if they had given him that authority in consideration of his forbearing to sue them for prior advances.] The order might have become irrevocable, if it had been shewn that there had been some subsequent advance made on the faith of that order; but here there is no consideration whatever shewn for the bankrupts foregoing their right to revoke. The allegation in the plea, that the defendant, relying on the authority to sell, permitted his advances to remain unpaid, states no more than a mere gratuitous act of his own in so doing, and could not affect their rights. [Parke, B. It is perfectly consistent with this plea, that the advances were made long before the authority to sell was given. Alderson, B. All that appears is, that the defendant had a lien on the goods.] Yes: that he was in the situation of a person having goods in his possession on which he had a lien.

Hoggins, contra. There is ample consideration stated in the plea for the agreement by the bankrupts, that the defendants should sell for the best market prices. But the first question is, whether the second count is good, and it is submitted that it is not. It states that it was the duty of the defendant not to sell the goods at less than invoice prices, before he had rendered an account to the plaintiffs of the goods remaining in his hands, and before the defendant had notice of the determination of the plaintiffs whether they would redeem the goods or not; whereas the breach is, that the plaintiffs gave notice to the defendant to send the goods to England, and that they would redeem them without sale; but that was more than the defendant was bound to do. [Parke, B. The substantial breach is not the omission to send the goods to England, but the [677] selling them at less than invoice prices, without waiting to see whether the plaintiffs would redeem or not.] The determination and notice are one entire thing; and the determination was one which he was not bound to obey. The notice was coupled with a condition which the plaintiffs had no authority to impose. The effect is the same as if no countermand had been given; the defendant was therefore remitted to the position in which he originally stood with the bankrupts. But, secondly, if the countermand were a good one, the plea is an answer. It states that the defendant had a lien on the goods for advances, and that in consideration of those advances, the bankrupts agreed with the defendant that he should use his best knowledge and judgment of the market, and sell and dispose of the goods at the best market prices, and realize thereon against his advances. Now that amounts to an agreement that he may sell forthwith, to satisfy his advances, and there is ample consideration stated for that agreement, which could not afterwards be revoked. But even if they had the power to countermand, the plaintiffs did so in a way that they were not entitled to do; and as there was no good countermand, the defendant was entitled to sell the goods.

Wightman, in reply. The second count is good. It may be admitted that the defendant was not bound to send the goods to England, but what is alleged to have passed was an ample revocation and perfect retraction of the authority to sell at discretion, given by the bankrupts.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was an action brought [678] by the assignees of a bankrupt, in which they charged the defendant with having been guilty of improper conduct, in selling certain goods received by him from America for the purpose of sale. The plaintiffs state in their declaration, that they had given the defendant notice not to sell under the invoice prices without further order, as they might redeem the goods, and remove them from his custody altogether if they thought proper. To

this declaration there was a plea, in which it was stated, that the bankrupts had given the defendant an authority which in fact rescinded the original contract, under which he received the goods, to sell them at a certain price; and that, in consideration of certain advances made by him, he had authority to sell the goods at such prices as he should consider in his judgment was best, and that he sold the goods accordingly. We wished to consider the subject, and having done so, the Court are of opinion that the plea is bad. I entertained a doubt about it at one time, or rather I wished to find some reason that would warrant the plea, and if I could have found a sufficient consideration to justify the defendant, I should have been glad; but after due consideration of the case, I am compelled to concur with the rest of the Court in thinking that there does not appear to be any sufficient consideration for the agreement which the defendant sets up as a defence. There is no doubt that the assignees had the same power and authority to countermand his selling below price as the bankrupts had. The judgment will therefore be for the plaintiffs.

Judgment for the plaintiffs.

[679] FAIRBURN AND ANOTHER, Assignees of Jonas Eastwood and Isaac Woodhead, Bankrupts v. JOHN EASTWOOD. Exch. of Pleas. 1840.—The defendant, by indenture, demised to E. & W. a fulling mill, for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that at the end or other sooner determination of the term, the machinery should be again valued by two indifferent persons chosen by the lessees and the lessor, and that if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor; but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease, the lessees became bankrupt, and their assignees declined to take the lease: but they required the defendant to appoint a person to value the machinery, and on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay:—Held, that the assignees (having demanded the machinery) were entitled to recover it in trover, and that their remedy was not by an action on the covenants, which had been determined by the bankruptcy, and by their refusal to take the lease.

[S. C. 9 L. J. Ex. 226.]

Trover for machinery. Pleas, first, not guilty; secondly, that the plaintiffs, assignees as aforesaid, were not possessed as of their own property of the machinery in the declaration mentioned; thirdly, leave and license: on which issues were joined.

At the trial before Coleridge, J., at the last York assizes, it appeared that by indenture of lease, dated 27th April, 1836, the defendant demised to the bankrupts, for a term of fourteen years, a fulling, scribbling, and carding mill, subject to the usual covenants contained in such leases: by one of which, after stating that the machinery in the said mill had been valued at the sum of 363l. 7s. 6d., it was mutually covenanted, that at the end or other sooner determination of the said term, the said machinery should be again valued by two indifferent persons, one to be chosen by the lessees and another by the lessor; and that if such second valuation should amount to less than the first valuation, the difference should be paid by the lessees to the lessor; but that if it should be greater than the first valuation, then the surplus of such second valuation should be paid by the lessor to the lessees. In June 1839, a fiat in bankruptcy issued against the lessees, under which they were declared bankrupts, and on the 1st of August following the plaintiffs were appointed their assignees. The plaintiffs declined to take the lease, and subsequently applied to the [680] defendant to appoint a person to value the machinery and fixtures, which the defendant refused to do. The plaintiffs then appointed a valuer on their part, who valued the machinery at 861l., and notice thereof was given to the defendant. In October 1839, they delivered up possession of the premises to the defendant, the machinery remaining therein, and demanded from him the difference between the first and second valuation, amounting (after certain deductions agreed on at the trial) to the sum of 346l. 7s., which the

defendant refused to pay. The defendant shortly afterwards advertised the premises and machinery to let; and having been served with a demand of the machinery by the plaintiffs, and refusing either to deliver it up or to pay for it according to the valuation, the present action was brought. None of the machinery claimed in the action was fixed to the freehold, and a great part of it had been placed in the mill by the bankrupts during the demise. It was contended for the defendant, at the trial, that this action of trover could not be maintained, and that the proper remedy was by an action of covenant against the defendant, for not appointing a valuer, or for not paying the difference in amount between the two valuations. The learned Judge reserved this point, and under his direction a verdict was given for the plaintiffs, damages £581, leave being reserved to the defendant to move to enter a nonsuit. In Easter Term, Alexander obtained a rule nisi accordingly, citing *Storer v. Hunter* (3 B. & Cr. 368; 5 D. & R. 240); against which

Cresswell (Hoggins with him) now shewed cause. Of the machinery claimed in this action, part having passed to the bankrupts under the lease, and the remainder having been by them purchased and put into the mill, the whole vested in their assignees, who are entitled to recover it in this action of trover against the defendant. The [681] term was determined by the assignees refusing to take to the lease, and the landlord thereupon resumed possession. It is said that the plaintiffs ought to have sought their remedy by an action on the defendant's covenants, to appoint a valuer, and to pay according to the valuation. The answer to that argument is, that the covenants were determined by the bankruptcy, and the refusal of the assignees to take to the lease. There is now no covenant in existence respecting this machinery; it remains, therefore, the property of the lessees, and passes on their bankruptcy to their assignees. *Kearsey v. Carstairs* (2 B. & Adol. 716) is an express authority to that effect. [Lord Abinger, C. B. The effect of the statute (6 G. 4, c. 16, s. 75) is to prevent the assignees from being assignees of the term, unless they assent.] Yes: then their rights remain as if there had been no lease at all, and the machinery, being the property of the bankrupts, passes to their assignees. In *Storer v. Hunter*, which is relied upon on the other side, the landlord had resumed possession before the bankruptcy of the tenant; and the bankrupt never had the possession, order, or disposition of the fixtures, but only a qualified right to use them during the term. [Alderson, B. There the assignees never were in possession.] Here the contract is altogether at an end, and therefore the assignees cannot sue in covenant.

Alexander and Wightman, contra. The question is, whether the assignees ever had such a property as to maintain trover. That depends, first, on the terms of the lease; secondly, on the operation of the bankrupt law. This is, as in *Storer v. Hunter*, a demise of a ready furnished mill. The lessee may add to and improve the subject of the demise, but the lease contemplates that the property in the whole shall revert to the landlord at the end of the term. Therefore it is that there are to be two valuations: therefore also [682] there is a covenant by the lessees to insure the whole. The parties have by their contract reduced it from a case of property in the tenant, to a mere right of payment under a covenant. Suppose no bankruptcy had intervened, and the lease had expired by effluxion of time, and the tenant had given up possession; if the landlord had refused to appoint a valuer, could the tenant have maintained trover? [Lord Abinger, C. B. Certainly not.] Or supposing the assignees had taken to the lease, must they not have resorted to the covenant? Then their having elected to give up the benefit of the lease does not alter the rights of the parties. *Kearsey v. Carstairs* only decides, that where the assignees elect to give up the covenant, they cannot avail themselves of it: the Court carefully abstained from deciding anything as to the property. It is a voluntary act of waiver by the assignees, and they have no right thereby to put the lessor in a worse position without his assent. The decision in *Storer v. Hunter* therefore applies, and the defendant is entitled to have a nonsuit entered.

LORD ABINGER, C. B. This appears to me a very clear case. It is admitted that the covenants were determined by the bankruptcy, and the refusal of the assignees to take to the lease; and the case is the same as if the parties had agreed to put an end to the covenants. The utmost the landlord could say is, that he had a right to buy the machinery; but he repudiates that, and wishes to keep the goods without paying for them. No hardship is done to the defendant: he was bound by his covenant to pay for the machinery; he has the offer of it, and he refuses it. The assignees

cannot sue upon the covenants; then the question is, whose is the property? Clearly theirs. The case of *Storer v. Hunter* has been misapplied. There the landlord obtained possession under his contract; then the property in the machinery vested in him, and all he had to do was to pay for it, *modo consensu*, under his covenant. [683] Here the landlord could only obtain them by virtue of the covenant, and that was put an end to before he had possession.

ALDERSON, B. I am of the same opinion. It is a fallacy to say that the property in the machinery passes to the lessor the moment it is put in by the lessees. The substance of the contract is, that whatever is put in or changed during the demise, the lessees stipulate to let the lessor have it at the end of the term, he paying for it according to the valuation, subtracting therefrom the difference between its increased value and its value at the commencement of the lease. The lessees, then, are possessed of the machinery, subject to the covenants: they become bankrupts; and thereby, according to the case of *Kearsey v. Carstairs*, the assignees are discharged from the covenants. Then they hold the goods as their own property, discharged from the bankrupts' covenants; they put the landlord into possession, in order that he may exercise his right of buying them; but he refuses to do so. The assignees cannot bring any action of contract, because the defendant makes none with them: they may therefore have an action of trover, in respect of their property remaining in the goods while in his hands. Our decision in this case will not infringe upon the law as laid down in *Storer v. Hunter*. There, by the forfeiture, the lease was put an end to, so as to dispense with the three months' notice which was to have been given for the purpose of a valuation: and it was the same as if it had been stipulated that the landlord should have the property in the machinery at the end or other sooner determination of the lease. Then he took possession, and so the property vested in him. Here the assignees had the possession discharged of the covenants; then, being so in possession, they hand the goods over to the landlord, who refuses to make any contract with them. They are therefore entitled to maintain trover.

[684] ROLFE, B. I am of the same opinion. These goods were the property originally of the bankrupts, and therefore of their assignees; and I can find nothing to make the property pass out of them.

Rule discharged.

NELSTROP AND ANOTHER, Assignees of Boddington, a Bankrupt v. SCARISBRICK, ESQ. Exch. of Pleas. 1840.—The stat. 2 & 3 Vict. c. 29, has a retrospective operation, so as to protect the sheriff from liability in respect of a *bonâ fide* execution levied on the goods of a bankrupt, without notice of the act of bankruptcy, where the seizure and sale took place, and the fiat issued, before the passing of the act, but the assignees were not appointed until afterwards.

[S. C. 8 Dowl. P. C. 746; 9 L. J. Ex. 229; 4 Jur. 582.]

Assumpsit against the defendant, late sheriff of the county of Lancaster, for money had and received to the use of the plaintiffs as assignees, and on an account stated. Pleas—first, non assumpsit; secondly, that the plaintiffs were not assignees of Boddington; on which issues were joined. At the trial before Erskine, J., at the last assizes at Liverpool, it appeared that on the 12th of July, 1839, the defendant seized certain goods in the possession of Boddington, the bankrupt, under a *fieri facias* issued upon a judgment entered up against him on a warrant of attorney. The goods were sold on the 15th. On the 18th, a fiat in bankruptcy issued against Boddington, founded on an act of bankruptcy committed on the 12th, (but subsequently to the seizure), and of which the defendant had notice on the 13th. On the 31st, the plaintiffs were appointed assignees. On the 19th of the same July, the stat. 2 & 3 Vict. c. 29, received the royal assent; whereby it is enacted, "that all executions and attachments against the lands and tenements, and goods and chattels, of any bankrupt, *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the persons at whose suit or on whose account such execution or attachment shall have issued, had not at the time of executing or of [685] levying such execution or attachment, notice of any prior act of bankruptcy by him committed." It was contended for the defendant, that the words of this statute were

retrospective, and protected the seizure in question. The learned Judge reserved the point, and under his direction a verdict was given for the plaintiffs, damages 86l. 15s., leave being reserved to the defendant to move to enter a verdict for him on the first issue, if the Court should be of opinion that the defendant was protected by the statute.

Alexander, in Easter Term, obtained a rule accordingly, against which

Wightman now shewed cause. If this act be construed to have a retrospective operation upon cases where both the seizure and sale of the goods, and the issuing of the fiat, were prior to its passing, many instances may occur in which great injustice may be worked, by the disturbance of rights vested before the passing of the act. In *Gilmore v. Shuler* (2 Lev. 227; 1 Vent. 330; 2 Jones, 108), where an action was brought after the passing of the Statute of Frauds, upon a promise of marriage made before the statute, it was held that the statute had not a retrospective operation upon such a case; it could not take away a right of action already vested. The case of *Edmonds v. Lawley* (ante, p. 285) is an authority to shew that such an unlimited construction ought not to be put upon this statute as is now contended for. There the fiat issued after the passing of the act, which was therefore held to apply: and Parke, B., says—"If a fiat had issued, and assignees had been appointed, before the passing of the act, they would have had a vested right to the [686] property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right. Perhaps, if the assignees had not been appointed when the act passed, but the fiat had issued before, we should in that case also construe it so as not to defeat the right of the assignees. But with respect to all fiats issued after the new act has come into operation, we think there is no injustice in saying, that the assignees must take the property subject to the new law." And the other Judges also put the case upon the same ground. It is true, that in *Luckin v. Simpson* (Tri. T. 1840; 8 Scott), the Court of Common Pleas, in a case similar in its circumstances to the present, (and where even the appointment of assignees was before the passing of the act), have decided that the statute had a retrospective operation so as to protect the execution; but the case of *Edmonds v. Lawley* was not brought to the notice of the Court, not having been decided until last Hilary Term, whereas *Luckin v. Simpson* was argued in the preceding Michaelmas Term, although judgment was not given until the present term.

Alexander and Cowling, contra, were stopped by the Court.

LORD ABINGER, C. B. I am of opinion that this rule ought to be made absolute. Assuming for a moment that we ought to adopt the narrow construction of the act of Parliament which is contended for by Mr. Wightman, still we should be entitled to say, on the facts of this case, that there are here no vested rights of the plaintiffs to conflict with the rights of the defendant. The fiat issued on the 18th of July, and the royal assent was given to the act of Parliament on the 19th, but no assignees were appointed until [687] the 31st; and if it were to be held that their appointment is necessarily to have a reference back, and to operate from the date of the bankruptcy, great injustice would be worked in many cases. In *Edmonds v. Lawley*, the fiat was issued after the act came into operation, but upon an act of bankruptcy committed before the levy, which was anterior to the passing of the act; and the Court there held the execution to be valid against the assignees. How could the parties know whether any assignees would be appointed at all? Their appointment might not have taken place until months after the seizure: and if the effect of their appointment were thus to divest the right of the execution creditor, the injustice would be great indeed. Taking this act of Parliament as it was construed by this Court in *Edmonds v. Lawley*, and limiting its operation to the case where no right actually vested in the assignees before the passing of the act, that case is exactly in point. But I am not disposed to take so limited a view of the subject, as I go the full length of the doctrine laid down by the Court of Common Pleas, in the case which has been cited as having been decided by them this term. I am of opinion that the proper construction of this act is, that in all cases where the execution creditor bona fide issues and levies his execution, and a sale of the goods takes place, before any of the proceedings in bankruptcy, that execution and sale are not to be prejudiced by a previous act of bankruptcy, of which he had no notice. I remember well, when the former act of Parliament on this subject, which was the production of Sir Samuel Romilly, was brought in, I assisted him in preparing the bill, and I know that he was much disposed

to have the law then settled in the same way as it is now; for he felt sensibly the inconvenience that would arise from commissioners of bankrupts having the power to divest rights which had been vested before they were endowed with any authority. It was his wish to have remedied this evil, if he thought the public would have gone along with him to [688] that extent, and to have established the law then as it is at present; but I know, from private communications with him, that he calculated that the legislature would in time become sensible of the injustice of the system, and that the law would sooner or later be altered in the manner it has been by this statute of 2 & 3 Vict. c. 29. I am of opinion, therefore, that in every case where an execution has been duly issued, and neither *mala fides* nor any knowledge of the fiat of bankruptcy can be shewn to have existed on the part of the execution creditor, the transaction is protected against the bankruptcy and its consequences: and that the doctrine laid down by the Court of Common Pleas is both right in law, and in accordance with the justice of the case. The struggle here, on the part of the plaintiffs, is not to give effect to vested rights, but to divest them. The statute ought to be so construed as not to allow those rights to be taken away from the parties who have lawfully asserted them; and I am glad to find that such has been the determination of the Court of Common Pleas upon the subject.

ALDERSON, B. I think we are bound by the decision of the Court of Common Pleas, which is expressly in point; independently of which, however, I entirely concur with the principles which have been laid down by my Lord Chief Baron.

ROLFE, B., concurred.

Rule absolute.

[689] IN THE MATTER OF THE GLATTON LAND-TAX. Exch. of Pleas. 1840.—

The stat. 1 & 2 Vict. c. 58, s. 2, which enables this Court, on application by the owner or occupier of lands, to call upon Commissioners of Land-Tax to appear and maintain or relinquish their assessments, in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of Commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated twice by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 23.

[S. C. 9 L. J. Ex. 211. For former proceedings see 4 M. & W. 570.]

This was a rule under the recent stat. 1 & 2 Vict. c. 58, s. 2, calling on the Commissioners of Land-Tax for the Hundred of Norman-cross, in the county of Huntingdon, to appear and maintain, or relinquish, their assessments in the parish of Glatton, of William Margetts, to the land-tax. The affidavit in support of the application stated, that in December, 1824, Mr. Margetts purchased a farm in Holme Fen, in the parish of Holme, in the Hundred of Norman-cross, consisting of about 640 acres; that in the following and each subsequent year the commissioners of land-tax for that hundred had assessed Mr. Margetts for that farm in the sum of 10l. 14s. 6d. for the parish of Holme, and in the sum of 7l. 16s. 6d. for the parish of Glatton, although no part of the land lay in the latter parish. That in 1831, Mr. Margetts brought an action of trespass against the clerk to the commissioners, in consequence of the seizure of his goods for non-payment of the sum of 7l. 16s. 6d. assessed upon him in Glatton, when having shewn that his land was locally situate in the parish of Holme, he obtained a verdict, which was ultimately confirmed by the Court of Queen's Bench; that notwithstanding such verdict, the commissioners had annually assessed him, but instead of issuing a distress-warrant, had caused his goods to be seized under a *levari facias*, whereby he was wholly without remedy. It further appeared, that the commissioners for the parish of Holme were also commissioners for the parish of Glatton. There was some doubt whether Mr. Margetts was, in point of fact, rated cumulatively for his lands, the commissioners stating in their affidavit, that the assessment in Holme was in respect of one portion of his farm, and that in Glatton for another, although they were unable to point [690] out the particular lands assessed in the respective parishes; but for the purpose of the argument it was assumed that he was rated twice for the same lands.

Hill and Gunning shewed cause. The stat. 1 & 2 Vict. c. 58, on which this rule was obtained, was meant to apply to a case where two conflicting bodies of commissioners, acting for different districts, have assessed a party for the same lands, each claiming it to be within their jurisdiction; and not to a case like the present, where one and the same set of commissioners have rated the occupier twice in respect of the same property. The second section recites, "that in assessing the land-tax, it sometimes happens that disputes arise as to the division, parish, or place, in which, or in aid of which, particular lands, tenements, or hereditaments, are legally liable to be rated, and by reason whereof such lands, &c., are rated in the several assessments made for two or more of such divisions, parishes, or places respectively; and it is expedient to provide a summary remedy for the relief of the owners or occupiers of such lands, &c., from such cumulative charges of the land-tax, and also to provide the means of ascertaining and determining the division, parish, or place in which, or in aid of which, such lands, &c., are legally liable, and ought to be rated, to the land-tax;" and it then enacts, "that upon application to her Majesty's Court of Exchequer, made by or on behalf of the owner or occupier of any lands, &c., by affidavit or otherwise, shewing that, by reason of some doubt or dispute as to the division, parish, or place, in which or in aid of which such lands, &c., are legally liable to be assessed to the land-tax, the same, or any person or persons in respect thereof, have or hath been assessed, rated, or charged to the land-tax in the several assessments made for two or more divisions, parishes, or places, and that such application is not made with a view to delay the payment of the land-tax which may be legally [691] assessed or charged upon or in respect of such tenements or hereditaments, and that the party by whom and on whose behalf such application is made, is ready to bring into Court, or to pay or dispose of in such manner as the Court may order or direct, the sum or sums assessed or charged by the said several assessments, or either of them, it shall be lawful for the Court to make rules and orders, calling upon the respective commissioners of the land-tax acting for the several divisions, parishes, or places, in or for which the said several assessments shall have been made, to appear and maintain the said assessments, or to relinquish the same respectively, so far as relate to the lands, &c., in question, and in the meantime to stay all proceedings by distress or otherwise against the party assessed or charged in respect of such lands, &c., for the levying or compelling payment of the sum or sums so as aforesaid assessed; and it shall also be lawful for the Court, if it shall think proper, to order the party by whom or on whose behalf such application shall be made, to pay into Court the sum or sums assessed, or any part thereof, to abide the determination of the dispute, and to be disposed of as the Court may direct; and for determining the question or questions in dispute, it shall be lawful for the Court to order the trial of one or more feigned issue or issues upon such point or points as the Court shall think proper, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants, on such trial, or otherwise to dispose of the question or questions in dispute, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable." The clause then goes on to provide as to the mode of determining the question in dispute. That statute contemplates the case where two distinct bodies of commissioners have assessed a party for the same property. The remedy Mr. Margetts has is by appeal under 38 Geo. 3, c. 5, ss. 8 & 23, which has not been repealed by the recent statute.

[692] Kelly and Andrews, *contra*. This is a case of double assessment for the same property; and all that the statute requires to be shewn, in order to give the Court jurisdiction, is, that the applicant has been assessed in two different parishes or places in respect of the same property. The words of the statute are amply sufficient to include the present case, and unless the Court give Mr. Margetts relief, he will be wholly without remedy, although he is assessed twice for the same lands. [Parke, B. Is there no appeal to the commissioners, if a party be charged too much?] Yes, there may be, where a party is charged too much: but in this case these lands ought not to have been assessed at all in the parish of Glatton. The 8th section of 38 Geo. 3, c. 5, provides, that every collector shall give notice of the time appointed by the commissioners for hearing appeals, that all persons who shall think themselves overrated may know when and where to appeal. The 23rd section, after providing that, in case of controversies in assessing commissioners, the commissioners concerned are to withdraw, enacts, that all questions and differences which shall arise concerning any of the said

rates, duties, and assessments, or the collecting thereof, shall be heard and finally determined by the said commissioners, in such manner as by this act directed, upon complaint thereof made to them by any person or persons thereby aggrieved. That act applies only to overcharges. It cannot be said that Mr. Margetts was aggrieved by an assessment under that act of Parliament, when he has not an acre of land within the parish of Glatton, where he is assessed.

LORD ABINGER, C. B. I think we have no jurisdiction in this case. The stat. 1 & 2 Viet. c. 58, s. 2, in my opinion, applies to assessments by two different sets of commissioners. In that case the act authorizes us to call upon the commissioners to appear, and maintain or relinquish their respective assessments. But where a party is assessed twice by one set of commissioners, I cannot doubt [693] that the commissioners have jurisdiction to hear the appeal.

PARKE, B. The question is, whether we have power under this act of Parliament to grant this application, and I am of opinion that we have no such power. It appears to me that under the 23rd section of the land-tax act, Mr. Margetts has a power of appeal to the commissioners, as a person aggrieved by the assessment. The act of 1 & 2 Viet. c. 58, s. 2, applies to a case where there have been two separate assessments to the land-tax, made by separate and conflicting bodies of commissioners. It appears to me that our jurisdiction under the act fails. If the land has been twice assessed by one body of commissioners, there must be a remedy by appeal. It is, however, quite enough to say that we have no jurisdiction.

GURNEY, B., concurred.

ROLFE, B. I am inclined to think that the act only applies to a case where land has been assessed by two distinct bodies of commissioners: for it enables the Court to order an issue to be tried, and to direct who shall be plaintiffs and defendants, as in a case under the Interpleader Act, which seems to imply that there must be two sets of commissioners, each claiming a right to rate the property.

Rule discharged.

EX PARTE BLACKHURST. Exch. of Pleas. 1840.—A person admitted and practising as an attorney in the Court of Common Pleas at Lancaster, previously to the rule of Easter Term, 6 Will. 4, is not entitled to be admitted in the superior Courts at Westminster, without being examined and giving the usual notices, &c.

[S. C. 8 Dowl. P. C. 770; 9 L. J. Ex. 229; 4 Jur. 611.]

R. V Richards applied to the Court that Mr. Blackhurst, an attorney of the Court of Common Pleas at Lan- [694] -caster, might be admitted an attorney of this Court, without the examination required by the rules of Easter Term, 6 Will. 4; or, if not, that he should be examined immediately, without going through the form of making the usual affidavits, depositing his articles of clerkship, giving notice, &c. It appeared from the affidavit on which he moved, that the applicant had been admitted and was practising as an attorney of the Common Pleas at Lancaster before the late rules were promulgated. In *Ex parte Parry* (1 M. & W. 295), it was held, that an attorney who had been admitted in another Court was entitled to be admitted in this Court as of course, without giving any notice or undergoing any examination. There the attorney, having been originally admitted an attorney of the Court of Great Sessions in Wales, on the abolition of the Welsh judicature was admitted an attorney of this Court and the Court of King's Bench; he had afterwards discontinued practising, and ceased to take out his certificate for some years, but had since been re-admitted an attorney of the Court of King's Bench; and the Court were of opinion that he was clearly entitled to be re-admitted in the Exchequer without examination. He also cited *Ex parte Yates* (2 M. & Scott, 618; 1 Dowl. P. C. 724).

LORD ABINGER, C. B. The rule is founded on an act of Parliament, the language of which is too plain to be misunderstood, and which requires a party to be examined before he can be admitted in one of the superior Courts; and the rule cannot be dispensed with, unless the party has been previously admitted an attorney of the superior Courts.

Rule refused.

[695] LAUGHTON v. TAYLOR. Exch. of Pleas. 1840.—The Court of the mayor of the borough of Liverpool is an inferior and not a superior Court; and therefore a plea that there is another action pending for the same cause in that Court, is no answer to an action in the superior Courts.

[S. C. 10 L. J. Ex. 57.]

Debt for goods sold and delivered. Plea as follows :—The defendant, by Thomas Sherwood, his attorney, prays judgment of the said writ and declaration, because he says, that before the issuing of the writ in this action, and before the plaintiff's declaring thereupon, to wit, on the 19th day of December, 1839, the plaintiffs, at the borough of Liverpool, in the county of Lancaster, impleaded the defendant in the Borough Court of Liverpool, then and there held before the mayor of the said borough of Liverpool, and thereupon then and there declared against him in the said Court, for the nonpayment of the very same identical debt sought to be recovered in this action, as by the record thereof more fully and at large appears; and the defendant further says, that the parties in this and the said former suit are the same, and not other or different persons, and that the said identical debt accrued to the plaintiff within the jurisdiction of the said Borough Court of Liverpool, to wit, at the borough of Liverpool aforesaid, in the county of Lancaster aforesaid, and before the commencement of the said suit in the said Borough Court of Liverpool, to wit, on the 4th day of December, A.D. 1839; and that the said Borough Court of Liverpool had in every other respect full power and jurisdiction to entertain, hear, and determine, the said last-mentioned suit, to wit, at the borough aforesaid, in the county of Lancaster aforesaid; and the defendant further says, that the said former suit, so commenced and prosecuted against him the defendant by the plaintiffs as aforesaid, is still depending and undetermined; and this the defendant is ready to verify; and therefore he prays judgment of the said writ in this suit, and the declaration thereon founded, now pleaded to, and that the same may be quashed.

Special demurrer, assigning the following causes :—[696] First, that the pendency of an action in an inferior Court cannot be pleaded to an action in a superior Court; Secondly, that if the defendant relies on the inferior Court being a Court of record, he ought to have averred that it is a Court of record; Thirdly, that it is not sufficient to plead that the matters are within the jurisdiction of an inferior Court, but that the nature of the jurisdiction ought to have been stated, and it ought also to be stated how such a Court was established, and how it obtained its jurisdiction, in order that the plaintiffs might take a traverse thereon: Fourthly, that the superior Courts cannot take judicial cognizance of there being such a Court as the Borough Court of Liverpool, and that the plea does not sufficiently inform the Court of the legal existence of such a Court as the said Borough Court; Fifthly, that it ought to be stated whether the Borough Court is the Court of our Lady the Queen, or whose Court it is; Sixthly, that the defendant ought to have stated that he was ready to verify the matter of record by the record, and that the mere reference to the record is not sufficient; Seventhly, that the plea ought to have stated where the action is still depending; Eighthly, that it is not sufficiently shewn that the said Borough Court was properly held before the said mayor, the constitution of the said Court not being averred; Ninthly, that the plea ought to have shewn how the action in the Court below was commenced, whether by levying a plaint, or how otherwise, and that such mode of impleading was according to the custom of the Court; Tenthly, that it is not averred that the Court was holden within the limits of its jurisdiction; Eleventhly, that the name of the mayor is not stated. Joinder in demurrer.

Hoggins, in support of the demurrer. The plea is bad. In Com. Dig., Abatement, (H. 24), it is said that "it is no plea to a writ in C. B., or other Court of Westminster, that there is another suit pending for the [697] same cause in an inferior Court, as in London, Norwich, &c." The same point was also decided in *Brinsley v. Gold* (12 Mod. 201). So, in *Sparry's case* (5 Co. 61 a.), it is said, "if a man bring an action of debt in London or Norwich, or in any inferior Court, and afterwards bring an action of debt in the Common Pleas, this suit in the higher Court, which is brought pending the suit by bill in an inferior Court, shall not abate, as appears in 7 Hen. 4, 8 a., and 3 Hen. 6, 15 a., b. So, in *Seers v. Turner* (2 Ld. Raym. 1102), where to an action for assault, battery, and false imprisonment, where the defendant pleaded in abatement

the levying of a plaint for the same cause of action in the Marshalsea, which plaint was in due manner removed into the Court of King's Bench by habeas corpus, where it was still depending; the Court overruled the plea, Holt, C. J., saying, "a habeas corpus does not move the cause out of the inferior Court, the cause is stayed below; but a plaint pending in an inferior Court is no plea to an action brought in the Courts at Westminster." Another objection to the plea is, that it does not state before whom the Court was held. The act for amending the proceedings and practice of the Court of Passage of the Borough of Liverpool, (4 & 5 W. 4, c. 92), enacts that the Court may be held before the mayor and one bailiff, or before the mayor alone, or two bailiffs only. The plea, therefore, ought to have shewn that the Court was properly constituted so as to have jurisdiction over the cause.

Godson, *contra*. It may be doubtful whether the Borough Court of Liverpool is to be considered as an inferior Court. The act of 4 & 5 Will. 4, c. 92, has been amended by 6 & 7 Will. 4, c. 135; by the second section of which it is enacted, "that no bailiff of the said borough shall henceforth be or form part of the said Court, but that the [698] Court shall be the Court of the Mayor of the Borough of Liverpool, and that in all cases it shall be sufficient to state any pleadings or proceedings to have been had before, or any judgments to have been given by or to have passed by the consideration of, or any Court to have been held before, the mayor of the borough of Liverpool, by the name of the mayor of the borough of Liverpool, without stating his christian or surname, and without noticing any change or changes of the person or persons filling the office of mayor." Thus, though not in the strict sense a superior Court, yet the process and proceedings, as regulated by this act of Parliament, resemble those of a superior rather than an inferior Court. Execution issued out of it may be levied in any part of the kingdom. A cause depending in an inferior Court may be removed to a superior, but from this Court it cannot. It may be compared to the Courts of the counties palatine. In Bacon's Abr., Courts (D.), superior Courts are divided into Courts more principal and Courts less principal. Of the latter description were the Courts of the counties palatine. This may be considered a Court of a similar nature.

LORD ABINGER, C. B. All that the act of Parliament says, is that the Court shall no longer be held before the mayor and bailiffs, but before the mayor alone; that does not constitute it a superior Court. There are many acts of Parliament to regulate the proceedings of inferior Courts, but they do not therefore make them more than inferior Courts. With respect to the Courts of the counties palatine, they were the King's Courts.

The other Barons concurred.

Judgment for the plaintiff.

[699] BELL v. THE HULL AND SELBY RAILWAY COMPANY. Exch. of Pleas. 1840.—By the Hull and Selby Railway Act, 6 Will. 4, c. lxxx. s. 69, it is provided, "that where any part of any carriage, horse, or foot road, railway or tram road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, &c., and for transporting, &c., of goods and merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low water mark the defendants constructed their railway, (in the line prescribed by the act of Parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous:—Held, that the plaintiff's wharf was thereby injured within the meaning of this section, (which was not confined to an injury done bodily to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendants, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's

jury to assess the sum payable for any future temporary or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act.—Under what circumstances proprietors of the railway, who had parted with their shares in order to become witnesses for the defendants, were competent, *quære*.

[S. C. 2 Railw. Cas. 279; 9 L. J. Ex. 213: in equity, 1 Railw. Cas. 616.]

This was an action on the case, brought in pursuance of an order of his Honour the Vice-Chancellor. The declaration stated, that the plaintiff, before and at the time of the passing of an act of Parliament of the 6 Will. 4, intituled, “An Act for making a Railway from Kingston-upon-Hull to Selby,” (6 Will. 4, c. lxxx.), had been, and still was, lawfully possessed of and entitled to a certain wharf, situate upon the river Humber; and that the defendants, in the exercise of the powers by the said act granted, so much injured the said wharf, as to render and cause the same to be inconvenient, and wholly unfit and useless for transporting, conveying, landing, shipping, and depositing goods and merchandize from, to, and at the said wharf: yet the defendants did not nor would, at their own expense, cause another good and sufficient wharf to be set out and made instead thereof, as convenient for transporting, conveying, landing, shipping, and depositing of goods and merchandize, as the said wharf so injured as aforesaid, or as near thereto as might be.

Pleas—first, not guilty (by statute); secondly, that the plaintiff was not lawfully possessed of the said wharf in the declaration mentioned; on which issues were joined.

[700] The cause was tried before Coleridge, J., at the last York assizes, when it appeared that the plaintiff was the owner of a wharf adjacent to the river Humber, in the town of Hull. The defendants, in pursuance of the powers granted to them by their act of Parliament, constructed a railroad on the foreshore of the Humber, between the plaintiff's wharf and low water mark. Before the construction of this railway, vessels were able to lie alongside the wharf, and there take in their cargoes; but by the intervention of the railway they were prevented from doing so, and could only be loaded at great inconvenience, and sometimes at risk to the cargoes. Compensation had been awarded to the plaintiff by a jury empannelled under the 26th section of the act,^(a) who took into consideration the value of the land, the increased expense necessary to carry on the business of the wharf, and the damage likely to be done to the goods shipped from the wharf. The plaintiff, however, insisted that he was entitled to have a new wharf constructed for him by the Company, under the 69th section of the act.^(b) No part of his land was [701] cut through, unless the foreshore of the river could be considered as belonging to him.

(a) Which empowers a jury (summoned and empannelled as therein mentioned) to assess damages in respect of the value of the land taken, “and also the sum of money to be paid by way of satisfaction, either for the damages which shall before that time have been done or sustained as aforesaid; or for the future temporary or perpetual, or for any recurring damages, which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said company; which satisfaction or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid.”

(b) Which enacts, “that in all cases in which, in the exercise of any of the powers thereby granted, any part of any carriage, horse, or foot road, railway or tram road, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the said Company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication (as the case may require) to be set out and made instead thereof, as convenient for passengers, cattle, and carriages, and for transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the said road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be.

The defendants called as a witness, at the trial, one James Walker, one of the proprietors incorporated by name in the act of Parliament. He was examined on the voir dire, and stated in substance, that he had 230 shares in the railway; that having been requested to transfer them, for the purpose of being qualified as a witness, he had transferred them to a Mr. Parker: that nothing was said about their being returned, although he believed there was an understanding to that effect: that he considered the return of the shares to depend on Mr. Parker's honour, but that he would have taken proceedings to compel the re-transfer of them. The learned Judge, considering the transfer of the shares to be merely colourable, rejected the witness as being still interested. He also rejected four other witnesses who appeared to stand in nearly similar circumstances with the witness Walker. And his lordship left three questions to the jury: first, whether the defendants had given the plaintiff as good a communication as he had before: secondly, whether he had already received compensation in respect of his present claim: and thirdly, whether the plaintiff was entitled to the foreshore in front of his wharf. The jury found the first two questions in the negative, and the third in the affirmative; and the verdict was thereupon entered for the plaintiff, with nominal damages.

In Easter Term, Starkie obtained a rule to shew cause [702] why a nonsuit should not be entered, on two grounds: first, that the 69th section of the act did not, under the circumstances, impose on the defendants the obligation of making a new wharf for the plaintiff, but only of making for him an equally commodious communication to the old wharf: and secondly, that Walker was improperly rejected as a witness. In this term,

Cresswell, Alexander, and Martin, shewed cause. The plaintiff is clearly entitled to a new wharf, under the 69th section of the act of Parliament; his "communication" has been "injured," and rendered "inconvenient for the shipping of goods and merchandize," within the very words of that section. It is not necessary for this purpose that any portion of his soil should have been actually cut through or taken away; it is sufficient, if the access to his wharf has been made either impassable or inconvenient by the construction of the railroad. Secondly, the witness Walker was rightly rejected, as being interested in the result of the suit. Although he had transferred his legal interest in his shares, he still retained, under the circumstances admitted by him, an equitable interest in them: the transferee would be a trustee for him, and would have been enjoined by a decree in equity to retransfer the shares to him. But further, it was a matter for the decision of the Judge at Nisi Prius, upon the facts elicited on the voir dire, whether the witness retained an interest in the shares, which rendered him incompetent; and even if he has come to a wrong conclusion upon them, it is a question whether the Court above can review his opinion. [Alderson, B. The point could not be raised by a bill of exceptions, but surely it may on a motion for a new trial. Suppose a Judge at Nisi Prius were to decide that certain facts amounted to a sufficient search for a document, to let in secondary evidence of its contents; if the Court above should think those facts did not constitute a sufficient [703] search, would it not be competent to them to overrule the decision of the Judge?] But the authorities shew that a deed executed for such a purpose as this was, is invalid altogether. In *Birch v. Blagrove* (Ambl. 264), a conveyance made to avoid being sheriff of London, was held to be wholly inoperative. *Ward v. Lants* (Prec. in Chan. 182), is to the same effect. The party may not, indeed, be competent to set up his own fraud to avoid his own deed; *Doe d. Roberts v. Roberts* (2 B. & Ald. 367); but here the objection comes from a third party, against whose interest the colourable deed is used. In *Parker v. Whithy* (Turn & Russ. 366), a person who admitted that he conceived himself bound in honour, though not legally, to contribute to the expenses of a party to the suit, was held nevertheless to be a competent witness for that party; but there there clearly was no interest, either legal or equitable.

Sir W. W. Follett, Starkie, Baines, and R. C. Hildyard, contra. First, the reasonable construction of the 69th section is, that the word "injured" should be construed with reference to the preceding words, "cut through, raised, sunk, taken," all of which are applicable only to the case where the property of the party is taken or affected by some bodily injury done directly to itself. The general class to which the remedy provided by that section is to apply, is an intercepted communication—the previous words, "road, quay, wharf, slope," are only instances of such communication. Here,

the wharf itself is not cut through, raised, sunk, or taken; neither is it injured, in the sense in which that word is used in this clause, viz. with relation to an injury by some bodily act, as it were, done by the thing itself which is the subject of complaint; it is only the communication to the wharf, along the foreshore, which is so injured. The plaintiff, therefore, is not entitled to have a new wharf constructed for him, but only to have [704] his intercepted communication thereto restored to its former state of convenience. That which is the subject of restoration, is the thing to which the actual bodily injury is done. The line of this railway is fixed by act of Parliament; and it would be very unreasonable to compel the company to erect a new wharf, where the present wharf is untouched, and the access to it only is affected by the railway. The plaintiff's remedy for the loss sustained thereby is provided by the 26th section, under which he was bound to seek compensation: *Rex v. Pease* (4 B. & Adol. 30), *Rex v. London Dock Company* (5 Ad. & Ell. 161; 6 Nev. & M. 390).

Secondly, the witness was competent, inasmuch as he had, by the instrument of conveyance, divested himself of all interest in the shares, both legal and equitable. The point to be considered is the operation of the instrument in law, not the intention, still less the expectation, of the party in making it. The Court of Chancery would not direct a reconveyance of property transferred for the purpose of making the conveying party a witness, in fraud of a Court of justice. *Hawes v. Leader* (Cro. Jac. 270; Yelv. 196), and *Doe d. Roberts v. Roberts*, are clear authorities to shew that this deed was valid, as against the witness, as well in equity as at law.

Cur. adv. vult.

The judgment of the Court was delivered a few days afterwards by

LORD ABINGER, C. B. In this case the plaintiff declared, that at the passing of an act of Parliament for making a railway from Hull to Selby, he was possessed of a wharf on the river Humber; that the defendants, the proprietors of the railway, so injured this wharf as to render [705] it inconvenient for the landing and shipping of goods, and that they had refused to make and set out for him another wharf instead thereof, as convenient for the landing and shipping of goods as the one so injured. To this declaration the defendant pleaded, first, not guilty (by the statute); secondly, that the plaintiff was not possessed of the wharf as of his own property. On the latter issue, the plaintiff is clearly entitled to a verdict; but the main question in the case arises on the general issue. This point depends on the construction to be put upon the 69th section of the act of Parliament in question, the 6 Will. 4, c. lxxx. It was contended for the defendants, on the argument, that the injury to the wharf which was, under that clause, to be compensated by the erection of a new wharf, must be an injury done by acts ejusdem generis with those specifically mentioned in the clause—such as by “cutting through, raising, sinking, or taking away” the wharf itself, and must have reference to some bodily injury done directly to the wharf. We think, however, that such is not the right construction of the act. A liberal interpretation ought to be put upon clauses of this kind. The plaintiff's wharf has been rendered comparatively inaccessible, and its usefulness for the landing and shipping of goods nearly destroyed, by the railroad which now cuts it off from the river: and it would surely be putting a most unreasonably strict construction on the act of Parliament, to say that the wharf is not thereby very considerably injured. The 26th section of the act does not afford the plaintiff the remedy he requires and is entitled to. If the case, therefore, rested here, the plaintiff would, on the construction which we think the act of Parliament ought to receive, be entitled to have the verdict entered for him on the first issue. The next question is, how far the case is altered by the alleged compensation obtained by the plaintiff before the sheriff. That question, however, does not arise on these pleadings. The case would [706] have been different, if the defendants had paid a shilling into Court, and pleaded that the plaintiff had sustained no further damage: as it is, there is no issue which raises the question. The last point is as to the rejection of the evidence of certain of the proprietors of the railway. The principle of law relating to this point is clear enough; the only difficulty is its application to the present case. If the witnesses have really parted with all legal and equitable interest, they are competent; otherwise they are not. Now this fact is left in some degree of ambiguity on the notes of the learned Judge. Some of the witnesses appear to have parted with one interest, others with both. Why they should have been tendered as witnesses it is difficult to see, because their evidence does not appear to be capable of throwing any light upon the construction

of the act of Parliament. Upon the whole, however, as there appears to be a doubt whether the witnesses, or at least all of them, were properly rejected as incompetent, we think the rule must be absolute for a new trial.

Rule absolute.

[707] THE EDINBURGH, LEITH, AND NEWHAVEN RAILWAY COMPANY v. HEBBLEWHITE. Exch. of Pleas. 1840.—By the Edinburgh and Leith Railway Act, 6 & 7 Will. 4, c. cxxi., s. 50, it is provided, that in actions by the Company for calls, it shall be sufficient to allege, that the defendant, being a proprietor of so many shares, is indebted to the Company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the Company by virtue of this act, without setting out the special matter; and in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act. To a declaration in the general form given by this clause, the defendant pleaded pleas denying notice of the calls pursuant to the act, and concluding with a verification:—Held, that the allegation of notice, that being a fact necessary to be proved in order to entitle the plaintiffs to recover, must be taken to be impliedly contained in the declaration, by reference to the act of Parliament; and therefore that the pleas, being in denial of a matter necessarily implied in the declaration, ought to have concluded to the country and not with a verification, and were on that ground bad on special demurrer.—Sembles, that in such case, the plea of not indebted would sufficiently put in issue all the matters required by the act to be proved in support of the action.—By another section of the act, (s. 49), the directors were empowered to make the calls in manner therein mentioned, and to sue for them, in case of nonpayment, by action of debt; or otherwise, in their option, the proprietors neglecting to pay the same should forfeit all their shares for the benefit of the Company: provided, that no advantage should be taken of any such forfeiture, until notice thereof given to the proprietor in manner therein mentioned, nor unless the same should be declared to be forfeited at some general or special meeting of the Company within six months after such forfeiture should happen, which declaration should ipso jure be a forfeiture of the shares. To an action of debt for calls, the defendant pleaded, that by reason of having neglected to pay calls on his shares, they were, in pursuance of the act, declared by the directors to be forfeited, and the directors exercised and declared their option, according to the act, that the same should be forfeited, and the same then became and were forfeited, of which the defendant had due notice, and acquiesced in the forfeiture:—Held, on special demurrer, that the plea was bad, for not shewing that the shares were declared to be forfeited at a general or special meeting of the Company, according to the provision of the act.

[S. C. 8 Dowl. P. C. 802; 2 Rail. Cas. 237.]

Debt for two calls of £2 each, upon forty shares in the above Company, of which the declaration stated the defendant to be the owner and proprietor, the declaration being in the general form given by the act of Parliament, 6 & 7 Will. 4, c. cxxi. s. 50.(a) Pleas—first, that [708] the defendant was not nor is indebted in manner

(a) Sect. 50. "In any action or suit brought by the said Company, in the manner hereinafter directed, against any proprietor or proprietors of any share or shares in the said Company, to recover any sum or sums of money due and payable to the said Company, for or by reason of any call or calls made by virtue of this act, it shall be sufficient for the said Company to declare and allege, that the defendant or defendants, being a proprietor or proprietors of such or so many share or shares in the said Company, is or are indebted to the said Company in such sum or sums of money, upon such or so many share or shares belonging to the defendant, as the case may happen to be, whereby a right of action or suit hath accrued to the said Company, by virtue of this act, without setting forth the special matter; and in such action or suit, it shall be only necessary to prove that the defendant or defendants, at the time of making such call or calls, was or were a proprietor or proprietors of some share or

and form, &c. ; secondly, that no notice of the respective calls in the declaration mentioned, or of any part thereof, was given in manner and form as required by the said act of Parliament :—verification ; thirdly, that the directors did not appoint any time or times or manner for the payment of the said calls, or any of them, nor any bank or bankers at which or to whom the same, or any of them, might or were to be paid, as in and by the said act in that behalf directed :—verification ; fourthly, that before the commencement of this suit, to wit, on the 13th of December, 1839, by reason of the defendant, as such proprietor as aforesaid, having neglected and refused to pay his rateable and proportionable share of money called for in respect of the said respective shares, according to the said act of Parliament, being the said calls in the declaration mentioned, for the space of two calendar months and more, theretofore elapsed after the time in that behalf fixed for payment thereof, the said shares in the declaration mentioned were and each of them was, in pursuance of the said provisions of the said act of Parliament in that behalf, declared by the directors of the said Company to be forfeited ; and the said directors then exercised and declared their option, according to the said act of Parliament, that the same should be forfeited, and the same respectively, to wit, then became and were forfeited, of which the defendant, to wit, then had due notice, accord-[709]-ing to the said act of Parliament and the provisions thereof, and, to wit, then assented thereto and acquiesced in the said forfeiture :—verification ; fifthly, that this action was commenced after a certain sale and transfer of the said respective shares theretofore made by the defendant, the then proprietor thereof, without his having paid or discharged divers large sums of money, amounting in the whole to a large sum of money, to wit, £100, which had theretofore, and before such sale and transfer, been duly called for upon the said respective shares, and upon each of which said respective shares there was at the time of such sale and transfer a large sum of money, part of the sum of £100, respectively due, and that such sale and transfer was made after the passing of the act of Parliament in the declaration mentioned, and before the passing of another act of Parliament concerning the said Company, passed the 1st of July, 1839, to wit, on the 1st of September, 1838, whereby, and according to the said first-mentioned act of Parliament, the same shares became and were forfeited ; of all of which premises the plaintiffs, to wit, on the said 1st of September, 1838, had notice, and the said forfeiture in this plea mentioned was, to wit, then, in all respects duly ratified and declared, in the manner in the said first-mentioned act of Parliament in that behalf directed :—verification.

Special demurrer to the 2nd, 3rd, 4th, and 5th pleas: assigning as causes of objection to each of them, “that it amounts to the general issue, and ought to have concluded to the country, and is neither a denial, nor a sufficient nor proper confession and avoidance, of any matters in the declaration mentioned, &c. ;” and, in addition, to the 4th and 5th pleas respectively, “that it is an informal and improper denial of the averment in the declaration, that the defendant was the owner and proprietor of shares in the Company, as therein alleged, and that the plea does not state that the said shares were declared to be forfeited at [710] any meeting of the said Company, general or special, after such forfeiture was made.”

Cowling, in support of the demurrer. All the pleas are bad, as amounting to the general issue, and also as not being either in denial, or in confession and avoidance, of any matter alleged in the declaration. The second plea states in substance, that no notice of the calls was given. But notice is a fact which must be shewn in evidence by the plaintiffs, in support of their case. The statute 6 & 7 Will. 4, c. exxi., s. 50, gives a general form of declaration for calls ; but it is nevertheless a necessary part of the proof on the part of the Company, under the plea of *nunquam indebitatus*, that the several conditions precedent, specified in the 49th section,(a) have been

shares in the said Company, and that such call or calls was or were in fact made, and that such notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call or calls, or other matters whatsoever, and the said Company shall thereupon be entitled to recover the said call or calls which shall appear to be due, and the legal interest which shall be due thereon, and the expenses that may be incurred in prosecuting for and recovering the same.”

(a) Section 49. “The said Company shall have power from time to time to make such call or calls of money from the present or any future proprietors, their heirs, &c., according to the amount of their respective interests, shares, and subscriptions already

com-[711]-plied with. In the case of *The London and Brighton Railway Company v. Wilson* (6 Bing. N. C. 135), the defendant sought to plead a similar plea to the present, but the Court refused to allow it, Tindal, C. J., saying, that the plea of never indebted called upon the plaintiffs, before they had any right to say such debt was recoverable, to prove the condition precedent as to notice, which the act of Parliament had imposed upon them. The act having expressly dispensed with certain allegations which must otherwise have appeared upon the face of the declaration, of which this as to notice is one, the defendant ought not to put upon the [712] record a plea professing to traverse a fact which is not alleged. In an action for goods sold and delivered, it would clearly be a bad plea to say that the goods were not sold or delivered. So here, the material fact in dispute is, whether, under the circumstances, the defendant is indebted for calls; and the prior circumstances on which that fact depends, are in the nature only of inducement. It is difficult to say whether the plea professes to be pleaded in denial, or in confession and avoidance: if in denial, it is bad for concluding with a verification, and not to the country; if in confession and avoidance, it is also bad, because, instead of confessing a right of action, it denies it, by shewing that no debt ever accrued by reason of the want of notice. [Lord

belonging to or subscribed for, or hereafter to belong to or be subscribed for by him, her, or them, for the purposes of this act, as the directors of the Company shall from time to time deem necessary for those purposes, payable on such day or days as shall be fixed by the said directors, due notice of which shall be made to the proprietors by advertisement in one or more of the newspapers published in Edinburgh, giving not less than fourteen days' notice, or by a letter put into the post-office, signed by the secretary or other officer or person or persons appointed by the directors; but so as no call shall exceed the sum of two pounds for every twenty pounds on the sum or sums so subscribed, and so as no call to that amount be made but at any interval of three calendar months, at least, from the preceding call; which money so called for shall be paid to such bank or bankers, and in such manner, as the said directors shall from time to time appoint and direct for the purposes of this act, and the said calls shall bear interest from and after the periods of payment so fixed until payment; and in case such proprietor or proprietors shall neglect or refuse to pay his, her, or their rateable or proportionable part or share of the said money, to be paid for as aforesaid, and interest thereon, for the space of two calendar months after the time or any of the respective times fixed for payment thereof as aforesaid, then, and in every such case, the same, with interest due thereon, and costs of suit, may be either sued for and recovered by the said Company in the manner after directed, in the Court of Session, or in any competent Court or Courts in Scotland, or in any of his Majesty's Courts of Record at Westminster, or in the Court of King's Bench and Common Pleas at Dublin, as the case may be, or otherwise, in the option of the directors, such proprietor or proprietors neglecting to pay the same shall forfeit all his, her, or their respective share or shares of the said capital stock, or part or parts thereof previously paid, and interest, in the said Company, all which shall go to and be paid for the benefit of the said Company, and all such forfeited share or shares shall or may be sold by private contract or public sale for the most money that can be got for the same; and the said forfeited share or shares shall form part of the capital stock of the said Company: Provided always, that no advantage shall be taken of any forfeiture of any such share or shares, until notice of such intended forfeiture in writing shall have been previously given by the secretary, or other officer, person or persons, appointed by the directors, to the proprietor or proprietors of such share or shares, by a letter or notice put into the post-office or left at his, her, or their usual or last known place of abode, nor unless the same shall be declared to be forfeited at some meeting of the same Company, general or special, to be held within six calendar months next after such forfeiture shall happen to be made, which declaration shall ipso jure be a forfeiture of the said share or shares, and of all sums paid thereon, and all interest or benefit arising therefrom, and that without the necessity of any process of law to that effect; and in cases of such forfeiture, the same shall be an indemnification to and for every proprietor, so forfeiting all his or her share or shares, and interest as aforesaid, against all or every action or actions, suit or suits to be commenced, or other agreement between such proprietor or proprietors so forfeiting, and the other proprietors."

Abinger, C. B. The declaration is not sufficient without the aid of the act of Parliament; then is not the act substantially a part of the declaration? and if so, must it not be taken to have alleged notice? If that be so, then the plea ought to have concluded to the country. But it is submitted, that the performance of the conditions imposed by the statute is matter of evidence, which ought not to be traversed by the plea. The same observations apply to the third plea as to the second. The fourth and fifth pleas are bad, inasmuch as they go to shew that the defendant was not a proprietor at the time of action brought, and therefore that no right of action existed against him. The fourth plea is bad also for not averring that the directors exercised the option given them by the 49th section, and declared the shares to be forfeited at a general or special meeting of the Company.

Crompton, *contra*. In actions of debt on statute, there is, strictly speaking, no general issue. The pleading rules of Hil. T. 4, Will. 4, tit. "Covenant and Debt," provide, that "the plea of nil debet shall not be allowed in any action;" and "in actions of debt on simple contract, other than on bills of exchange and promissory notes, the de-[713]fendant may plead that he never was indebted in manner and form as in the declaration alleged, and such plea shall have the same operation as the plea of non assumpsit," &c. "In other actions of debt, in which the plea of nil debet has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. It is true, that in the present case, the facts denied by the pleas do not appear on the face of the declaration, but that is by reason of the provisions of the 50th section of the act; and there being no general issue in debt on statute, the defendant is compelled to shew them by plea. It is said the pleas should have concluded to the country. Where there are a direct affirmative and a negative, the plea ought, no doubt, to conclude to the country: Com. Dig. Pleader (E. 32); 2 Saund. 337, n. (1); 1 Saund. 103 a., n. (3). But it is also laid down, that where the defendant selects one out of many averments in a plea, he may traverse that fact, and conclude with a verification. Here, by the general form of declaration allowed by the act, great difficulty is thrown on the defendant: but as the plea discloses matter not before alleged, it properly concludes with a verification. The plea cannot be considered in denial, since it states a fact nowhere averred. [Alderson, B. Is it in confession and avoidance? It does not admit a debt.] It confesses the matter alleged in the declaration, and avoids it by shewing non-performance of the conditions precedent to the right to sue upon the contract. [Lord Abinger, C. B. This is an action of debt founded on the original contract between the parties, viz. to pay upon the calls being duly made. The clause which gives the form of declaration proceeds upon the contract between the parties. Is not this, therefore, debt on simple contract?] The statute does not declare it to be so; and by the 49th section, certain requisites are to be per-[714]-formed before the right of action accrues at all. Besides, no action of debt at common law would lie, because the parties are partners: it is therefore an action entirely given by statute. The pleadings are like those in an action on a recognizance of bail, where the defendant may plead *no ca. sa.* sued out against the principal, and the plaintiff replies by setting it out. [Alderson, B. Must not the declaration be considered as containing the averments which the 49th section requires to be proved, in order to sustain the action? If so, it would involve in it the fact of notice. But that section says nothing about the place of payment: therefore your third plea may, perhaps, be bad, and the second good.] With regard to the case in the Court of Common Pleas, the Court decided nothing as to the sufficiency of the pleas themselves, but only whether such pleas should be pleaded together. Then as to the fourth plea: that shews new matter, by disclosing the fact that the shares are forfeited, and therefore that the directors have no longer any right to sue for the calls upon them. The 49th section does not warrant any action after any step has been taken towards the forfeiture of the shares. It is said that the plea does not aver that the directors exercised their option as allowed by the 49th section, by declaring the shares forfeited at a general or special meeting: but that is a matter which is peculiarly within their knowledge, and need not, according to the rules of pleading, be averred by the defendant. The plea is sufficient, by stating that the shares were declared to be forfeited according to the act, that the directors exercised their option according to the act, and that the defendant had notice thereof, and acquiesced in the forfeiture.

Cowling, in reply. The argument on the other side, as to the first point, rests mainly on the supposition that there is now no plea of the general issue in debt on statute: [715] but it was decided by this Court in *Earl Spencer v. Swinwell* (3 M. & W. 154), that notwithstanding the new rules, nil debet is still a good plea to debt on a penal statute. [Alderson, B. That was a plea of nil debet given by statute.] If these pleas amount to a traverse, they ought to conclude to the country: and if the declaration impliedly states notice, then the pleas do amount to a traverse. The defendant ought to have traversed the main averment, of his being indebted. How then are they in confession and avoidance? It is inconsistent to say, by way of avoidance, that there was no notice; because the confession, admitting that the defendant was indebted, admits that there was notice. If there is a good confession, the avoidance is repugnant to it. The pleas, therefore, are either bad in confession and avoidance, because they avoid repugnantly to their confession; or bad as a traverse, for not concluding to the country.

LORD ABINGER, C. B. The Court were much disposed, in the course of the argument, to come to a different conclusion; but on consideration, we think there must be judgment for the plaintiffs on all the pleas. With respect to the fourth plea, it is clear that the directors have no right both to declare the shares forfeited, and also to sue for the calls; the proviso in the 49th section only allows them an alternative. But the question is, whether it is sufficiently alleged in the plea that the directors have exercised their option of declaring the shares forfeited. On looking closely into the act, it appears to me that there is no binding forfeiture, unless it be declared by the directors at a general or special meeting of the company, within six months. The plea not stating this, which is so distinctly required by the act, does not shew a sufficient defence to the action.

But the second plea has occasioned considerable doubt [716] and perplexity in the mind of the Court, principally from a desire to do justice to the defendant, and yet to respect the established rules of pleading. By the rules of pleading, a defendant cannot traverse any matter not alleged or necessarily implied in the declaration. On the other hand, it is equally clear that a plea in denial must conclude to the country. Now here the declaration does not allege notice of the calls, that being rendered unnecessary by the statute; and yet it is a fact material to the maintenance of the action. Then it is contended, that either the plea ought not to traverse a fact not alleged in the declaration; or that, if notice be a matter necessarily implied in the declaration, the plea ought to conclude to the country, and not with a verification. There is certainly great difficulty in reconciling the act of Parliament with the new rules. The fourth rule requires, that in actions of debt, in which the plea of nil debet has been hitherto allowed, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance. In this declaration, taken by itself, no matter of fact is alleged, except that the defendant is indebted in a certain sum for calls: but all the matters which are necessary to maintain that allegation are by the act required to be proved. The declaration would be bad at common law, and is only rendered good by the express enactment of the statute. It appears, then, that in order to make the declaration good, the act must be referred to, and it must be taken that the declaration includes all the facts necessary to be proved by the plaintiffs in support of it, and among them the averment of notice to the defendant. The case then falls within the fourth rule, which requires the defendant, in actions of debt other than simple contract, to deny some particular fact alleged in the declaration. If the declaration had contained an averment of notice, that would have been admitted, unless denied by the plea. The result is, that the plea ought to have con-[717]cluded to the country, and is therefore bad on that special ground.

The third and fifth pleas are in substance the same as the second and fourth, and it is therefore unnecessary to advert particularly to them.

ALDERSON, B. I quite agree. The difficulty in this case has arisen in a great measure from allowing the plea "that the defendant was not nor is indebted" together with the plea denying notice. The averment that the defendant is not indebted must be considered as supplied by denying all those facts which the statute has required to be proved as conditions precedent to the right to recover: but the proper mode of pleading is to traverse the allegation in terms. I cannot suppose, however, that the act intended to preclude the party from pleading specially matter of defence ex post

facto. If he be a proprietor—if the calls have been made in point of fact—and if notice have been given of them, he is liable to pay, and can have no defence except by matter subsequent; and that, as it seems to me, he may shew by plea.

With respect to the fourth plea, I think it does not contain a sufficient statement to amount to a defence, because it does not shew that the company, at a general meeting, have adopted the act of the directors in forfeiting the shares, which is necessary to make it binding on the company.

GURNEY, B., concurred.

Judgment for the plaintiffs.

[718] HILL v. MARSDEN. Exch. of Pleas. 1840.—The plaintiff alleged as an excuse for not making profert of a deed, that it was “in the possession of certain persons, to wit, J. B. H. & T. H., who before and at the time of the commencement of the suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant;” —Held, that this was not a sufficient excuse for the want of profert, as it did not allege that the party who had possession of the deed had refused to produce it.

[S. C. 8 Dowl. P. C. 756; 9 L. J. Ex. 262; 4 Jur. 633.]

Covenant on an indenture of lease, for not keeping in repair certain premises and furniture demised by the plaintiff to the defendant, pursuant to the covenant contained therein. The declaration stated that theretofore, to wit, on &c., by a certain indenture then made between the defendant of the one part, and the plaintiff of the other part, which said indenture, sealed with the seal of the defendant, being in the possession of certain persons, to wit, John Brooke Hyde and Thomas Hyde, who before and at the time of the commencement of this suit, and thence hitherto, have held and still hold the same by agreement theretofore in that behalf made between the plaintiff and the defendant, and which said deed, being so in the possession of the said John Brooke Hyde and Thomas Hyde, the plaintiff, before and at the time of the commencement of this suit, has been, and still is, unable to bring the same into Court here, the date whereof is the day and year aforesaid, the defendant did demise, lease, set, and to farm let &c.

Special demurrer, assigning for causes, that the plaintiff had not brought the indenture into Court, nor made any profert thereof, or alleged any sufficient excuse for not producing the same, or for not making such profert, and that the excuse alleged was insufficient and bad; that it was not shewn what were the terms of the agreement, or how the plaintiff was precluded from having, or unable to have possession of the said indenture, or how the said J. B. Hyde and T. Hyde were entitled, under such agreement, to retain the said indenture as against the plaintiff; and that the said declaration does not shew that, under the said agreement, the said indenture is not in the possession of the said J. B. Hyde and T. Hyde, to be delivered over to the plaintiff upon request, or upon the performance of [719] some act to be done by the plaintiff, and in his power to perform.

Wateley, in support of the demurrer, was stopped by the Court, who called upon Cowling to support the declaration. The excuse alleged is sufficient. It is always a sufficient cause for not making a profert, that the instrument is in the possession of a third person. The question is not whether the party in whose possession it is could be compelled by a subpoena duces tecum to produce it at the trial, but whether the plaintiff is unable to bring the deed into Court; and for that purpose it is enough to shew that it is in the hands of a third party. [Alderson, B. It does not appear from this declaration, that the parties who hold the deed have declined to produce it.] The defendant has the same power of procuring the deed, or of obtaining an inspection or copy of it, as the plaintiff has. The parties are not trustees for the plaintiff alone, and not for another; and when a deed is so in the possession of trustees, profert need not be made. It is a question of fact whether the plaintiffs were unable to produce it, and the defendant might have taken issue upon that. It is enough in the first instance to allege that the deed is in the possession of a third person, and the plaintiff is unable to produce it. An allegation that a deed is lost by time and accident, is a sufficient excuse for the want of profert; and though it afterwards turns up and is

found, it may be produced and given in evidence at the trial. It was so held in *Hawley v. Peacock* (2 Campb. 557), on the ground that the averment of the loss of the deed related to the time of the plea pleaded, and applied only to the excuse of the profert. [Lord Abinger, C. B. You say, "who hold the same by agreement:" it may be that they hold it as your agents.] [720] It is admitted that if it had appeared that it was in the hands of the plaintiff's agent or attorney, it would not be enough: but the allegation here is general, that it is in the hands of a third party, which is sufficient. The plea that a deed is lost by time and accident, does not state how lost.

Wheatley, contra, cited *Hallis v. Harrison* (4 M. & W. 538).

LORD ABINGER, C. B. It is quite a modern practice to plead that a deed is lost by time or accident, and the propriety of permitting it has frequently been doubted. The object of making profert is that the defendant may see the instrument on which the plaintiff relies. He is entitled to that as a matter of right; but here the plaintiff seeks to deprive him of it, by alleging that the indenture is in the hands of a third party, who does not appear to have refused to produce it, but over whom it is said the plaintiff and defendant have an equal control. The plaintiff, however, has no right to cast upon the defendant the burden of applying for the indenture. Suppose the case of landlord and tenant, where only one part of a lease has been executed, and deposited with an attorney for the benefit of both parties, would that circumstance excuse the party from making profert?

ALDERSON, B. It is laid down in *Dr. Leyfield's case* (10 Rep. 92), that profert ought only to be excused in cases of extreme necessity. Can we say that this is a case of extreme necessity?

Leave to amend on payment of costs, otherwise judgment for the defendant.

[721] WILSON AND WIFE v. THORPE. Exch. of Pleas. 1840.—Where, on the trial of a cause before the sheriff, under the Writ of Trial Act, a verdict was by consent taken for the plaintiff, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the Court set aside the verdict and judgment, though not the award, on the ground that the sheriff was bound to try the cause, and could not delegate his authority to another.

[S. C. 9 L. J. Ex. 232.]

At the trial of this cause before the sheriff, upon a writ of trial, a verdict was taken for the plaintiff with one shilling damages, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party. The arbitrator having made his award, and having ordered a verdict to be entered for the defendant, that was accordingly done, and judgment signed thereon. A rule having been obtained, calling upon the defendant to shew cause why the award, and the verdict and judgment, should not be set aside,

F. Robinson shewed cause, and contended that the parties had full power to refer upon any terms they chose, and that there was nothing to prevent them from consenting to a verdict being entered. He compared it to the case of a special verdict being taken by consent in an ordinary trial at Nisi Prius.

LORD ABINGER, C. B. The sheriff cannot delegate his authority. He was bound to try the cause under the writ of trial, and had no authority to refer it so as to give power to alter the verdict and judgment. The verdict and judgment must be set aside, but not the award.

ALDERSON, B. The 18th section of 3 & 4 Will. 4, c. 42, says, that "the sheriff or his deputy, or judge presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at Nisi Prius;" but that does not give him all the powers that a judge at Nisi Prius has. The sheriff had no authority to give power to another to alter the verdict of the jury. It would be very inconvenient [722] nient that a sheriff should have power to order a reference of cases sent to be tried before him, when the object of sending cases to be so tried is, that, where they are of a nature so simple and of so small an amount, the parties ought not to be put to the expense of trying them before a judge at Nisi Prius, or to the expense of a reference.

Rule to set aside the verdict and judgment absolute.

JENKIN v. PEACE AND OTHERS. Exch. of Pleas. 1840.—In pleading a conveyance by lease and release, profert must be made of the release.

[S. C. 8 Dowl. P. C. 758; 10 L. J. Ex. 58; 4 Jur. 850.]

Trespass for breaking and entering certain closes of the plaintiff, and digging, making, and sinking divers mines, pits, and shafts therein, &c.

Plea, that the said closes in which &c., from time &c., have been, and still are, within and parcel of the manor of Aspall: and that one Sir William Gerard, Bart., now deceased, was lord of the said manor, and seised in his demesne as of fee of and in the said manor, and of and in divers tenements respectively situate and being within the said manor, comprising, amongst other things, the said closes in which &c.; and the said Sir William Gerard, being so seised, &c., long before the said first time when, &c., to wit, on the first day of April, 1678, by a certain indenture then made between the said Sir William Gerard, one Richard Gerard, and Thomas Gerard, son and heir apparent of the said Richard Gerard, of the one part, and John Anderton, &c., of the other part, bearing date on the same day and year last aforesaid, and sealed with the seal of the said Sir William Gerard, for and in consideration of five shillings, then therefore paid by the said John Anderton to the said Sir William Gerard, he the said Sir William Gerard did bargain and sell the said several tene-[723]-ments, comprising the said several closes in which &c., with the appurtenances, unto the said John Anderton, his executors, &c., to have and to hold the same, with the appurtenances, unto the said John Anderton, his executors, administrators, and assigns, from the day next before the date thereof, for and during the term of one whole year thence next ensuing, and fully to be completed and ended; by virtue of which indenture, and by force of the statute for transferring uses into possession, the said John Anderton became and was possessed of the said several tenements, with the appurtenances, for the said term so to him thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said Sir William Gerard, his heirs and assigns: and the said Sir William Gerard being so interested as aforesaid, and the said John Anderton being so possessed, afterwards, and long before the said first time when &c., to wit, on the 2nd day of April in the year last aforesaid, by a certain indenture then made between the said Sir William Gerard, the said Richard Gerard, and Thomas Gerard, of the one part, and the said John Anderton of the other part, bearing date the same day and year last aforesaid, and sealed with the respective seals of the said Sir William Gerard, Richard Gerard, and Thomas Gerard, he the said Sir William Gerard, for the considerations therein mentioned, did give, grant, bargain, sell, release, and confirm unto the said John Anderton, his heirs and assigns, all and singular the said several tenements, so comprising the said several closes in which &c., with the appurtenances, saving and except thereout unto the said Richard Gerard and Thomas Gerard, and their heirs, all mines of cannel lying and being within the said several and respective tenements and hereditaments, &c.: to have and to hold all and singular the said several tenements with the appurtenances, except as aforesaid, unto the said John Anderton, his heirs and [724] assigns for ever; and the defendants further say, that all the estate and interest of the said John Anderton of and in the said first-mentioned messuage and tenement, called &c., by divers mesne conveyances thereof, came to and vested in one Samuel Walker, &c.; and the defendants further say, that, after the making of the said last-mentioned indenture, and before the making of the indenture hereinafter next mentioned, to wit, &c., the said Richard Gerard died, leaving the said Thomas Gerard his son and heir him surviving; and that he the said Thomas Gerard, being seised of and in the said manor, and of and in the said mines of cannel, and entitled to the liberties in that behalf aforesaid, after the death of the said Richard Gerard, to wit, on the 5th day of June, in the year of our Lord 1718, by a certain other indenture, &c., &c. [setting forth, in the same manner as before, other deeds of lease and release, whereby the manor, mines, &c., were conveyed by Thomas Gerard to Sir William Gerard, John Gerard, and Alexander Osbaldeston, and Nicholas Starkie, their heirs and assigns for ever.] The plea then set out other conveyances by lease and release, in similar terms, without profert, and justified the trespasses by the defendants, as the servants of the then owner of the mines.

Special demurrer, assigning for causes, that the defendants have not brought the said several supposed indentures and deeds of lease, and the said several supposed

indentures of release, in the said plea mentioned, or any of them, into Court, or made any profert thereof; and because the plaintiff, from the manner in which the said several supposed deeds and indentures are above pleaded, cannot have oyer of the same, that he might know whether they are or are not the deeds of the said parties therein mentioned, or that the said supposed matters were granted or conveyed therein or passed thereby; and because it does not appear by the said plea, whether the said [725] supposed indentures or deeds are actually destroyed, or whether they do not still exist, and are only lost or mislaid: and because no excuse is given for the not producing and making profert of the said supposed indentures and deeds, or any of them. Joinder in demurrer.

Cowling, in support of the demurrer. The plea is bad, for not making profert of the deeds of release set forth in it. The authorities all shew that profert is necessary in such a case. In Littleton, s. 452, it is said—"And note, every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as to him to whom the release was, if the tenant hath the release in his hand to plead." And again (s. 453)—"In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold; and they shall have as great an advantage of this, if they can shew it." In the last edition of Mr. Serjeant Stephen's Treatise on Pleading, (p. 470, 4th edit.), the rule is thus stated:—"In pleading a conveyance by lease and release, under the Statute of Uses, it is not necessary to make profert of the lease, because it is the statute that gives effect to the bargain and sale for a year, and the deed does not intrinsically establish the title. But in pleading the release, it would seem that profert ought to be made, as the same reason does not apply." The precedents are all in favour of making profert of the release. See 1 Lilly's Entr. 136; *Johns v. Whitley* (3 Wils. 134); *Jeffreson v. Morton* (2 Saund. 11). He also referred to Sanders on Uses, pp. 60 and 63. The Court here called upon

[726] Addison, contra. There are undoubtedly authorities to shew that it is necessary to make profert of a release, where it operates intrinsically by itself. [Alderson, B. It is laid down by Lord Kenyon, in *Bunfill v. Leigh* (8 T. R. 573), that profert is not necessary where a conveyance to uses or a feoffment is pleaded.] The cases are collected in 1 Saund. 8 b., where it is said—"Where a person pleads a deed operating under the Statute of Uses, there is no necessity of making a profert: citing *Estoff's case* (Dy. 227 a.); *Earl of Huntingdon v. Mildmay* (Cro. Jac. 217), *Stockman v. Hampton* (Cro. Car. 441), *Reynel v. Long* (Carth. 315; Sir W. Jones, 337), *Read v. Brookman* (3 T. R. 151), *Bolton v. Bishop of Carlisle* (2 H. Bl. 262). Now a conveyance by lease and release is one conveyance: and it is conceded that it is not necessary to make profert of the lease for a year. In *Bolton v. Bishop of Carlisle*, in setting forth a conveyance by lease and release, it was stated that the release was cancelled by the seal of the releasor being taken off and destroyed, and that part of the deed was destroyed or lost; with a profert of the residue. On demurrer, this was holden to be good pleading: and Heath, J. said—"As this is a conveyance deriving its effect from the Statute of Uses, all that is averred about the deed being destroyed is mere surplusage." The same learned Judge repeated the same dictum in *Onslow v. Smith* (2 Bos. & P. 384), where also the deeds pleaded were a conveyance by lease and release. [Alderson, B. The origin of that rule would seem to be, that a conveyance under the Statute of Uses being to A. to the use of B., B. would not be required to make profert, because A. would have possession of the deed. The reason given in *Reynel v. Long* is, that in such case B. is in by operation of law, and not by the deed.] The same reason is given in *Stockman v. Hampton* [727] The release derives all its authority and validity from the previous bargain and sale for a year, which, as is stated in the plea, operates by force of the statute for transferring uses into possession.

Cowling, in reply. The rule laid down in the authorities referred to on the other side, is not disputed; but it is contended that the deeds set forth in this plea do not operate under the Statute of Uses. There is no averment, as to the deeds of release, that they do so operate, but only as to the leases for a year, which are mere matter of form, and as to which it is immaterial whether they are seen by the Court or not. No doubt the lease and release constitute one conveyance as to the quantity of estate which passes by them; but not for the purposes of pleading. A party could not allege in pleading, that by a lease and release and fine, the estate passed. These are,

and appear on the face of the plea to be, deeds of release operating only at common law. They operate in the same manner, whether it be upon a bargain and sale for a year under the Statute of Uses, or upon a lease at common law. The lease for a year is only to give a legal possession, and create a privity of estate; but whether that arises so, or from actual possession at common law, is immaterial. Suppose it were merely averred that the party was in possession under a lease for one year, and thereupon a release was granted to him, would not profert be necessary? The decision in *Stockman v. Hampton* proceeded on the ground that the party pleading the deed had no right to the possession of it. But here, looking at the release only, who has the right to the deed? Clearly the party who claims title under it. The release operates, because the lease operates under the statute; but the release operates at common law. Here the releasees of Gerard are in at common law; the estate is released directly to them: they are in "in the per." *Stockman v. Hampton* was the case [728] of a covenant to stand seised: there the deed would be in the possession of the covenantors; there, also, the party was not in the per. The dictum of Heath, J., in *Bolton v. Bishop of Carlisle*, was unnecessary to the decision of the case, and is not confirmed by the other Judges.

Cur. adv. vult.

The judgment of the Court was delivered on a later day in the term by

LORD ABINGER, C. B. The question which the Court reserved for its consideration, is, whether this special demurrer, for want of profert of the deeds of release mentioned in the defendant's plea, can be supported; and, after consideration, we are of that opinion. The rule is laid down in *Dr. Leyfield's case* (10 Rep. 92), that "if he who is party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims parcel of the original estate, yet he ought to shew the original deed to the Court; and the reason that deeds, being so pleaded, shall be shewn to the Court, is, that to every deed two things are requisite and necessary: the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the Judges of the law; the other concerns matters of fact, se. if it be sealed and delivered as a deed, and the trial thereof belongs to the country; and therefore every deed ought to approve itself, and to be proved by others: approve itself to the satisfaction of the Court in three manners: 1st, as to the composition of the words, to be sufficient in law, and the Court shall judge that; 2nd, that it be not raised or interlined in material points or places, and upon that also the Judges in ancient times did judge upon their own view the deed to be void, [729] but of late times have left that to the jury, if the raising or interlining were before delivery; 3rd, that it may appear to the Court, and the party, if it were upon condition, limitation, or with power of revocation, &c., to the intent that if there be a condition, &c., if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of it."

The plaintiff contends that these reasons are clearly applicable to the present case. It was, however, contended on the part of the defendant, that the law had recognised certain exceptions to this general rule, and that the present case fell within them.

These exceptions are mentioned by Lord Kenyon, in *Banfill v. Leigh* (8 T. R. 573), and by Mr. Justice Heath, in *Bolton v. Bishop of Carlisle* (2 H. Bl. 262); in the former case Lord Kenyon mentions feoffments and conveyances to uses, and in the latter Mr. Justice Heath mentions conveyances to uses, as not requiring profert. It is material to inquire, however, on what principles these exceptions depend. Thus, in the case of a feoffment pleaded, profert needs not be made: but the reason for this seems to be, that the estate does not pass by the feoffment, but by the livery and seisin, which Callis, p. 31, calls "the most perfect form of any by which the freehold and inheritance of lands is transferred from one to another;" and he adds, "where a feoffment is made, the lands there pass by the livery, and not by the deed." The shewing, therefore, of the feoffment to the Court, would not enable them to determine the right of the party, as suggested in *Dr. Leyfield's case*. The next exception, and that, in fact, on which the defendants rely, is that of conveyances under the Statute of Uses. And the reason for this seems to be given in *Stockman v. Hampton* (Cro. Car. 441) viz. that the party pleading has not possession of the deed, nor any means [730] to obtain it; and so accords the case of *Gray v. Fielder* (Cro. Car. 209), where, in debt on bond assigned by commissioners of bankrupt, profert was not made, and yet it was

held good, "because," say the Court, "he is in by act of law, and had no means to obtain the obligation."

These exceptions of deeds operating under the Statute of Uses probably, therefore, arose from the circumstance that such conveyances were in form conveyances to A. to the use of B., and so A., not B., was considered to have the possession of the deed; and consequently, when B. pleaded it, the Judges did not require him to make profert. Another reason is to be found in some cases, viz. that the party pleading is not in "in the per," which is, in fact, only another technical mode of expressing the same thing. If a man is in "in the per," he is in by the party executing the deed; if in "in the post," he is in by the party to whom the deed is executed. This appears from Vin. Abridgment, "Feoffment," (A. 4), who states it thus: "In the case of a feoffment at common law, the feoffee is in in the per, scilicet. by the feoffor; but in the case of a feoffment by the statute of 2nd Ric. 3, the feoffees are in in the post, viz. by the first feoffees." In such cases, therefore, those to whom the deed is executed are presumed by law to have the possession of the deed, and the others, to whose use they hold, not having the deed, cannot be required, when claiming under it by pleading, to make profert.

This, we think, is the true principle on which these cases were originally decided; but even if this were not so, and if they depend on the ground stated in some of the cases, that profert is not necessary in any case where the party claiming under the deed is in by operation of law, (which seems by no means a satisfactory reason, seeing that all deeds operate according to the law), yet either of these reasons is sufficient for the determination of the present case. For although the bargains and sales for a year, [731] as stated in these pleadings, are undoubtedly deeds operating by force of the Statute of Uses, and so profert of them would not be required to be made; yet the releases are deeds operating merely at common law, and in favour of the party to whom they are executed, and he is the person who, according to law, must be presumed to have the possession of them. If, therefore, the present defendants claim under them, they must at all events make profert of the release, in conformity with the rules laid down in *Dr. Leyfield's case*. We think, therefore, that the demurrer must be allowed.

Judgment for the plaintiff.

GREEN AND ANOTHER, Assignees of Ashley, a Bankrupt v. KETTLEBY. Exch. of Pleas. 1840.—The plaintiffs having brought an action of debt against the defendant, obtained a distringas and proceeded to outlawry. The defendant did not render to the sheriff on the exigent, but before the last proclamation entered an appearance, but without obtaining a supersedeas. The plaintiffs thereupon stayed all proceedings in the outlawry: but having another cause of action against the defendant on a special contract, commenced an action of assumpsit against him, and applied to his attorney to appear for him, which the latter refused to do. The plaintiffs then proposed to consolidate the two actions, by changing the first writ in debt into assumpsit, so as to include both causes of action in the latter. This the defendant refused to do, and kept out of the way to avoid being served with the writ. The Court refused to set aside the appearance to the first writ, or to allow that writ to be amended.

[S. C. 8 Dowl. P. C. 785; 9 L. J. Ex. 228; 4 Jur. 725.]

The plaintiffs having brought an action of debt to recover money owing to the bankrupt, had obtained a distringas for the purpose of proceeding to outlawry, and proceedings were accordingly taken. The defendant did not render to the sheriff on the exigent, but before the last proclamation, the defendant, without issuing a writ of supersedeas, entered an appearance in Court. The plaintiffs thereupon directed the sheriff to stay all further proceedings in the outlawry, and having another cause of action on a special contract, commenced an action of assumpsit against the defendant, and applied to his attorney to appear for him, which he refused to do. They then proposed to consolidate the two actions, by changing the first writ of debt into assumpsit, and to include the cause of action in [732] debt in the latter action; but this the defendant refused, and kept out of the way to avoid service of the writ.

Byles now moved for a rule, calling upon the defendant to shew cause why the

appearance entered in the first action should not be set aside, or why the writ issued in the first action should not be amended, by altering it from debt to assumpsit. The plaintiffs are entitled to the expenses incurred by them in the proceedings towards outlawry. The defendant should either have appeared in Court, or issued a writ of supersedeas. In *Peuch v. Wadland* (Barnes, 319), a defendant, against whom proceedings to outlawry had been commenced, gave notice to the plaintiff that he had appeared and obtained a supersedeas of the exigent; but on searching at the Compter it was found that there had been no allowance of the supersedeas, and the defendant was returned outlawed; which the Court refused to set aside. At all events, the Court will allow the writ to be amended. It is the practice to do so in cases in which the remedy would otherwise be lost; as when the Statute of Limitations would otherwise be a bar.

PARKE, B. We cannot accede to this application. The fault rested entirely with the plaintiffs themselves. Their proper course was to have gone on with the proceedings to outlawry. The proclamations require the defendant to appear in the County Court; if he does not appear there, the plaintiffs may go on with the outlawry. Had that been done, the defendant would have been compelled to come to the Court to set aside the outlawry, which we should not have allowed without his paying all the costs incurred. Then, as to amending the writ; this is not a case in which the remedy would otherwise be barred, and therefore is not analogous to the case of the Statute of Limitations. Amendments are allowed in those cases, [733] because otherwise the statute would operate as a bar to the plaintiff's cause of action. There are only two cases in which a writ is allowed to be amended: one is, where the Statute of Limitations would otherwise be a bar; the other, where there has been a clerical mistake in the writ (see *Kirk v. Dolby*, ante, 636).

The rest of the Court concurred.

Rule refused.

PAGE v. THOMAS. Exch. of Pleas. 1840.—In an action by the payee against one of three makers of a joint and several promissory note, another of the makers was called as a witness for the plaintiff, and stated on his examination on the voir dire, that the note had been given by the defendant as principal, and that it was signed by himself and the other maker as sureties:—Held, that the witness was competent.

[S. C. 9 L. J. Ex. 245; 4 Jur. 724.]

Assumpsit by the payee against one of three makers of a joint and several promissory note, with a count upon an account stated. Pleas, first, that the defendant did not make the note; secondly, the Statute of Limitations. At the trial before Maule, J., at the last assizes for the county of Pembroke, the note was produced, and was as follows:—

“Haverfordwest, May 9, 1832.

“Twelve months after date we jointly and severally promise to pay George Page, of Rosemary Farm, yeoman, or order, £100, with lawful interest on the same, at the rate of £5 per cent. per annum, value received.

“STEPHEN THOMAS.

“T. A. ALLEN.

“Witness, James Thomas.

“JOHN JENKINS.”

The attesting witness having denied his handwriting, the plaintiff, for the purpose of proving the making of the note, called J. Jenkins, one of the makers, who stated on his examination on the voir dire, that the note had been given by the defendant as principal, and was signed by himself and Allen (the other maker) as his sureties, and [734] that Allen had since become insolvent. On this statement it was objected that the witness was incompetent; but Maule, J., received the evidence, reserving leave to the defendant to move to enter a nonsuit. The jury found for the plaintiff for £125, principal and interest. There had been a part payment of the latter, which took the case out of the Statute of Limitations. Evans, in Easter Term last, obtained a rule to shew cause why a nonsuit should not be entered.

J. Wilson and E. V. Williams now shewed cause. It is clear both on principle and the decided cases, that the witness was competent, as he stands indifferent as to

the result of the action. The person ultimately liable is the defendant, whatever collateral remedies there may be in the case. The witness being only surety, in the event of his being compelled to pay the amount of the note, he could recover over against the defendant the amount so paid. The first case on this subject, and the foundation of all the other cases, was that of *Lockhart v. Graham* (1 Stra. 35), where there were three obligors, and the action was brought against one of them only, and the other obligor was allowed to be a witness to prove the execution of the bond by the defendant. That was not a mere *Nisi Prius* decision, but after conference with other Judges. In *York v. Blott* (5 M. & Selw. 71), which was an action on a promissory note made by the defendant and T. S., the plaintiffs called T. S., an uncertificated bankrupt, who proved the defendant's signature, and it was decided, on the authority of *Lockhart v. Graham*, that he was a competent witness. The reason given was, that if the plaintiffs recovered against the defendant, T. S. would be liable to him for contribution; if they failed in this action, they might resort to T. S. for the whole, and then T. S. would be entitled to contribution from the defendant, so that, quæcunque viâ, T. S. stood indifferent. [Lord [735] Abinger, C. B. Have you any case in which a surety has been allowed to be called against the principal? If the principal is compelled to pay, the surety ceases to be liable altogether.] The whole debt must ultimately be paid by the principal, and therefore the witness cannot have any interest whether it is paid immediately or circuitously. [Lord Abinger, C. B. Here, if the plaintiff succeeds, the witness gets scot free.] He must ultimately be scot free, whether he becomes so first or last. In *Blackett v. Weir* (5 B. & C. 385; 8 D. & R. 142), which was an action for coals sold and delivered to a steam yacht company, one Gibson was called to prove that the defendant had a share in the concern, and he proved on the voir dire that he himself was also a partner, and his evidence was objected to as interested; but Bayley, J., overruled the objection. A rule nisi for a nonsuit having been obtained, the Court of King's Bench, after argument, held that he was a good witness. Abbott, C. J., there says: "It is said that the witness had an interest: he had so; but it was his interest to defeat the plaintiff, for in the event of his recovering, the defendant would be entitled to contribution from the witness." Bayley, J., says: "To a certain extent he had an interest in obtaining a verdict for the defendant, for having admitted his own liability, he made himself liable to pay a proportion of the costs, as well as the debt, if the plaintiff recovered. The only difficulty arises from his proving a partnership with the defendant; but his testimony would not prove that in any other action; and if the defendant can hereafter make out that he was not a partner, I think that he may perhaps at law, and certainly in equity, recover from the witness all that he is compelled to pay in the action." And Holroyd, J., says: "It has been argued, that unless the defendant were fixed with a part, the witness might be liable to pay the whole debt. [736] But it appears to me, that the defendant would have a right to recover from the witness, in an action at law for money paid to his use, the whole sum recovered in this action, if he could shew that the witness was originally liable to pay it. That is the ground upon which all actions for contribution proceed." Littledale, J., also puts it on the same ground. In *Browne v. Lee* (6 B. & Cr. 689; 9 D. & R. 700), one of three co-sureties for the payment of an annuity paid money on account of the annuity, after the bankruptcy of a co-surety; and it was held that the latter was liable to an action for contribution, though he had obtained his certificate, as one surety would not prove the value of the annuity under the commission against his co-surety; but that he could not at law be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. [Lord Abinger, C. B. That was a case of sureties inter se.] So, in the recent case of *Fowler v. Round* (5 M. & W. 478), which was covenant on an indenture of lease against the administratrix of the assignee of the lessee, assigning breaches for non-payment of rent and non-repair; to which the defendant pleaded, that, by assignment during the continuance of the lease, the premises were assigned to the intestate and one Smallwood, and that Smallwood was still alive; which assignment was denied by the replication: it was held, that Smallwood was a competent witness for the plaintiff, to prove that he never accepted or acted under the assignment. The objection here taken seems to be, that the witness was interested in getting the debt satisfied in this action; but the same thing must happen where one co-trespasser is a witness for the plaintiff; yet he is competent. In Buller's *Nisi*

Prius, 286, it is said, "a particeps criminis may be a witness for the plaintiff, though left out of the declaration for that purpose; yet [737] this mightily lessens his credit, especially in trespasses, where satisfaction from one is a discharge for all the rest." [Lord Abinger, C. B. There is no contribution among co-trespassers.] Nor is there here, because the witness is a surety. In no possible case could the defendant sue the witness—the same as in the case of a co-trespasser. [Lord Abinger, C. B. In the case of a co-trespasser, there is no written evidence of the relation in which he stands.] But the objection equally applies, because when he is called, he must admit on the voir dire that he was a co-trespasser, in order to raise the point. This principle was fully recognised in *Hall v. Curzon* (9 B. & Cr. 646). There a shareholder of a company was admitted to prove that the defendant was also a shareholder, although it was objected that by so doing he would diminish the amount of his own contribution; and Lord Tenterden says, "The case is similar in principle to that of a co-trespasser. The recovery against one of several co-trespassers is a bar to an action against the others. In practice, the co-trespasser is constantly called to prove that he did the act by the command of the defendant." And there is this note to that case by the reporters—"In a plea in abatement, a party who according to the plea ought to be joined, is a competent witness for the plaintiff, but not for the defendant." The interest, therefore, that the witness has that this action should be maintained, is the same that any co-trespasser has, and he has been held competent. The Court are not to consider whether Allen was solvent or not; for if this action failed, and an action were brought by the plaintiff against the witness, and he recovered, the witness might bring an action against the principal, and recover the whole. The case of *Browne v. Lee* was that of a bankrupt, which was stronger. The witness was therefore clearly competent.

[738] Evans, in support of the rule. The cases which have been cited as to co-trespassers are distinguishable; for there there is no contract or liability for contribution, in the event of a verdict against one of them. In *Blackett v. Weir*, Holroyd, J., says, "But it appears to me that the defendant would have a right to recover from the witness, in an action at law for money paid to his use—." Now, to stop there, would this defendant have a right to recover against this witness? Most certainly not. Then he goes on to add—"the whole sum recovered in this action, if he could shew that the witness was originally liable to pay it." *York v. Blott* proceeds upon the same reasoning. But here this rule ought to be sustained, on the ground that the witness would free himself from an action by the plaintiff, if he enabled him to recover in this action. Nothing appears on the note as to principal and surety, but all are joint makers; and if the plaintiff failed, and brought an action against the witness, and recovered against him, he would only have his action for contribution against the other two makers for one-third each; and here Allen was shewn to be insolvent. The fact of there being three parties here, distinguishes this case from *York v. Blott*. Suppose these parties to be all jointly liable as joint makers of this note, the witness, by enabling the plaintiff to recover, would free himself, by his evidence, of one-third of the debt.

LORD ABINGER, C. B. I think this witness may be considered in the same light as an indorser, who is called as a witness in an action against the acceptor, to prove his handwriting. The witness in such a case has a direct interest in making the acceptor pay; but then if he is called upon himself to pay, he has his remedy over against the acceptor: he is presumed to be indifferent upon the subject. I think what Mr. Williams says is true, that we must suppress the circumstance of the insolvency of Allen, [739] in deciding this case. We must treat the case by analogy to actions against the acceptor of a bill of exchange, where the drawer and indorser may be called as witnesses for the plaintiff. This rule must therefore be discharged.

The rest of the Court concurred.

Rule discharged.

WINGATE v. WAITE. Exch. of Pleas. 1840.—A parish, consisting of two districts, had immemorially been assessed to the repairs of a sea bank (which was necessary for the protection of lands from the sea in both districts), by one assessment, collected by one dyke-reeve. The commissioners of sewers, without any presentment of a jury, appointed two dyke-reeves, one for each district, and made a rate

on one distriet exclusively for the repairs of the sea bank:—Held, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable in trespass for the taking of the plaintiff's cattle under a distress warrant issued by them for arrears of such rate.

[S. C. 9 L. J. Ex. 319; 4 Jur. 860.]

This was an action of trespass brought against the Commissioners of Sewers for the county of Lincoln, acting in and for the hundreds of Kirton and Skirbeck, for distraining the plaintiff's cattle.

The defendant pleaded, first, the general issue, not guilty; secondly, that the commissioners committed the supposed trespasses by virtue of and under a certain commission of sewers of his late Majesty King William the Fourth, amongst others, for the limits of the hundreds of Kirton and Skirbeck, in the county of Lincoln aforesaid, for a certain assessment or tax assessed on the plaintiff, by virtue of the said commission, and according to the purport of the statute of sewers made in the 23 Hen. 8 (cap. 5), which said commission was and still is in force; and that the said close in which &c., was within the limits aforesaid, and the jurisdiction of the said commissioners. The plaintiff replied *de injuriâ*, whereupon issue was joined.

The cause came on to be tried before the Lord Chief Baron, at the Lincoln Summer Assizes, 1839, when a *ver-[740]*-dict was taken for the plaintiff for 2l. 16s. 3d. damages, with liberty for the defendant to move to enter a nonsuit. In Michaelmas Term, 1839, the Court granted a rule nisi for setting aside the verdict and entering a nonsuit, with directions that the facts should be turned into a special case, which was accordingly agreed upon, and was as follows:—

The defendant was owner and occupier of lands in South Butterwick: the defendant was clerk to the commissioners of sewers for the county of Lincoln, within whose jurisdiction the parish of Butterwick, divided into North and South Butterwick, together with an adjoining district called Butterwick Hundred, lay. The lands of South Butterwick and Butterwick Hundred abut on the sea bank hereinafter mentioned, along the whole length thereof, and lie between the said bank and the district of North Butterwick. The action was brought to try the validity of a rate intitled "a rate or assessment of one shilling an acre, made and granted to Robert Enox, dyke-reeve of Butterwick South and Butterwick Hundred, for every acre of land in Butterwick South and Butterwick Hundred aforesaid, chargeable with and liable with the payment of the dyke-reeve rate, to be charged upon the several owners of the said lands and their respective tenants thereof, to defray the expenses incurred and to be incurred by the said dyke-reeve, in repairing the sea bank extending from the blue stone on the sea bank of Frieston to the sea bank in Pennington, and also to defray all and every other expense incurred or to be incurred by the said dyke-reeve, in the execution of the said office, or in relation thereto, for the year ending at Easter, 1838; the said lands and the owners and occupier being liable by prescription, founded on custom or immemorial usage, to repair the same." The plaintiff's cattle, mentioned in the declaration, were distrained for non-payment of the sum assessed upon him by the said rate, which sum had been previously demanded of him. The plaintiff, [741] before the time of taking the distress, had been summoned by the commissioners to shew cause before them why he should not pay the said sum. The plaintiff appeared by his attorney, and objected to the validity of the rate, but did not shew sufficient cause in the judgment of the commissioners.

On the 21st of February, 1800, the Court of Sewers made an order, which was duly registered in the books of the said Court by the clerk of the commission, that in future two dyke-reeves should be appointed for the parish and hundred of Butterwick, one for North Butterwick, and one for South Butterwick and Butterwick Hundred, who should lay separate rates, and keep separate accounts of their respective offices. And this order had from thenceforward, up to the period of imposing the present rate, been acted upon: and the plaintiff, and the owners and occupiers of the plaintiff's lands in South Butterwick, have, since the year 1800, paid to the dyke-reeve of South Butterwick the separate rates levied in pursuance of the same order.

For all previous time within living memory, and also as far back as the records of the Court would shew, being more than 100 years, the whole parish and hundred of Butterwick had been jointly assessed to the repairs in question by one commixed assessment, applied by one sole dyke-reeve. There had been no presentment of a

jury against South Butterwick and Butterwick Hundred, as a foundation either of the order or of the rate. The sea bank required repairs, and was a necessary protection to the lands, as well in North as South Butterwick and Butterwick Hundred; in fact, North Butterwick would, by any irruption of the sea, be laid deeper under water than South Butterwick or Butterwick Hundred, as it lay lower, and the drainage of all three was now, by a recent alteration, carried through North Butterwick to the Hob Hole Sluice. North Butterwick was nowhere assessed to the repairs of the bank.

[742] The following were the plaintiff's points for argument:—First, The rate purports to be founded on prescription, which is disproved; secondly, The rate is bad, for omitting rateable property; thirdly, The rate is questionable in an action of trespass, there having been no presentment by a jury.

J. Hildyard, for the plaintiff. The commissioners of sewers were bound to include in the rate all the lands within the ambit of the parish and hundred, unless they could shew a custom or prescription from time immemorial to exclude North Butterwick, and impose a rate on South Butterwick, and Butterwick Hundred only; and here no such custom or prescription is stated in the case. The commissioners were therefore wrong in imposing on South Butterwick and Butterwick Hundred alone the burthen of repairing a dyke which was equally beneficial to North Butterwick, which ought, therefore, to be included in the rate. The law is laid down in *Rooke's case* (5 Rep. 100), thus: "That the commissioners ought to tax all who are in danger to be endamaged by the not repairing, equally, and not him who has the land next adjoining to the river only; for the statute of 6 Hen. 6, c. 5, on which the commission of sewers is formed and specified, has precise words in the same commission, that no person, of any estate or condition, shall be spared: And if the law should be otherwise, inconvenience might follow; for it may be that the rage and force of the water might be so great, that the value of the land adjoining will not serve to make the banks, &c.; and therefore the statutes will have all which are in danger, and are to receive benefit by the making of the banks, to be contributory, for qui sentit commodum, sentire debet et onus; and the said statutes require equality, which well agrees with the rule of equity." In *Emmerson v. [743] Saltmarsh* (7 Ad. & Ell. 266; 2 N. & P. 446), it was held that a sewers' rate assessed in gross upon a township was bad. In *Rex v. The Commissioners of Sewers for the County of Essex* (1 B. & Cr. 477; 2 D. & R. 700), Lord Tenterden says: "If no usage has prevailed, all those are liable who enjoy the benefit of the work."

Wildman, for the defendant. It would be a great hardship, if the omission of a single person in the rate were to render it void. [Lord Abinger, C. B. This is the omission of a whole district.] The omission of a single person would equally render it void, if such a doctrine is to prevail as is contended for by the plaintiff; there can be no distinction in that respect. The question is, whether the omission of this district makes it so void as to render the commissioners liable in trespass. It is submitted that these collateral defects cannot be inquired into in an action of trespass. The rate being good in form, it is valid until it is quashed upon a certiorari. The commissioners of sewers, in making a rate, act in a judicial and not in a ministerial capacity, as was observed by Patteson, J., in *Pocock v. O'Shaughnessy* (6 Ad. & Ell. 807), and therefore are not liable to trespass. The Court of the Commissioners of Sewers is a Court of Record. Com. Dig. "Sewers," D.; Callis on Sewers, 128. Their power to hear objections is recognised in the recent statute for amending the law relating to sewers, 3 & 4 Will. 4, c. 22, s. 16. In *The Duke of Newcastle v. Clarke* (8 Taunt. 631; S. C. 2 Moore, 666), Burrough, J., says, "The commissioners are clothed with no individual rights as a consequence of their office; they act in their official capacity only. They are persons holding a Court of Record." Even assuming the rate, therefore, to be bad for want of a presentment, it would not render the commissioners liable to an action. The proper mode in such a case is to [744] move that the rate be quashed on a certiorari. In *Ackerley v. Parkinson* (3 M. & Selw. 411), it was held that an action would not lie against the vicar-general of the bishop for excommunicating a person, although the citation was void, and the proceedings thereon had been set aside upon appeal. Lord Ellenborough there says, "If it were necessary, I should like to look at several of the authorities which have been cited. But the impression on my mind at present is, that this action is not maintainable, if the Ecclesiastical Court had a general jurisdiction over the subject-matter; and that it had general jurisdiction over the subject-matter, and in regard to some of the

particulars mentioned in the citation, there can be no doubt." In *Emmerson v. Saltmarsh* the point was not raised, whether trespass was maintainable; besides, the rate there was bad on the face of it. It has been held that no action lies against officers for a seizure to satisfy a poor rate, made by an order of justices acting within their jurisdiction. *Nichols v. Walker* (Cro. Car. 394), *Milward v. Cuffin* (2 W. Bl. 1330). The commissioners cannot be liable in their individual capacity for what they did in their judicial capacity, having power under the stat. 4 Hen. 8, c. 5, s. 3, to hear and determine all matters relative to the making of a rate. In *Garnett v. Ferrand* (6 B. & Cr. 611; 9 D. & R. 657), it was held that no action will lie against a judge of a Court of Record for an act done by him in his judicial capacity; and that therefore trespass would not lie against a coroner, for turning a person out of a room where he was about to take an inquisition. Whatever these commissioners have done in their judicial capacity cannot be impeached, until it is reversed by a competent tribunal. *Stafford v. Hamston* (2 Brod. & B. 691; 5 Moore, 608), *Fawcett v. Fowles* (B. & Cr. 391; 1 Man. & Ry. 102), *Dove v. Gray* (2 T. R. 358), *Brittain v. Kinnaird* (1 Brod. & B. 432; 4 Moore, 50). Under the Statute of Sewers, every person whose property de-^[745]-rives a benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate, *Soady v. Wilson* (3 Ad. & El. 248; 4 Nev. & M. 477); and in an action of trespass against the commissioners for levying a rate, if it appear that they had jurisdiction, the Court will not inquire whether the rate was proportioned to the benefit received from the sewage by the party rated. Lord Denman, C. J., says in that case, "Though numerous cases were cited in the argument from *Keighley's case* (10 Rep. 142 b.) to *Rex v. The Commissioners of Sewers for the Tower Hamlets* (9 B. & Cr. 517; 4 Man. & R. 385), the doctrine laid down is all uniform and undisputed as applicable to the present question. It rests on the principle, that every one whose property derives benefit from the works of the commissioners may be assessed to the rates they impose."

Hildyard, in reply. The very foundation of the authority of the commissioners is, that they should enquire through the medium of a jury, and therefore a presentment was necessary. The 17th section of 3 & 4 W. 4, c. 22, provides, that nothing therein contained shall prevent any court of sewers from causing inquiry and presentment to be made by a jury; expressly recognising their authority to do so. Without a presentment, there would be nothing which could be traversed. In the case of *The Commissioners of Sewers v. Wilmore* (2 Keb. 137), the Court refused a certiorari to remove a presentment for not repairing a sewer, on the ground that it did not appear that the commissioners had refused to allow the defendant to traverse it; but there was no presentment, and nothing which could be traversed. These commissioners have entirely exceeded their authority, and are therefore liable to an action.

[746] LORD ABINGER, C. B. Suppose an action is brought in a Court where there is a limited jurisdiction, and the defendant pleads to the jurisdiction, the Court must decide whether they have jurisdiction or not; and if they decide that they have jurisdiction, in a case where they clearly have no pretence for it, and give judgment against the defendant, and act on that decision, they may be liable to an action. With respect to the case before the Court, I always thought that the jurisdiction of the commissioners of sewers was founded entirely on the presentment to be made by a jury; and if that be so, and they proceed without a presentment, their jurisdiction fails, and they are liable to an action like any one else. The case of *Ackerley v. Parkinson* is very distinguishable; there the vicar-general had a general jurisdiction over the subject-matter, and was bound to decide upon it when brought before him, one way or another; and although the Court above might set aside his adjudication, still he would not be liable to an action.

Cur. adv. vult.

On a subsequent day.

LORD ABINGER, C. B., said that the Court had considered the matter, and that it appeared to them that the plaintiff was entitled to judgment: that the foundation of the jurisdiction of the commissioners to make a rate was the presentment of a jury, without which the rate was utterly void, and consequently the warrant which was founded upon it was also void.

Judgment for the plaintiff.

[747] ROWE AND ANOTHER v. AMES. Exch. of Pleas. 1840.—In an action on the case against the sheriff, the declaration stated a judgment recovered against one R. W., the delivery to the sheriff of a writ of *fi. fa.* issued upon this judgment, indorsed to levy &c.; that the sheriff seized the goods of R. W. within his bailiwick, and remained in possession of them for a long time, during which he might and ought to have sold them, yet that he neglected the execution of his office, and forbore to sell, and afterwards falsely returned that the goods remained in his possession for want of buyers. To this declaration the defendant pleaded—1st, that he did not take in execution any goods of R. W., or remain in possession by virtue of the said writ for the said space of time, or any part thereof; 2ndly, that he could not, nor might, nor ought to have sold the said goods, or any of them, under or by virtue of the said writ, or to have raised thereout the monies indorsed to be levied, within the space of time in the declaration mentioned; 3rdly, that R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned, and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict. c. 29, and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt; and that, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested.—Held, that the first plea was bad for duplicity; that the second plea was bad, as amounting to the general issue; and that the third was bad, as being an argumentative denial of the seizure of the goods of R. W.

[S. C. 8 Dowl. P. C. 750; 9 L. J. Ex. 260.]

Case. The declaration stated a judgment recovered in the Court of Exchequer against one Richard Waring, for a certain debt, adjudged to the plaintiffs for their damages; that the said judgment being in full force, and the said debt and damages remaining unsatisfied, the plaintiffs, on &c. sued out a writ of *testatum fieri facias*, directed to the sheriff of Bedfordshire, commanding him, &c., which said writ was duly indorsed to levy 47l. 18s. 6d., and was, before the return thereof, to wit, on &c., delivered to the defendant, who then and until after the return of the said writ, was sheriff of the said county of Bedford, to be executed in due form of law. It then alleged a seizure by the defendant, before the return of the writ, of the goods of the said R. Waring, within the bailiwick, and that the defendant remained in possession of the goods for a long space of time, to wit, from &c., the money indorsed to be levied remaining all that time unpaid; that the defendant might have sold the said goods, but, intending to deprive the plaintiffs of the money indorsed and directed to be levied, he wilfully neglected the execution of his office, and wrongfully, and without the consent of the plaintiffs or either of them, forbore to sell, &c., from &c. (the date of the writ) until &c., when he, the defendant, returned that he had taken goods and chattels of the said R. Waring, to [748] the value of the debt and damages and interest in the said writ mentioned, and then in and by the said return, falsely and deceitfully further returned, that the goods remained in his hands for want of buyers; by means whereof the plaintiffs were deprived of the benefit of the said writ, and now put to great costs and expenses, &c.

Pleas. 1st, that the defendant did not seize or take in execution any goods or chattels of the said Richard Waring, or remain or continue in possession thereof, by virtue of the said writ, for the said space of time in the said declaration in that behalf mentioned, or any part thereof, in manner and form as the plaintiffs have above in their said declaration in that behalf alleged, and of this the defendant puts himself upon the country, &c. Secondly, that the defendant could not nor might, nor ought, during any part of the time in the said declaration in that behalf mentioned, to have sold the said goods and chattels in the said declaration in that behalf mentioned, or any or either of them, or any part thereof, under or by virtue of the said writ, or to have raised thereout the monies indorsed on the said writ and directed to be levied, or any part thereof, ready to have been paid to the plaintiffs within the space of time, or before the day or year in the said declaration in that behalf mentioned, in manner and form as the plaintiffs have above in their said declaration in that behalf alleged; and of this the defendant also puts himself upon the country, &c. Thirdly, that long

before the delivery of the writ of *fi. fa.* to the defendant, to wit, before and on &c., and from thence continually until the issuing of the fiat in bankruptcy thereafter mentioned, the said R. W. was a trader within and subject to the provisions of the stat. 6 Geo. 4, c. 16, and that the said R. W., so being such trader, on &c. became and was indebted to one G. W. in &c., and the said R. W. being so indebted, and being such trader as aforesaid, afterwards, and before the delivery of the said writ to the defendant as aforesaid, to wit, on &c., became and was a bankrupt, and that thereupon after-[749]-wards, and within two calendar months of the issuing of the said writ, and of the delivery thereof to the defendant, and of the seizing and taking in execution of the said goods and chattels of the said R. W., and before the passing of the 2 & 3 Vict. c. 29, and before the defendant as such sheriff as aforesaid could, or might, or ought to have sold the said goods or any part thereof, under or by virtue of the said writ in the said declaration mentioned, to wit, on &c., a certain fiat in bankruptcy issued against the said R. W. by the Rt. Hon. Christopher Charles Lord Cottenham, &c., &c., by which fiat the said Lord Chancellor did authorize the said G. W. to prosecute his said complaint in the said Court of Bankruptcy in that behalf, (as by the said fiat duly filed and entered of record, and now remaining in the said Court of Bankruptcy, being a record of the said Court of Bankruptcy, reference being thereunto had, fully appears): by virtue of which said fiat, and by force of the statutes in such case made and provided, John Herman Merivale, Esq., being one of the Commissioners of the Court of Bankruptcy, afterwards, to wit, on the 23rd day of May in the year last aforesaid, did, in due form of law, find that the said R. W. had become and was a bankrupt within the true intent and meaning of the statutes made and then in force concerning bankrupts, before the day of the date and suing forth of the said fiat, and did then declare and adjudge the said Richard Waring to be a bankrupt accordingly, and afterwards, and before the commencement of this suit, to wit, on the 23rd day of May in the year last aforesaid, being the date of the said adjudication, the said John Herman Merivale, so being such commissioner as aforesaid, duly made a memorandum of the said adjudication; as by the said memorandum now remaining of record in the said Court of Bankruptcy, reference being thereunto had, will more fully appear. The plea then stated the due appointment of an official assignee, and that the estate and effects of the said R. W., including the said goods and chattels so seized and taken in execution under and by [750] virtue of the said writ, became and were vested in the said assignee; and that the said fiat in bankruptcy, and the proceedings thereunder respectively, remain and are in full force and effect, and not in anywise abated, superseded, rescinded, or annulled. Verification.

Special demurrer, assigning for causes, that the first plea is double, in denying any taking in execution, and also denying a continuance in possession by the defendant for a time in which he ought to have sold. And also, that the defendant is estopped from denying the matters denied by that plea.

That the second plea amounts to the general issue, and is argumentative.

That the last plea is argumentative, in indirectly denying that the defendant seized any goods of the said R. W., and also that it is informal and uncertain.

Bramwell, in support of the demurrer. The declaration begins by stating, in the usual way, the issuing of the writ of *fi. fa.*, and the delivery of it to the sheriff, and then avers that he seized and continued in possession for a long space of time, during which he might have sold the goods, and complains that he did not do so. [Lord Abinger, C. B. Is not the gravamen the charge of a false return?] The declaration states that a false return has been made; but it is submitted that the action is not brought for that, but for a breach of duty in what took place before the return, viz. the not selling; and that the action would be maintainable, though the defendant had afterwards sold, for the damages sustained by his delay. This appears from *Aireton v. Davis* (9 Bing. 740; 3 M. & Scott, 138), and *Jacobs v. Humphrey* (4 Tyr. 272; 2 C. & M. 413). [Alderson, B. You say the declaration would be good, if every thing relating to the return were struck out?] Yes; and it is questionable whether the return be false: as it seems [751] to mean no more than this, that the sheriff has not sold. Then the first plea is double; it denies the seizure, and it also denies that he remained in possession as alleged. [Lord Abinger, C. B. If he did not seize, he could not remain in possession.] But the converse is not true; viz. that if he did seize, he must have remained in possession. The test as to whether a plea is double, is to strike out one of the allegations said to constitute the duplicity, and see if a

sufficient answer remains in the other; and then, striking out the latter, let the first remain, and see if that constitutes an answer. If each of the allegations is an answer, and they do not involve each other, the plea is double. In this case, if no writ had been issued, the defendant could not have seized under it; yet no doubt a plea denying both the issuing of the writ and the seizure would be double. Tried by this test, then, the first plea is double. [Lord Abinger, C. B. You say, under a denial by the defendant that he remained in possession, he could not have contested that he seized.] Certainly. [Lord Abinger, C. B. That is so; but would a plea merely denying that he remained in possession be good? Must he not shew how he ceased to be in possession?] It would be bad in form, for that reason; but, it is submitted, good in substance. Suppose issue joined on such a plea, the defendant might shew that he parted with the goods by the license of the plaintiff; or he might shew, (what he no doubt intended to do in this case under that denial, viz.), that by reason of the bankruptcy, his continuance in possession was unlawful: he might even shew a rescue. [Alderson, B. That would not excuse him.] It would shew that the plaintiff's right of action was not that alleged here; because the sheriff could not then have been guilty of the delay alleged. Then it would be a good answer in substance; and a plea is not the less double, because one of the matters is informally pleaded. This plea, therefore, is double: but it is also bad for the other reasons assigned. The plaintiff does not contend that the [752] defendant could not deny a seizure under the writ, but he complains of the manner in which he has done it. It is impossible, on reading the plea, to say what it admits or denies:—whether it denies a seizure altogether, a continuing in possession altogether, or, admitting both seizure and remaining in possession, or one of them, denies that both or either of them was under the writ. [Alderson, B. You say he should have said he did not seize in manner and form.] That would have been correct; or if not, admitting a seizure, he should have said it was not by virtue of the writ. The plea is a negative pregnant, and the objection is very strong as to the denial that he continued in possession by virtue of the writ. [Alderson, B. I cannot tell whether or not he admits he seized by virtue of the writ, and that he continued in possession, but denies that was by virtue of the writ. Lord Abinger, C. B. There is another defect. How can he deny he seized, in the face of his return, which appears on the declaration?] That is the next objection. [Bramwell was then stopped as to the first plea.] Secondly, as to the second plea. [Alderson, C. B. That is the general issue, if ever there was one; it denies the breach of duty complained of.] [The learned counsel was then directed to argue as to the insufficiency of the last plea.] The first objection to that is, that it is an argumentative denial of the allegation that the defendant seized the goods of Waring. *Wright v. Lainson* (3 M. & W. 44) is a direct authority to that effect. In that case, all the facts up to the return were precisely the same as here; and on an application to plead two pleas, one denying a seizure of the bankrupt's goods, and the other specially stating the bankruptcy, Lord Abinger, C. B., said, "They were at that time the goods of the assignees by relation to the time when the act of bankruptcy was committed, although the fiat was not issued until afterwards. It is quite clear, that to prove [753] the shorter plea, you must prove the trading, the petitioning creditor's debt, and an act of bankruptcy before the date of the levy." Alderson, B., said—"To allow these pleas together would be introducing all the evil of double pleading, which it was the object of the rules to avoid." [Lord Abinger, C. B. That case only shews that, under a traverse that the defendant seized the goods of the bankrupt, he might have shewn the bankruptcy, &c.; not that the special plea was bad.] It is submitted that the one proposition follows from the other; for if, under the traverse that Waring's goods were not seized, this matter may be shewn, then the special plea amounts to a denial of that fact, and so it is an argumentative traverse. The common test is, that a plea must either traverse, or confess and avoid. If this plea traverses, it is wrongly concluded. Then does it confess and avoid? Certainly not. It is also open to the same objection as the first plea; it is contrary to the return stated on the record. [He was then stopped by the Court.]

Gunning, contra, relied upon *Lewis v. Alcock* (3 M. & W. 188), as an authority to shew that the second plea was good; but the Court intimated an opinion that the pleas were clearly bad, and he thereupon prayed and obtained

Leave to amend on payment of costs.

[754] *BIRD v. PENRICE*. Exch. of Pleas. 1840.—A declaration in assumpsit contained a count in the sum of £200, for horse keep, and work and labour; and another count in the like sum upon an account stated. The defendant pleaded, as to all except £150, non assumpsit, and as to that sum payment. The cause was referred to arbitration, and the arbitrator awarded, as to the first issue, that the verdict should be entered for the plaintiff; and as to the second issue, so far as it related to £150, he directed a verdict to be entered for the defendant, and as to the residue of that issue, for the plaintiff; and he assessed the damages at 14l. 4s. 9d., that being the balance which he adjudged to be due to the plaintiff:—Held, that the arbitrator was not bound to find the first issue distributively, so as to find for the plaintiff as far as related to 14l. 4s. 9d., and for the defendant as to the residue.

[S. C. 8 Dowl. P. C. 775; 9 L. J. Ex. 257; 4 Jur. 970.]

The first count of the declaration was in indebitatus assumpsit, in the sum of £200, for horse-keep, and work and labour; the second, on an account stated, for the like sum. Pleas, first, except as to 150l. 14s. 8d. non assumpsit; secondly, as to that sum, payment. The arbitrator not having determined the issue on the account stated, the Court, on a former day, directed the award to be sent back to him to be corrected in this particular. By a mistake in drawing up the rule, the cause, and not the award, appeared to be sent back to the arbitrator. The arbitrator refused to rehear the matter or to examine any witnesses, and he drew up his award in these terms:—"As to the first issue joined between the parties, I direct that a verdict shall be entered for the plaintiff; and as to the second issue, as far as it relates to 150l. 14s. 8d., I direct that a verdict be entered for the defendant, and as to the residue of that issue, for the plaintiff, and I assess the damages at 14l. 4s. 9d., that being the balance which I adjudge to be due to him."

Byles now moved for a rule to shew cause why the award should not be set aside. As the cause, and not the award merely, was referred back to the arbitrator, it was his duty to have reheard the case and examined witnesses; and not having done so, the award ought to be set aside. Secondly, the plaintiff having succeeded as to part only of the first issue, the arbitrator should have found it distributively, in the same manner as he has done the second issue. The declaration claims two distinct items; but, according to this award, the plaintiff has failed as to part, and that ought to be found for the defendant, as [755] he is entitled to costs as to that part in which he has succeeded. *Anderson v. Chapman* (5 M. & W. 483) shews that the general issue may be found distributively. In *Prudhomme v. Fraser* (2 A. & E. 645; 4 N. & M. 512), which was an action for a libel, there was but one count, and a plea of not guilty; the jury found a verdict for the plaintiff, and also that a great part of the alleged libel did not apply to him; and the Court decided that such part of the declaration was divisible, and that, in respect of it, the defendant was entitled to costs as to so much of the declaration as charged libellous matter, the innuendoes respecting which had been negatived. In indebitatus assumpsit, where several demands are included in one count, the issue is necessarily distributive. Here the arbitrator should have found, as to the first issue, as far as the same related to 14l. 4s. 9d. for the plaintiff, and as to the residue of that issue, for the defendant.

LORD ABINGER, C. B. We cannot grant this application. The arbitrator was not bound to rehear the case, the only object in sending the case back to him being that the award might be set right. Secondly, the arbitrator was not bound to find the first issue distributively. The plaintiff in his declaration charges the defendant with being indebted to him in the sum of £200, but that sum is not material, although in an action of debt the sum was formerly held to be so. There are no distinct issues raised on the first count. It is a single issue, raising the question whether the defendant is indebted to the plaintiff or not.

ALDERSON, B., concurred.

Rule refused.

[756] GEORGE EDMUND PLATT AND JUDITH ANNE, his Wife, since Deceased, *Plaintiffs*; AND JOHN ROUTH, AND OTHERS, *Defendants*. Exch. of Pleas. 1840.—J. R. by his will, after directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter J. A. P., J. R., J. S., and J. G., his executrix and executors, upon trust, to permit his said daughter to receive the rents and dividends thereof during her life, and after her decease, upon trust, for such person or persons (other than and except J. W. and his relations, M. H., and his relations, and the relations of the late husband of the testator's said daughter, and every of them) in such parts, shares, and proportions, and in such manner and form, as the said J. A. P., whether sole or covert, should by will appoint, and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that in case his said daughter should intermarry with the said J. W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, the said J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and thereby, in exercise of the power under her father's will, she gave £10,000 Consols to the descendants of the before-named D. R., and gave all the rest of her late father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R. the testator.—Held, 1st, That, on the death of J. A. P. a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof.—2ndly, That no probate duty was payable upon the probate of the will of J. A. P., in respect of the estate and effects bequeathed and appointed by her will.—3rdly, That legacy duty was payable in respect of the bequests contained in the will of J. A. P. at the same rate at which it would have been payable if they had been mere legacies given by her, payable out of her own personal estate.

[S. C. 10 L. J. Ex. 105: in Equity, 1841, 3 Beav. 257; 10 L. J. Ch. 131. Affirmed, nomine *Drake v. Attorney-General*, 1843, 10 Cl. & F. 257. See *In re Philbrick's Settlement*, 5 N. R. 502; 34 L. J. Ch. 368; *In re Hoskins' Trusts*, 1877, 5 Ch. D. 229; 6 Ch. D. 281; *In re Byron's Settlement*; *Williams v. Mitchell*, [1891] 3 Ch. 474; *In re Power*; *Acworth v. Stone*, [1901] 2 Ch. 659; *Commissioners of Stamp Duties v. Stephen*, [1904] A. C. 137.]

By an order of the Master of the Rolls, the following case was stated for the opinion of this Court.

John Ramsden, of Hammersmith, &c., duly made and published his last will and testament in writing, bearing date the 10th day of March, 1825, and bequeathed unto his daughter, Judith Ann Platt, J. Routh, T. Sharman, and J. Gillett, (whom he appointed his executrix and executors), their executors, administrators and assigns, a certain leasehold messuage and premises situate at Hammersmith, for all such term, estate, and interest as he should have therein at the time of his decease, and all the household goods and furniture, plate and plated articles, china, prints and pictures, household linen, wine, spirits, and other household effects whatsoever, which should be his property in or about the same messuage and premises at the time of his death; upon trust, if the said Judith Ann Platt should so direct, but not otherwise, to sell the same in manner therein mentioned, and to stand [757] and be possessed of the money which should arise and be produced from such sale, after deducting the costs and expenses attending or incident to the same, as part of his residuary estate: And the said testator by his said will also gave and devised, and by virtue and in exercise and execution of every power and authority in any wise enabling him in that behalf, appointed all and singular the freehold and copyhold messuages or tenements, lands, and hereditaments, then belonging to him the said J. Ramsden, either in possession, reversion, remainder, or expectancy, or in or over which he had any devisable interest or power of appointment, with their and every of their rights, members, and appurtenances, unto and to the use of the said Judith Ann Platt, J. Routh, J. Sharman, and John Gillett, their heirs and assigns, upon the trusts thereafter declared concerning the same, that is to say, upon trust, with the consent in writing of the said Judith

Ann Platt during her life, and after her decease, then at their discretion, to make sale and absolutely dispose of the said hereditaments and premises in manner therein mentioned; and the said testator thereby declared, that the money which should arise or be produced by or from such sale should fall into and be considered as further part of the residue of the personal estate of him the said testator, and that the rents and profits of the said premises in the meantime, until the same should be sold, should be considered as part of the income of the said residuary personal estate of the said testator, or of the stocks, funds, or securities in or upon which the same or the produce thereof was thereafter directed to be invested: and that the said monies, rents, and profits respectively, should be subject to the dispositions thereafter made of and concerning the residue of the said personal estate of the said testator, and the income thereof. And the said testator thereby also gave and bequeathed to each of them the said J. Routh, J. Shar [758]-man, and John Gillett, respectively, the sum of £400 £3 per cent. Consolidated Bank Annuities; and to each of them the said J. Sharman and J. Gillett respectively, the further sum of £2000 of lawful money; to Hannah Keen Routh, the sum of £200 of like lawful money; to Joseph Chapman, £100 of like lawful money; to J. Blagborough, £50 of like lawful money; and to Elizabeth London, during her life, an annuity of £25: And the said testator also gave and bequeathed unto the said Judith Ann Platt, J. Routh, J. Sharman, and J. Gillett, all his leasehold messuages, tenements, and lands, with the buildings and appurtenances thereunto belonging, except the leasehold premises at Hammersmith, which he had thereinbefore disposed of as aforesaid, for all such term and estate as he should have therein at his decease, and all the rest and residue of his money, and securities for money in the funds, goods, chattels, and personal estate whatsoever and wheresoever, not thereinbefore given or bequeathed, upon trust that they, or the survivors or survivor of them, his executors, administrators, or assigns, should, as soon as they conveniently could after his decease, collect, get in, and receive all such money as should be then due to him from any person or persons whosoever; and should sell, dispose of, and convert into money his said leasehold premises, and such part of his residuary personal estate as should not consist of money or monies in the funds, and should, by and out of that part of his personal estate which should consist of money, and the money to be collected as aforesaid, and the produce of any other stock or funds belonging to him the said testator, which his said trustees were thereby authorized and empowered at any time to sell and dispose of, pay and discharge all his the said testator's just debts and funeral and testamentary expenses, and the legacies and sums of money thereinbefore bequeathed, and directed to be raised and appropriated for [759] the purposes thereinbefore mentioned, and should lay out and invest the residue of the said trust-monies, and also the monies which should arise from the sale of the said freehold and copyhold hereditaments thereinbefore devised, in the joint names of them the said trustees, in case, as to the said last-mentioned monies, such sale or sales should be made in the said Judith Ann Platt's lifetime, in or upon any of the Government stocks or funds of Great Britain, or upon real securities in England, and should from time to time vary and change the securities in or upon which the said trust-monies should then be invested, either as occasion should require, or as the said Judith Ann Platt should think fit; and should stand and be possessed of the said trust-monies and premises, and the stocks, funds, and securities belonging to the said testator, or so much and such parts of the same as should not be disposed of as aforesaid, and the dividends, interest, and income thereof, and also of the rents and profits of the said testator's freehold and copyhold hereditaments and premises, until the sale of the same, upon the trusts thereafter mentioned, that is to say, upon trust that his said trustees or trustee for the time being should pay the dividends, interest, and income of all and singular the said trust-monies, stocks, funds, and securities, and the rents and profits of the said testator's freehold and copyhold hereditaments and premises, until such sale thereof as aforesaid, unto, or otherwise permit and suffer, the said Judith Ann Platt, or her assigns, to receive the same for the term of her natural life; and from and immediately after her decease, then upon trust that his said trustees or trustee for the time being should pay thereout £3000 of lawful money to the said John Sharman, and £3000 of like money unto the said John Gillett; and the said testator thereby directed, that after such last-mentioned payments, his then surviving trustees should stand and be possessed of the said trust-[760]-monies, stocks, funds, and securities, and the dividends, interest, and income thereof, and of the rents and

profits of his said freehold and copyhold hereditaments and premises, until the sale of the same, upon trust for such person or persons (other than and except Joseph Woodhead, otherwise Woodward, of Russia Row, Cheapside, and his relations, Moses Hoper of Dorset Street, Esq., and his relations, and the relations of the late husband of the testator's said daughter, and every of them) in such parts, shares and proportions, for such intents and purposes, and in such manner and form as the said Judith Anne Platt, as well when covert or sole, and notwithstanding her coverture, by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, of any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more credible witnesses, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, should not extend, upon trust for the next of kin of Dyson Ramsden, late of Waterelough, in the parish of South Oram, near Halifax, in equal shares and proportions, and to pay the same accordingly. And by the said testator's will it is provided, and he did thereby expressly declare his will and mind to be, that in case his said daughter Judith Ann Platt should at any time thereafter intermarry with the said Joseph Woodhead, otherwise Woodward, or with any of his relations, or in case she should reside with or should visit or receive visits from him the said Joseph Woodhead, otherwise Woodward, or any of his relations, then, and in any or either of the said cases the said testator declared, that all and singular the gifts and bequests to, and the trusts contained in his said will in favour of, and the power of appointment thereinbefore given to, the testator's said daughter, should from thenceforth be absolutely null and void to all intents and [761] effects and purposes, and then and from thenceforth the said testator directed that his said trustees, their executors, administrators, and assigns, should stand and be possessed of all and singular the said trust monies, stocks, funds, and securities, upon trust with and out of the said dividends, interest, and income thereof, to pay to his said daughter the weekly sum of 40s., and no more, during her life; and subject thereto, it was the testator's will that the whole of his said trust monies, stocks, funds, and securities, and the dividends, interest, and income thereof, should go and belong to, and be held in trust for, the next of kin of the said Dyson Ramsden, to whom the said testator gave and bequeathed the same accordingly; and the testator declared that the right of his said daughter to consent to the sale of his said freehold and copyhold premises should absolutely cease and be void, and his said trustees should be at liberty to proceed to a sale thereof, in the same manner as if the said testator's daughter had actually departed this life.

The said John Ramsden, on the 10th of May, 1826, died without having altered or revoked his said will, leaving the said Judith Ann Platt, being his only child and heiress at law, and sole next of kin, him surviving, and also leaving the said several other legatees in the said will mentioned, excepting the said wife of the said testator, him surviving. And after the death of the said testator, the said will was duly proved by the said Judith Ann Platt, John Routh, John Sharman, and John Gillett, in the Prerogative Court of the Archbishop of Canterbury.

Soon after the death of the said testator, the said Judith Ann Platt filed a bill in the Court of Chancery against the said John Routh, John Sharman, and John Gillett, the other executors and trustees named in the said testator's will, praying that the trusts of the said will might be carried into execution under the decree of the said Court, and that the usual accounts might be taken [762] of the said testator's estates, debts, and legacies, and that the residue might be invested and secured in the said Court, upon the trusts of the said will; and that the income thereof might be paid to the said Judith Ann Platt, according to the trusts of the said will.

By a decree made on the hearing of the said cause, by his Honor the Master of the Rolls, bearing date the 10th day of March, 1828, his Honor did declare that the will of the said testator ought to be established, and the trusts thereof performed and carried into execution, and did order and decree the same accordingly. [The case then set forth an account of the testator's property, which is not material.]

After the death of the said John Ramsden, the said Judith Ann Platt intermarried with the said George Edmund Platt, who survived her, and she, being under coverture, duly made and published her last will and testament in writing, bearing date the 27th day of April, 1837, signed and published by her in the presence of and attested by three credible witnesses; and thereby, after reciting the last will and testament of

her father, the said John Ramsden, and the said power of appointment to her thereby given, she the said testatrix, pursuant to and by force and virtue and in exercise and execution of the power or authority to her for that purpose given or limited, or in her vested in or by the said will of her said father, and of all other powers and authorities enabling her in that behalf, directed and appointed, that immediately from and after her decease, all the residuary personal estate of her said late father, of which she had any disposing or appointing power under or by virtue of his said will, should be in trust, and be conveyed and assigned, and paid and payable, to William Walker Drake, Esq., his heirs, executors, administrators, and assigns, according to the nature and quality of the said estates respectively : but nevertheless, upon and [763] for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations thereafter expressed and declared of and concerning the same. And in further exercise of the said power or authority in her vested as aforesaid, the said testatrix did thereby direct and declare, that, immediately after her decease, there should be raised and paid out of the real and residuary personal estate of her said late father, the legacies or sums thereafter mentioned, that is to say [setting forth various legacies to different persons, which it is unnecessary to state]. And the said testatrix did also direct and declare, that there should be paid unto the defendants Sarah Denison, Sarah Pickels, Mary Bagerley, Susanna Wilson, Robert Ramsden, William Ramsden, Rose Frith, Thomas Leeming, Sarah Cropper, and Elizabeth Tattersall, or such of them as should be living at the time of her decease, and to the personal representatives by way of substitution of such of them as might be then dead, and unto any other person or persons living at her decease, who, in case the said testatrix had died without exercising the power given to her by the will of her said late father as aforesaid, would have been entitled to all or any part of his real and residuary personal estate, under the description in his said will of next of kin of Dyson Ramsden, late of Waterclough, in the parish of South Oram, near Halifax, in the county of York, deceased, or the personal representatives, by way of substitution, of any of them who might be then dead, the sum of £10,000 £3 per cent. Consolidated Annuities, to be divided between or amongst them, or their respective representatives by way of substitution as aforesaid, in equal shares or proportions ; but so that such respective personal representatives should be entitled to no greater or other shares than their respective testators or testatrices, or persons intestate, as the case might be, under whom such representatives might respec-[764]-tively claim, would have been entitled if then living ; and the said testatrix desired the said sum of £10,000 £3 per cent. Consolidated Annuities, to be paid within six calendar months next after her decease : and subject to and charged and chargeable with the payment of the said legacies and annuities thereinbefore appointed, given, and bequeathed, the said testatrix did thereby appoint, give, bequeath, and devise all and singular the freehold and copyhold hereditaments, and parts and shares of freehold and copyhold hereditaments, leasehold premises, furniture, stocks, monies, mortgages, securities, shares, and all other real and residuary personal estate and effects of her said late father, and over which she had any disposing or appointing power under or by virtue of his said will, unto the said William Walker Drake, his heirs, executors, administrators, and assigns ; and the said testator did thereby appoint the said William Walker Drake, and also George Edmund Platt, Esq., executors of her said last will.

The estate and effects so bequeathed and appointed by the said last-mentioned will, consisted of £1000 East India stock, £20,000 Reduced £3 per cents., £40,000 New £3½ per cents., £40,000 Reduced £3½ per cents., £20,800 £3 per cent Consols, 3333l. 6s. 8d. £3 per cent. Consols, and 833l. 6s. 8d. like stock, subject to the respective life interests of Robert Ramsden and his children, and of Elizabeth London, and other effects of the value of 6050l. 2s. 4d.

All the persons named as cestuique trusts in the appointment made by the will of Mrs. Platt, whereby she limited and appointed all the residuary personal estate of the said John Ramsden to William Walker Drake, were strangers in blood both to Mr. Ramsden and to Mrs. Platt, except the descendants of Dyson Ramsden, to which descendants the sum of £10,000 consolidated Bank Annuities was given, and which Dyson Ramsden was the son of a brother of the father of the testator, John Ramsden.

[765] The questions for the opinion of the Court were :—

First. On what principle is the legacy duty payable in respect of the bequest, in

the said will of John Ramsden, of the residue of his estates and effects to Judith Ann Platt to be calculated?

Secondly. Whether probate duty is payable upon the probate of the will of the said Judith Ann Platt, in respect of the said Estate and effects bequeathed and appointed by her said will as aforesaid: and if the Court shall be of opinion that probate duty is payable only in respect of some portion of the said estates and effects; then,

Thirdly. In respect of what portion of such estate and effects is probate duty payable?

Fourthly. Whether legacy duty is payable in respect of the several bequests contained in the said will of the said Judith Ann Platt: and if the Court shall be of opinion that legacy duty is payable in respect thereof, then,

Fifthly. At what rate is the legacy duty payable in respect of the said several bequests respectively to be calculated?

The case was argued in Easter Term last, by

The Solicitor-General, for the Crown. In arguing this case, it may perhaps be more convenient to take the fourth question first; which raises the point whether legacy duty is payable by the appointees under Mrs. Platt's will, as the others will depend mainly upon that. There are three points that arise upon this part of the case: the first is, whether the duty is not payable from these appointees as from strangers in blood taking under Mrs. Platt's will, that is, £10 per cent. upon the amount of the legacies. By the stat. 55 Geo. 3, c. 184, schedule, part 3, the duty is given upon "legacies," and one question will be, what is the sense in which the legislature has used the [766] word "legacies," in respect of which the duty is imposed. Whatever questions might arise in many cases upon that subject, the legislature has rendered unnecessary the discussion in this case, because it has given its own definition of what shall be deemed a legacy. It will be necessary to call attention to the 36 Geo. 3, c. 52, s. 7, a statute which is still in force with regard to all its provisions that apply to this case, although repealed with regard to the amount of the duty. The fourth section of the 45 Geo. 3, c. 28, will also be found material. The former defines what is to be considered a legacy where it is derived from personal property only; and the latter repeats that definition in respect to charges upon real property. By the 36 Geo. 3, c. 52, s. 7, it is enacted, "That any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, which shall give the same; except so far as the same shall be satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a *donatio mortis causâ*, shall also be deemed a legacy within the intent and meaning of this act." The enactment in the 45 Geo. 3, c. 28, s. 4, is to the same effect, only extending it to charges upon real estate. The effect and bearing of the several statutes cannot be better or more distinctly stated, than in the words of Lord Lyndhurst, C. B., in delivering the judgment of [767] this Court in the case *Ex parte Cholmondeley* (1 C. & M. 149). His Lordship says:—"The facts of the case were these: Upon the marriage of Mrs. Cholmondeley, the sum of £20,000 was vested in trustees, upon trust, as far as related to the income arising out of that money, to her father for life, and to her husband for life, and in the event of her surviving, to her for life, and in the event of her having no children, with a power to her to appoint that sum of money. The result was, she had no children; and she made a testamentary appointment conformably to the authority thus given. The question is, whether the money taken under that testamentary appointment is subject to the legacy duty imposed by 55 Geo. 3, c. 184. In the schedule to that act, the duty is imposed upon every legacy payable out of the personal estate of the testator. It was contended at the bar, that this was not a legacy payable out of the personal estate of the testator, and that it did not come, therefore, within the words or within the meaning of the act, and that the duty, therefore, was

not payable. In order to come to a right conclusion upon this subject, it is necessary to advert to the previous acts imposing duties upon legacies. The three first—20 Geo. 3, c. 28; 23 Geo. 3, c. 58; and 29 Geo. 3, c. 51, impose the duties upon a receipt or acquittance given upon the payment of legacies left by any will, in general terms, leaving the Court to define what was meant as a legacy within the meaning of the act of Parliament. The next act, namely, 36 Geo. 3, c. 52, in the clause imposing the duty, enacts, that the duty shall be payable upon all legacies paid out of the personal estate of the testator; but in the 7th section of that act there is a declaration of the legislature as to what is to be deemed a legacy within the meaning of the act. By the 7th section [768] it is enacted, that all gifts payable out of the personal estate of the testator, or out of the personal estate which the testator has the power of disposing of, shall be deemed and considered a legacy within the meaning of the act of Parliament. The legislature, therefore, in the act itself, interpreted and defined what is meant by a legacy payable out of the personal estate. The next act is the 44 Geo. 3, c. 98; in that act there is no section or provision corresponding with the provision to which I have adverted in the 36 Geo. 3, describing what the legislature meant by the term 'legacy' within the meaning of that act. However, if the question had arisen upon the 44 Geo. 3, I should have been of opinion, that as the legislature had in the previous act defined what is meant by the term 'legacy,' it would be considered that the legislature used the term (the act being passed in *pari materiâ*) in the same sense and to the same extent in which it had used it in the previous act; and it appears to me obvious that this must have been the meaning of the legislature, because the object of the 44 Geo. 3 was to consolidate the regulations and provisions of the previous act, and to consolidate the duties. There is no intimation whatever in the 44 Geo. 3, that there was any intention to reduce the duties; that leads, therefore, I think, fairly to the conclusion, that the legislature would not have intended, under the term 'legacy,' to give a more limited meaning to that term than it had in the 36 Geo. 3. We are led to the same conclusion by the consideration of the 45 Geo. 3, c. 28, which was passed in the following year. By the 45 Geo. 3, the duty is made payable upon legacies out of any real or personal estate of the testator. In the 45 Geo. 3 there is a clause similar to the 7th section of the 36 Geo. 3, defining what the legislature meant by the term 'legacies,' and in that description it states, that any gift payable out of the personal estate, or out of any personal estate which the testator has the power of disposing of, shall be considered a legacy within the meaning of that act. So that, under the 36 Geo. 3, and under the 45 Geo. 3, the legislature has distinctly defined what is meant by the term 'legacy'; and it seems impossible to come to a conclusion, that in the intermediate act of 44 Geo. 3, it intended to give a different interpretation to the term, or that it should have less effect than in the previous and subsequent acts. I should think, therefore, it is perfectly clear under the 44 Geo. 3, that the term 'legacy,' meaning any legacy payable out of the personal estate of the party deceased, would not only extend to a legacy properly payable out of the personal estate, but to a legacy payable out of any property which the party had the power of disposing of by will. If that be so, the language of the 48 Geo. 3 is the same in substance as that of the 44 Geo. 3, and the language of the 55 Geo. 3 is the same as that of the 48 Geo. 3. Taking all the acts together, therefore, applicable to the same subject, and passed in *pari materiâ*, and the legislature, in the 36 Geo. 3 and the 45 Geo. 3, having described and defined what they meant by a legacy, and having given no such description as to the intermediate act of 44 Geo. 3, but it being obvious what their meaning was with respect to the act, it seems impossible to come to a conclusion, that they meant to use that term in a more limited sense in the 48 Geo. 3 and the 55 Geo. 3. If that be the true meaning of the act of Parliament, it will follow, that, under the 55 Geo. 3, the duty would be payable, not only upon a legacy payable out of the personal estate, strictly considered, of the testator, but out of any personal estate which the testator had the power of disposing of as he or she might think proper. That would apply to the present case. We are of opinion, therefore, that, considering all the acts together, the duty is payable in respect of this property, which was taken by the appointees, under the will of Mrs. [770] Cholmondeley." The particular form in which that power was created differed from the present case, in this, that there it was created by deed and here by will; and it was given upon different events from those that apply to this case; but with respect to the point upon which the judgment must turn, it is

not distinguishable from the present case. By the will of Mrs. Platt, certain persons are to take certain benefits : and the question is, whether the benefits so taken are or are not, under these acts of Parliament, legacies paid out of the estate of which Mrs. Platt had the power of disposition. It is submitted that they are, and that they fall within the definition in the 36 Geo. 3, which has been held to be applicable to the 55 Geo. 3. The object of the legislature was to make persons, taking property by way of bounty under testamentary dispositions, contribute to the burthens of the state a portion of their gains : and these provisions have been directed, as far as possible, to prevent evasion of the general object that the legislature had in view ; and it has, therefore, generally been determined, that the legacy duty is to be satisfied out of the personal estate of the testator immediately making the will, or any other personal estate of which the testator has the power of disposition. The only question which arises in the present case is, whether, Mr. Ramsden having thought fit to exclude any destination of his bounty in favour of three distinct families, that can be said to prevent the application of the words in the 7th section, "out of any personal estate which such person shall have power to dispose as he or she shall think fit." The circumstance of particular persons being excluded stands upon very different grounds from that of a will prescribing in whose favour the power shall be exercised. The act would become a dead letter, and persons would at once be able to give a power to dispose of their property without rendering it liable to legacy duty, if the introduction of such an [771] exception would have that effect. Nothing would be so easy as to exclude a particular person or class of persons, as Commissioner Lin, or the Commissioner of Stamps, and entirely to evade the act, if such an exception were to have that effect. To prevent the parties from having the power to dispose of the property as they think fit, within the meaning of the act, there must be not only an exception and exclusion, but also some control and direction. Here there is no compulsion upon Mrs. Platt to make any appointment in favour of any particular person or class of persons. The words of the act must be reasonably construed, and to have the effect of preventing their application, there must be a control of a very different kind upon the party having the power of appointment, than the exclusion of families or persons, such as are alluded to in this case.

But further, Mrs. Platt was possessed of a general power under the will of Mr. Ramsden, which is within the meaning of the words "general and absolute power of appointment," in the 18th section of the 36 Geo. 3, c. 52. That clause may be divided into three parts : The first deals with dispositions, where there is a power to appoint in favour of clearly designated individuals, which is not applicable to the present case. It next deals with dispositions made by persons who would themselves take nothing upon failure of appointment ; and it enacts, that "where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect [772] thereof." That applies to the case of the person to whom the property would go in default of appointment ; in the present case it goes to the next of kin of Mr. Ramsden, in the event of the power not being executed. The third part deals with the execution of powers by persons who would be entitled upon failure of the execution of the power ; and in that case, as the persons would be entitled upon failure of appointment, and the execution of the appointment rests in their own discretion, they are called upon to pay the duty accordingly. It enacts—"And where any property shall be given with any such general power of appointment, which property, in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment." The words "general power" are there used in the sense of and as applicable to a party not being restrained as to the persons to whom they shall give the property ; where they are not compelled to give it to certain specified persons, and only restrained as to a few persons or classes of persons. It is in that sense that the words "general power" and "absolute power" are used in that section.

But further than this, the execution of the power in this case operated upon a part of the personal estate of Mrs. Platt. This is a power of appointment, with regard to which the law deals in a particular manner. If Mrs. Platt had not been a married woman, and had been a person capable of contracting debts, the execution of this power would have made the property amenable to the payment of her debts. Equity would have ingrafted upon the power an implied pecuniary trust in favour of her creditors. With the exception of the families mentioned, [773] she had the absolute power of appointment, and could appoint in favour of her creditors if she thought fit, and equity would imply that she intended a trust in their favour. [Rolfé, B. You mean, supposing she made a will executing the power?] Yes. Where a party having a general power of appointment does not appoint at all, the creditors can take nothing; but where the party has executed the power of appointment, (not in favour of creditors, but in favour of certain persons), the will is superseded by an implied trust in favour of creditors; and equity regulates the trust, and applies the fund to the payment of debts. The effect of that rule is, to give Mrs. Platt such a power of disposition, that the property may be affected by contracts made by her during her life: and though the disposition cannot operate until she dies, when the will first comes into effect; yet, there being such a general power, there can hardly be a more distinct proof that, within the meaning of this act, it becomes a part of her personal estate and effects, than that equity should make it applicable to the payment of her debts, superseding her express appointment. On the same principle it becomes subject to legacy duty, on the ground that it passes as part of her personal estate. The authorities, with regard to this part of the case, bear more upon the subject of probate than of legacy duty, but still they are applicable. The cases are *Palmer v. Whitmore* (5 Sim. 178), *Attorney-General v. Staff* (2 C. & M. 124), and *Vandiest v. Fynmore* (6 Sim. 570). In the two first cases, the probate duty was held to be payable upon the will of a party executing a power, and that the property was to be considered as part of the personal estate. In the third case, a supposed distinction is taken between the case where the power is created by deed, and [774] where it is created by will; but it will be found, on more careful examination, that there is no ground for that distinction. In *The Attorney-General v. Staff*, the case of *Palmer v. Whitmore* was recognised and acted upon. Lord Lyndhurst, in delivering the judgment of the Court, says, "In *The Attorney-General v. Staff*, which was argued yesterday, we are of opinion that the estate is subject to probate duty in respect of the property in question. Matthew Stainton, by his will, bequeathed the sum of £4000 £3 per cent. Consolidated Bank Annuities, to trustees, subject to a general power of appointment in Judith Staff. Shortly after the death of Matthew Stainton, the testatrix Judith Staff executed the power of appointment by appointing the property to herself and another person, subject to a new power of appointment created by herself. That second power of appointment was also a general power of appointment, corresponding in substance with the former power. The second power of appointment was executed by her will. The property, by the execution of the power of appointment, became liable to her debts, and became her personal estate; she had an absolute control over it. She was not a mere trustee, but had a beneficial interest in the property. The case, therefore, comes within the very words of the 38th section of the 55 Geo. 3, c. 184, and clearly within the spirit and meaning of it. We are of opinion, therefore, that the probate duty attaches. In the case of *Palmer v. Whitmore*, the same question appears to have been decided, upon exceptions to the Master's report, by the Vice-Chancellor, and there was no appeal from that decision." These cases were determined upon the ground that, for the purpose of this act, the effect of the power, coupled with the execution of it, made the property pass as part of the personal estate, so as to render it liable to duty. In *Vandiest v. Fynmore* the testator gave to A. a power to dispose by her will of £5000, part [775] of his estate, on which probate duty was paid. A. exercised the power by her will; and it was held, that probate duty was not again payable in respect of the £5000. *Palmer v. Whitmore* and *The Attorney-General v. Staff* were there cited, and the Vice-Chancellor, in giving judgment, said, "The cases relied on by the Commissioners of Stamps do not apply; for in those cases, the powers were created by deed. Here the power was given by the will of the original testator, and the appointees take as if they had been named in his will. Notwithstanding the Attorney-General does not appear on this petition, the point is so clear, that I do not think it necessary to

send a case for the opinion of the Court of Exchequer; but I shall make an order according to the second alternative of the prayer." That second alternative was, "that the petitioner (the executor) might be at liberty to defend any suit, action, or other proceeding which might be brought against him for payment thereof." But there is, in truth, no such distinction as the one there taken. How does it differ, as concerns the party executing the power, whether it is made in execution of a power created by deed or by will? There is no reason why a party should pay legacy duty or probate duty upon a will made in execution of a power created by a deed, and not pay it upon a will made in execution of a power created by will. The legislature could not have intended any such distinction. Whatever technical rules may be acted upon in equity, in construing and giving legal effect to a power when executed, and holding that the parties take in a certain way under the original power when that power has been executed, they can have no effect in a court of law. If the power is created by deed, according to the doctrine of a Court of Equity, they take under the original deed, and would have to pay probate duty; and why not, when they take under the original will? [Parke, B. The Vice-Chancellor seems to have [776] thought that the Crown were not entitled to have the probate duty twice.] That is not the ground upon which the case is put by his Honor; but he appears to have had in his mind the technical rule, by which it is said that the person who takes under an appointment must be said to take under the original grant or will creating the power, and that you must refer back to the original creation of the power, and, construing the instrument creating the power and the instrument executing the power together, you will be able to give to the whole the effect to which it is entitled.

The next question is, whether probate duty is payable or not. That depends upon the third part of the schedule, by which duty is imposed upon the probate, "where the estate and effects for or in respect of which such probate, letters of administration, confirmation, or cik, respectively shall be granted." Now, it can hardly be contended that this probate was not granted for or in respect of the estate and effects in question. Where a power is to be executed by will, it is requisite that it should have all the legal incidents of a will; the party purporting to execute by will must comply with the Statute of Frauds in every respect and it can only be recognised as a will when it is properly proved, and the probate duty paid upon it. With respect to any part of the estate and effects over which there is a power of appointment, but for or in respect of which no probate can be produced, there is a failure of appointment. The power is only exercised for or in respect of so much of the property as the probate duty is paid upon; the law recognises no will but by the probate, which is indispensable to give effect to the power, and to give a right to the possession of the property. It is just as necessary that there should be a probate of the will, as if the property was absolutely and independently the property of the testator. [Lord Abinger, C. B. The ex-[777]-ecutor, in order to give it to the appointee, must prove the will. It could not be taken by the executor of the former testator. Parke, B. There must be a probate; but the question is, what is the amount of the stamp duty.] Independently of this being a general power, is the legal effect of this will such as to make it liable to probate duty for or in respect of the estate and effects in question? If the intention of the legislature had been confined and limited to the property which, in the strict sense, was in the power of the testator, very simple words, capable of expressing that intention, would have been found in the act; but inasmuch as the legislature have contemplated that the will would have effect, when the duty must be paid, upon property which was not strictly the property of the testator, it uses the words "estates for or in respect of which the probate is granted." [Parke, B. These words are added "exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially." Rolfe, B. The argument on the other side will perhaps be this: that this is property which the testatrix, as trustee, is to dispose of to some others of mankind than those named in the will.] But to make that argument available, it must be shewn that the party having the power of appointment is a trustee, which she would not be unless there be persons named as the objects of the trust. If there is a special power of appointment to the children of A. B., and no bequest over, in that case equity will consider the party having the power of appointment a trustee to execute in favour of those persons; but that cannot be the case where the property is given over. In this case, in default of appointment, the

property is given over. Now this is the power of giving to all the world, excluding the persons excepted. Then for whom is the party trustee? The party having the power of appointment cannot be made trustee [778] by the very instrument by which she gives the property. The doctrine of trusts, in respect of persons having a power of appointment, can only apply to a case where you can tell who is the cestui que trust; but in this case that would be perfectly impossible: it will be difficult therefore to raise any argument as to its being a trust; but if there should, at all events this is not the species of trust contemplated by the act; because powers of this description are subjects of specific enactments, and are dealt with in a different mode, which shews that the legislature has not so treated them. The legatees can only escape the probate duty by shewing that the probate is not essentially necessary to make a part of the title of the party claiming the property, and that it is not probate in respect of that property. But it is clear that it is by the probate they take everything, and that it is the foundation of their title. It is submitted, first, that the claim of the Crown is established to the probate duty upon the property over which Mrs. Platt exercised the power of disposition; next, that the persons she has appointed are liable to pay as strangers, they taking under her will, and that it would not matter if they could make out that they took under the original will, because there is only £10,000 out of £130,000 which would not go to strangers in blood.

But there is a third question, which is, what rate of legacy duty the fund is liable to in respect of Mrs. Platt's interest under the original will; and that depends upon the 18th section of 36 Geo. 3, c. 52, coupled with the 7th section. It has already been shewn that this is a general power of appointment, under the 18th section; upon the execution of which a certain duty becomes payable by her, namely, one per cent. in respect of the property so falling within her general power of disposition. [Parke, B. You say that this is a general power of appointment, and that, when she executes the power, she must pay one per cent. [779] upon the total succession, deducting what she had paid upon the life interest.] Certainly. For these reasons, it is submitted that there ought to be judgment for the Crown on all the questions in the case.

Teed, for the appointees. No probate duty is payable upon Mrs. Platt's will, in respect of the property, the subject of her appointment; and whatever legacy duty is payable, (if any be payable at all), is payable only upon the will of Mr. Ramsden. The case entirely depends upon the construction which is to be put upon the act by which the duties are imposed. Looking at the circumstances of the case, whether the restriction as to the persons named in the will is a restraint really intended to operate upon the party, or introduced colourably, as it might have been if Commissioner Lin had been specified, the question is, whether the Court can see that Mrs. Platt had such an absolute power of appointment, as, if exercised, might have made the estate her own, and so liable to legacy and probate duty; or whether it would be liable to probate duty in any ease. By the 36 Geo. 3, a legacy is defined to be a testamentary gift which is "to be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit." Under the Probate Duty Act, it is duty payable upon the estate of the deceased "in respect of which the probate is granted." So that, when both acts are taken together, the legacy duty may be payable out of the property of the deceased, or not out of the property of the deceased, but out of property subject to the absolute disposition of the deceased; but unless the probate duty be paid out of the property of the deceased, or the property which he had the absolute disposal of, it is very possible that legacy duty may be payable out of property in respect of which no probate duty is payable. The Solicitor-General has referred to the words of the schedule, part 3 of the 55 Geo. 3, c. 184, and he says, that, inasmuch as the power of appointment created by will is to be exercised by will, the Court cannot recognise that to be a will which is not established as such in the Ecclesiastical Court, or, in other words, has received probate, and that the stamp duty must be paid upon every thing in respect of which probate is granted. It is submitted, however, that the stamp duty is to be, not in respect of every thing for which probate is granted, but in respect of the estate of the deceased, in respect of which probate is granted. If the property is out of the jurisdiction, the probate duty does not operate. Where there is a limited power of appointment, a mere naked power of deciding in what proportions a certain class of persons shall take a certain sum of money, though that

power is to be exercised by will, and the will must be proved before it can take effect, no one can contend that the probate duty is payable upon such property; yet the will must be proved: and it may be in respect of that very property that it must be proved. It is impossible to contend that probate duty is payable upon such a mere naked appointment.

But then it is said, that the donee of the power is a trustee for the objects of the power. No authority has been cited for that, and it is submitted that it is not so. The donee may execute the power or not, at her option. There would be no breach of trust in her not doing so. There is a power of discretion conferred on her, to exercise the power and select the objects of it, but there is no trust. The not executing the power, or the executing it, would not make the object of the power come within the exception, "exclusive of what the deceased shall have been possessed of or entitled to as trustee for any other person or persons, and not beneficially." That this is the correct view of the case will be seen, by looking [781] at the different provisions made in the act for securing the payment of the legacy duty. By the 38th section of the 55 Geo. 3, c. 184, it is provided, that before probate is to be granted, an affidavit is to be made by the party taking out probate, which affidavit is to set out the "estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estate for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due and owing from the deceased." Then it provides that, "where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be," there shall be a return of the stamp duty: so that, before the probate is granted, the person taking the probate is to swear that the estate of the deceased is under a certain sum. This excludes anything not the estate of the deceased. It is not that the estate for which the probate is to be granted is under a certain sum, but the estate of the deceased for which it is granted. Unless the property was the property of the deceased, it is not liable to probate duty; for the act says it shall only be paid in respect of the estate and effects of the deceased in respect of which probate is granted. All the cases which have been cited are reconcilable with this view of the subject. In *Ex parte Cholmondeley*, the claim to probate duty was given up. Upon the claim for legacy duty, the Court decided that it attached; because there was a general power of appointment, which was executed, which it differs from this case. In *The Attorney-General v. Staff*, and *Palmer v. Whitmore*, the settlements [782] were by deed. In *Palmer v. Whitmore*, the probability is that the settlor was the testator, and that he disposed of the property by his own will. That such was the case in *Ex parte Staff* is beyond controversy. In that case an estate for life, with a general power of appointment by deed or will, was given to Judith Staff. She executed it by deed in her lifetime. The moment she executed that power over it, she made it her own property. She transferred it to other trustees, to be held to other uses, to herself for life, with a power of disposition by deed or will; which she afterwards exercised by will. There, without doubt, the estate and effects for which probate was to be granted were the estate and effects of the deceased. No one could say that legacy duty was not payable in such a case; for the testatrix was disposing of her own property placed in the hands of trustees, who were bound to give it back to her if she called for it. The act says, that duty shall be paid in respect of the property of the deceased. If the property, being legally hers, is put into hands of trustees for her benefit, it remains her property. [Parke, B. No; it is limited to her to such uses as she shall by deed or will appoint. Rolfe, B. Suppose she had made her will, and said, I give my property to such and such persons, in case a particular event happens?] There would in that case have been a resulting trust. Where a power is created and executed, the appointee takes under the instrument creating the power. In *The Attorney-General v. Staff*, it is clear that the party took under the instrument by which the power was created. Judith Staff, by her will becoming incorporated into her own deed, appointed to that which was her own property. The legatees took by her will that which was her own property. The distinction taken by the Vice-Chancellor in *Vandiest v. Fymore* was a sound one. There the effect of the execution of the power [783] was not to appoint to the property of the appointor, but that of the

donor of the power; and the case is reconcilable on that ground with *The Attorney-General v. Staff*, and *Palmer v. Whitmore*.

But even if the Court should think that the property in question was given generally to Mrs. Platt, and that it passed as such by her appointment, so that the appointees would be liable to legacy duty, still probate duty would not be payable under her will. In *Ex parte Cholmondeley*, where the claim to probate duty was given up by the Crown, the testatrix had a power of appointment under the marriage settlement, in case of her surviving her husband, by deed; and she executed the power during the life of her husband by will. Where a party has a power of disposing of property, and executes that power, it does not make it the party's own property for any purpose of the probate duty.

The main question, however, is, what legacy duty is payable; whether such legacy duty as if the appointees named in Mrs. Platt's will were ingrafted into the will of Mr. Ramsden; or whether the appointees are to be considered as the legatees of Mrs. Platt, and not the legatees of Ramsden. It is submitted that they are to be considered as the legatees of Ramsden only; and it being admitted that all the legacy duty that became payable in the lifetime of Judith Platt, treating her as legatee for life, has been fully paid, nothing is payable by the executors of Ramsden, by reason of the exercise of the limited power of appointment given to Judith Platt, except such duty as shall be payable by them in respect of legacies given by her, as legacies payable by Ramsden's executors, out of his estate. It is contended, on the other side, that, under the 18th section of the 36 Geo. 3, as soon as Judith Platt executed the power given to her, a further duty became payable as by her. It cannot be con-[784]-tended that this case falls within the description of a limited interest, with a general and absolute power of appointment; and it is only in cases where it is a general and absolute power, and that power is exercised, that the duty is so payable. A general and absolute power is that power which a party may exercise at any time, and in any mode, and in favour of any person he pleases, and by the exercise of which he may give to himself, in his own lifetime, absolute property. The distinction between general and limited powers is perfectly well known. In Sugden on Powers, 495, it is said, "An important distinction is established between general and particular powers. By a general power, we understand the right to appoint to whomsoever the donee pleases. By a particular power, it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is in regard to the estates which may be created by force of it, tantamount to a limitation in fee; not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so." A general power being one that a party may exercise when he pleases, in favour of whom he pleases, and how he pleases, it is a limited power if he be confined either as to the mode or the objects. A power to appoint by deed cannot be executed by will, and vice versa; and a power to appoint to one class of persons cannot be executed by appointing to others. It is impossible here to say that Judith Platt had the entire and absolute control over this estate, or that she could do any thing more than appoint to the exclusion of the persons named, and therefore it does not come within the description of a general and absolute power. [Kilfe, B. Do I understand you to [785] contend that no power of appointment is general, when it is limited to be executed by will—that, to be general, it should be to be executed by deed or will?] Certainly; if there is the power of disposing of it by will only, the donee can never have the full enjoyment under it. Where there is a general power, the donee may carry the estate into the market and dispose of it. The question is, whether the donee can, by executing the power, obtain the absolute possession of the property in his own lifetime. Where it is only to be executed by will, it is a limited power in the mode of its execution. It has been said that in this case the subject of the power would be assets in equity, and the property of the testatrix for the payment of debts; but no authority has been cited in support of that proposition. [Parke, B. In *Ex parte Cholmondeley*, the donee had no power of acquiring the property beneficially.] There the attention of the Court was not drawn to the distinction, that she had the power, during the coverture, of appointing by will only, nor to the question whether anything is a general and absolute power by which the party is

restrained from acquiring enjoyment in his lifetime; and it was considered that the power of appointing to anybody by will would have been for the purposes of that case a general power of appointment. It is impossible to read this will, without seeing that the testator was determined that his daughter should not have an absolute power of appointment; for he excluded families the most likely to be the objects of her bounty. It is a limited power, if it be restrained as to the mode, the time, or the object. That it is here limited as to the mode is clear, as it is to be exercised by will only, and it is restrained as to the objects also. According to the language of the statute, the will is to have effect and be satisfied "out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she [786] shall think fit." That corresponds with the language of the 18th section, as to a general and absolute power of appointment, because the words "as he shall think fit" can scarcely be understood as being short of intending a general and absolute power of appointment, otherwise it might be contended that a gift to a particular class came within that definition, which it is clear it does not. It must be a general and absolute power, such as would enable the donee to enlarge the estate for life into a fee-simple interest, to make it subject to the larger duty. Now, to try whether Mrs. Platt could have dealt with this property as she thought fit, what would have been the effect of an appointment in favour of any of the persons named in the will? It is clear the gift over to the next of kin of Dyson Ramsden would have taken effect. It would be declared that she could not dispose of it as she thought fit. [Lord Abinger, C. B. I understand the Solicitor-General to say, it is very true, if you take the literal construction, she would not have power to dispose of it as she thinks fit, because she is limited by the exception of three families; but if you look at the whole purview of the act, the question is, whether, when he gives her all the world to select from except three individuals or families, that is such a limitation of the power as is meant by the act of Parliament.] But as the question is whether this is an absolute power or not, it is not immaterial to shew that the persons named in the case, stand in a relationship that would make them the objects of Mrs. Platt's kindness, and that she was prohibited from giving the property to them. There are restraints imposed upon her, and yet it is contended that she is bound to pay the same duty as she would have done if there had been no restraint upon her. The question is, whether, in a case like this, where there are restraints that are real and not illusory, there would, as it is insisted on the other side, be a trust for creditors if the tes-[787]-tatrix had any. No case has been cited, and none can be found, for such a position. In all cases where it has been so held, the power was absolute, and it was only in a certain mode made assets, and the executor had no power to interfere with it. But this property is no more personal assets of the deceased, than a freehold estate charged with debts either by will or by law.

Simpkinson appeared for the executors of the original testator.

The Solicitor-General was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was a case directed by the Master of the Rolls for the opinion of this Court, as to the probate and legacy duties payable under the wills of John Ramsden and Judith Ann Platt, his daughter.

It appears that John Ramsden, by his will dated the 10th day of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter Judith Ann Platt, John Routh, John Sharman, and John Gillett, his executrix and executors, upon trust, to permit his said daughter to receive the interest and dividends thereof during her life, and after her decease (subject to certain payments then to be made), upon trust for such person or persons (other than and except Joseph Woodhead, of Russia Row, and his relations, Moses Hoper, of Dorset Street, and his relations, and the relations of the late husband of the said testator's said daughter, and every of them, in such parts, shares, and proportions, and in such manner and form, as the said Judith Ann Platt, whether sole or coverte, should by will [788] appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequests in her favour should utterly cease.

The testator died in the month of May, 1825, and his will was duly proved by his executrix and executors.

After the testator's death, the said Judith Ann Platt married George Edmund Platt, and the interest and dividends of the testator's residuary estate (which was very considerable) were regularly paid to her until her death, which happened on the 9th September, 1837.

Previously to her death (namely, on the 27th of April, 1837), she made a will, and thereby, in exercise of the power under her father's will, she gave £10,000 Consols to the descendants of the before-named Dyson Ramsden, and she gave all the rest of her late father's property to various persons, strangers in blood both to her father and herself. Dyson Ramsden was the son of a brother of John Ramsden, the testator.

The points on which the opinion of this Court is desired are these, as to the legacy duty payable in respect to the bequests contained in the two wills, and as to the liability of Judith Ann Platt's will to the probate duty.

This question, so far as regards the legacy duty, appears to us to depend entirely on the construction to be put upon the 18th section of the 36 Geo. 3, c. 52, which regulates the duty in cases where legacies are given subject to power of appointment. It will be observed, that the legislature in this section refers to two sorts of powers of appointment only: first, powers of appointment to or for the benefit of any person or persons specially named, or described as objects of the power; and secondly, general and absolute powers of appointment. It is plain, from the whole context of the act, that these two classes of powers were meant [789] to include all possible cases; and the question, therefore, is, under which class does the power now under consideration range itself. It does not literally come within either description. It is not a power to appoint for the benefit of persons specially named or described, for no persons are either named or described. It is not a general and absolute power; because there are certain persons and their families, in whose favour the power cannot be executed. In applying the provisions of the act to a case like the present, some violence, therefore, must be done to the language of the clause in question; and, after much consideration, we think that there is less difficulty in treating this as a general and absolute power, than as a power to appoint for the benefit of persons specially named or described. The power is one which might have been exercised by Mrs. Platt solely for her own benefit. She might have contracted debts to any amount in her lifetime, and then by her will have directed the fund in question to be applied in their discharge; nay, further, if she had died indebted, and had appointed the fund to strangers, the appointees could only have taken subject to her debts; for the rule of equity, which subjects a fund so appointed to the debts of the appointor, does not appear to be affected by the circumstance, that there are certain persons to whom the fund could not have been given. The question in such cases is, not whether there are persons to whom the fund could not have been given, but whether the party executing the power might have executed it for his own benefit, i.e., in payment of his own debts; and where that is the case, all appointees are held as volunteers, and as being in no better situation than ordinary legatees, taking by the bounty of the appointor, and subject to his debts. See the language of Lord Hardwicke, in *Lord Townshend v. Windham* (2 Ves. sen. pp. 9, 10).

[790] Inasmuch, therefore, as the power given to Mrs. Platt is one which she might have exercised for her own benefit, and under an exercise of which no one can claim any right, except subject to her debts; and as it is impossible, without manifest absurdity, to treat the persons in whose favour she might appoint (namely, all mankind except three families) as being persons specially named or described; we think the power must be treated, according to the only other alternative in the 18th section, as a general and absolute power.

The same reasons which induced us to put this construction on the 18th section, also appeared to us to establish, that, according to the true construction of the 7th section, the property subject to the power was personal estate, which Mrs. Platt had power to dispose of as she should think fit.

With regard to the question of the probate duty, we are of opinion, that no duty is payable on the probate of the will of Judith Ann Platt, in respect of the residuary estate of her father. We are aware that this opinion is directly opposed to the decision of this Court in *The Attorney-General v. Staff* (2 C. & M. 124), as also to the previous case of *Palmer v. Whitmore*, before the Vice-Chancellor (5 Sim. 178). But

these cases both proceeded on the ground, that property subject to a general power of appointment forms part of the property "for or in respect of which the probate is granted;" and it appears to us impossible to reconcile that doctrine with the subsequent decision of the House of Lords, in *The Attorney-General v. Hope* (1 C. M. & R., 530). In that case, which was very fully considered, the House of Lords held, that probate duty was not payable in respect of such parts of the testator's assets as were situate [791] in America at the time of his death; and the broad ground on which that decision rested was, that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate, being in fact that property which, but for the will, the ordinary would in early times have been entitled to apply in pious usus. Now, although Judith Ann Platt had what we consider an absolute power of appointment over the property in question; yet it is clear, that the ordinary never could, under any circumstances, have had any right whatever to interfere with it; and it is also certain, that, whether probate be granted or not, the executor, quâ executor, can have no title to any part of the property. Lord Lyndhurst, in delivering the judgment of the Court in *The Attorney-General v. Staff*, said, that that case, which was exactly similar to the present, came within the very words of the 38th section of 55 Geo. 3, c. 184. But that is in fact begging the whole question. The words of the 38th section are, that the person applying for probate shall make oath that the estate and effects of the deceased, for or in respect of which the probate is to be granted, exclusive of property of which the testator was possessed as trustee, and not beneficially, are under a certain sum. The question is, whether property circumstanced like the present, is property of the deceased, for or in respect of which the probate is granted; and the House of Lords having decided that the probate is granted in respect only of that property which, but for the will, the ordinary would have been entitled to administer; and it being quite clear, that neither the ordinary nor the executor ever could have administered any part of this property; we cannot hold that this is property for or in respect of which the probate is granted.

It might be sufficient for us to stop here: to say, that as it appears to us impossible to reconcile *The Attorney-General v. Staff* with the subsequent case in the House of Lords, we are bound to act on the latter authority. But it is right we should also add, that, even independently of the authority of the case in the House of Lords, there would be many serious difficulties resulting from the doctrine of *The Attorney-General v. Staff*, which do not seem to have occurred to the Court when that case was decided. The executor is the party who is to pay the duty, and the only funds to which he can resort for reimbursement are the general assets. What then is he to do in a case like the present, where the fund to be appointed is very large, and the general assets very small? It may, and probably in the present case would, happen that the duty would far exceed the whole of the assets, which the executor can ever possess. The consequence would be, that he never would be able to prove at all. In the 45th and following sections of the 55 Geo. 3, c. 184, provision is made for enabling the Commissioners of Stamps to grant probate on credit, where the assets realized are not sufficient to enable the executor to pay the duty. But in such case, the full amount is made a debt due from the executor; and it is plain from the nature of the provisions, that the legislature did not contemplate the possibility of a case in which the duty could ever eventually exceed the amount of the assets realized by the executor; as it certainly may, if the doctrine in *The Attorney-General v. Staff* is followed.

How is the duty on the appointed fund to be obtained, in a case where the general assets are in one province, the province of Canterbury for instance, and the appointed fund in another, the province of York? The executor proving in the province of Canterbury, would certainly not be bound to pay duty on the appointed fund; and the act contains no provision obliging him, in such case, to prove at all in the province of York. The legislature [793] could hardly have meant, that the liability of the appointed fund to probate duty, should depend on the accident of its being, or not being, situate in the same province with the general assets.

Again, suppose the case of the appointed fund being in a foreign country, it can hardly be contended, after *The Attorney-General v. Hope*, that in such a case probate duty would be payable; and yet there is no more reason why it should not be payable then, than where the funds are in England; for in neither case would the probate give any right to the executor.

The language of the Court in *The Attorney-General v. Staff* is—"The property by

the execution of the power of appointment became liable to her debts, and became her personal estate; she had an absolute control over it." If this be the correct test as to the liability to probate duty, it will include the case of a power to appoint a sum to be raised out of real estate, as well as the power to appoint personal estate; and surely it would be a strange anomaly, that probate duty should be payable in respect of a charge on real estate, created by virtue of a power, when it is clear no such duty is payable where the charge is created by the owner of the fee-simple.

We have pointed out these incongruities (and many more might be suggested) for the purpose of shewing, that, in following the principle established by the case of *The Attorney-General v. Hope*, we are taking the course, not only consistent with the decision of the House of Lords, but also, as it appears to us, most conformable to the spirit and intention of the act.

It will be observed, that, according to our view of this subject, the Vice-Chancellor was right in the case of *Launtiest v. Funnmore* (6 Sim. 570), which was after the case of *The At-[794]-torney-General v. Staff*, in holding that probate duty was not there payable. But we feel bound to add, that we do not concur in the reasons in which his Honor is represented as considering that case distinguishable from those which had preceded it.

On these grounds, we propose to return the following certificate in answer to the questions submitted to us by the Master of the Rolls:—

First. We are of opinion, that, on the death of Judith Ann Platt, a duty of one per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof.

Secondly and thirdly. We are of opinion that, no probate duty is payable upon the probate of the will of the said Judith Ann Platt, in respect of the estate and effects bequeathed and appointed by her said will as aforesaid.

Fourthly and fifthly. We are of opinion, that legacy duty is payable in respect of the bequests contained in the will of the said Judith Ann Platt, at the same rate at which it would have been payable, if they had been mere legacies given by her, payable out of her own personal estate.

[795] KINLOCH AND ANOTHER v. NEVILLE. Exch. of Pleas. 1840.—To an action of trespass qu. cl. fr., the defendant pleaded a right of way across the locus in quo for the occupiers of B. field, on foot and with cattle and carriages, enjoyed as of right and without interruption for twenty years before the commencement of the suit, under the stat. 2 & 3 Will. 4, c. 71. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of Parliament (the Trent Navigation Act, 23 Geo. 3, c. 48) under which the Trent Navigation Company, before the commencement of the twenty years, made a haling-path for towing vessels along the river, across the locus in quo, into B. field; that after the commencement of the twenty years, under the powers of another act of Parliament (the Dunham Bridge Act, 11 Geo. 4, c. lvi.), another haling-path was set out nearer to the river, but also across the locus in quo and into B. field, and that thereupon the Navigation Company abandoned the former haling-path, which thenceforth ceased to be used as such: that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed, as of right and without interruption, by virtue and under the provisions of the first act of Parliament, a way along the first-mentioned haling-path, across the locus in quo, on foot and with cattle, which right of way ceased and determined on the abandonment of that haling-path: but that, from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way, as a continuation of the right before enjoyed by them under the act of Parliament, continued to use the same way: which way, and the use and enjoyment thereof along the haling-path as aforesaid, is the same way, and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages:—Held, on demurrer, that the replication was good: that it disclosed facts shewing that the defendant's user, although as of right and without interruption during the twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2 & 5, was not such as would, before that statute, have been

sufficient to prove a claim by prescription or non-existing grant: and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea.

[S. C. 10 L. J. Ex. 248. Applied, *Tone v. Preston*, 1883, 24 Ch. D. 744. Referred to, *Gardner v. Hodgson's Kingston Breweries Company*, [1900] 1 Ch. 592.]

Trespass for breaking and entering a close of the plaintiffs, situate at the parish of Newton, in the county of Lincoln, (describing its abutments), and pulling down posts and rails standing thereon, &c.

The defendant, by his fourth plea, alleged an enjoyment for twenty years next before the commencement of the suit, by the respective occupiers for the time being of a close called the Breast Field, situate in the parish aforesaid, and adjoining to the said close in which &c., of a general right of way from the Breast Field towards, unto, into, through, over, and along the close in which &c., and from thence unto and into a common Queen's highway, and back again, &c., on foot, with cattle, and with carts, waggons, and other carriages, &c.; and justified the trespasses in exercise of such right of way. The fifth plea alleged the existence of a common and public highway into, through, over, and along the close in which &c., for the purpose of fetching, drawing, loading, and taking away all such lime and coal, and other materials, as might be landed on a certain public landing-place adjoining the said close in which &c., and a certain public navigable river called the river Trent, [796] from boats, barges, and other vessels in the said river; and justified the trespasses in the use of such highway, for the purpose of fetching &c., lime, coal, and other materials which, just before the times when &c., had been landed on the said landing-place from boats, barges, and other vessels in the said river.

Replication to the fourth plea, as to so much thereof as relates to the allegation of a right of way with carts, waggons, and other carriages, and to the exercise of the way with carts, waggons, and other carriages, traversing such right. And as to the residue of the plea, that, after the making and passing of a statute made and passed in the 23rd year of the reign of his Majesty King George the Third, intituled "An Act for improving the Navigation of the River Trent, from a place called Willden Ferry, in the counties of Derby and Leicester, or one of them, to Gainsborough, in the county of Lincoln, and for empowering persons navigating vessels thereon to hale the same with horses," (a) and before the commencement of the said period of twenty years in the said fourth plea mentioned, to wit, on the 1st day of January, 1785, the company of Proprietors of the River Trent Navigation, in the said act mentioned, and by virtue of and according to and in pursuance of the said act, did set out, and from thence until the abandonment thereof hereinafter mentioned, did use, a certain convenient and sufficient path for haling, towing, and drawing, by men or with horses, any boats, [797] barges, keels, or other vessels using the said navigation; which said path was a certain path from and out of the said common highway towards, unto, into, and through the said close in which &c., unto, into, and through the said close called the Breast Field. And the plaintiffs further say, that afterwards, and since the commencement of the said period of twenty years in the said fourth plea mentioned, and before the first of the said times when &c. in the declaration mentioned, and after the passing of a statute made and passed in the 11th year of the reign of King George the 4th, intituled "An Act for building a Bridge over the river Trent, from Dunham, in the county of Nottingham, to the opposite shore in the county of Lincoln," (11 Geo. 4, c. lxvi.), to wit, on the 1st day of January, 1833, the Dunham Bridge Company, in the said secondly recited act mentioned, did, under and by virtue and in pursuance of the said last-mentioned act of Parliament, for the length of sixty yards next to the

(a) 23 Geo. 3, c. 48: the 92nd section whereof enacts, "That all owners and occupiers of lands through which the said haling-path shall be made, shall have free liberty to use the said haling-path as a foot-way, bridle-way, or drift-way for their cattle, to, from, or through their respective lands, and to or from their proper watering places at the said river: . . . and all persons authorized to use the said haling-path, by themselves or with horses (not drawing), or other cattle as aforesaid, shall be liable to the like penalties and forfeitures for any trespasses or neglects hereinbefore specified, or owners, or drivers, or horses, employed in haling boats, &c., are subject to by virtue of this act," &c.

Dunham Bridge in the said act mentioned, being part of the length of the path next hereinafter mentioned, set out and make, and the said Company of the Proprietors of the River Trent Navigation did, under and by virtue and in pursuance of the first-mentioned act, for the residue of the length of the path next hereinafter mentioned, set out and make, and the last-mentioned Company have from thence hitherto used and maintained, one other sufficient and convenient path, nearer than the said first-mentioned path to the said river, for haling, towing, or drawing by men or with horses, any boats, barges, keels, or other vessels using the said navigation; the said secondly mentioned path being so made as aforesaid in a continuous line from and out of the said highway towards, unto, into, and through the said close in which, &c., unto, into, and through the said close called the Breast Field: and the said Company of Proprietors of the River Trent Navigation did thereupon, after the said secondly mentioned path had been so set out and made as aforesaid, [798] and within twenty years next before the commencement of this suit, and before the first of the said times when &c. in the declaration mentioned, to wit, on the day and year last aforesaid, wholly abandon the said first-mentioned haling-path, which thereupon did cease, and from thence hitherto hath ceased, to be or to be used as such haling-path as aforesaid; and from the time of the said abandonment of the said first-mentioned haling-path hitherto, the said secondly mentioned haling-path hath been and still is the only haling-path to, from, through, or in the said close in which &c., and also the only haling-path, to, from, through, or in the said close called the Breast Field. And the plaintiffs further say, that before and at the time of the commencement of the period of twenty years in the said plea mentioned, until the said abandonment of the said first-mentioned path, the occupiers of the said close called the Breast Field actually had, used, and enjoyed, and were respectively accustomed to have, use, and enjoy, as of right and without interruption, by virtue of and under the provisions of the said first-mentioned act, but not under any other right or title, a way in and along the said first-mentioned haling-path, for themselves and their servants to go, return, pass, and repass, on foot and with horses, mares, geldings, sheep, and cattle, from the said close called the Breast Field towards, unto, and into, through, over, and along the said close in which &c., and from thence unto and into the said highway, and so from thence back again, from the said highway towards, unto, into, and through the said close in which &c., unto and into the said close called the Breast Field, every year and all times of the year, at his or their free will and pleasure, as to the said close called the Breast Field belonging and appertaining: which said right of way, during the period of twenty years in the said fourth plea mentioned, and before the first of the said times when &c. in the declaration mentioned, ceased and determined upon and by virtue of the said making of the said secondly [799] mentioned haling-path, and the said abandonment of the said first-mentioned haling-path. And the plaintiffs further say, that from the time when the said first-mentioned haling-path was so abandoned as aforesaid, and ceased to be such haling-path as aforesaid, until the commencement of this suit, the respective occupiers for the time being of the said close called the Breast Field, claiming right to the way hereinafter mentioned, as and by way of a continuation of the said right so by the respective occupiers for the time being of the said close called the Breast Field, by virtue of and under the provisions of the said first-mentioned act, previously had, used, and enjoyed as aforesaid, continued to use and enjoy, and were respectively accustomed to use and enjoy, and had actually had, used, and enjoyed, as of right and without interruption, in and along the said first-mentioned haling-path, the same way as aforesaid [describing it as before]: And the plaintiffs further say, that the said way, and the said use and enjoyment thereof in and along the said first-mentioned haling-path, was and is the same way, and the same use and enjoyment thereof, as the way, and the use and enjoyment thereof, in the said fourth plea mentioned, except so far as the plea alleges the same to be a way for carts, waggons, and other carriages, and not another or a different way, use, or enjoyment, and that there was no origin, title, or ground for the said alleged right of way, so far as the same does not relate to carts, waggons, and carriages, which was so used and enjoyed as in the said fourth plea and in this replication mentioned, except the said first-mentioned act of Parliament. Verification.

The defendant, as to so much of this replication as related to the allegation in the plea of the right of way with carriages, joined issue thereon: and as to the residue of the replication, demurred specially, assigning for causes, that the said replication is

double, in this, that it states several distinct and material issues: that the plaintiffs ought either to have traversed the matters contained in the [800] fourth plea, or to have confessed and avoided such matters; that the plaintiffs have in their replication set out another and different right of way, and averred it to be the same right of way and identical with that claimed by the defendant in his said fourth plea, as to the said close called the Breast Field belonging and appertaining; and that the said replication is argumentative, and no certain or specific issue can be taken thereon, &c. The following point was also stated in the margin:—That the right of way in the fourth plea and in the introductory part of the said replication mentioned, did not cease by the setting out and making of the said haling-path by the Dunham Bridge Company of Proprietors of the River Trent Navigation, as in the replication mentioned. Joinder in demurrer.

To the 5th plea, the plaintiffs new assigned, that they issued their writ, &c., not only for the several trespasses in the introductory part of the said 5th plea mentioned, and therein attempted to be justified, but also for that the defendant, on the said several days and times &c., broke and entered the said close of the plaintiff, &c. &c., which are other and different trespasses than the said trespasses in the said 5th plea mentioned, and therein attempted to be justified, &c.

Plea to the new assignment, setting up the same right of way as alleged in the 4th plea: to which there was a replication in the same terms as the replication to the 4th plea, which was followed also by a similar joinder of issue, demurrer, and joinder in demurrer.

The case was now argued by

Bayley for the defendant, in support of the demurrer. The replications are bad: they do not in any way meet the right set up by the pleas. The defendant claims a general right of way, on foot, and with cattle and carriages, from the Breast Field, over the plaintiff's close, into a highway, and back again. The plaintiffs, in answer to this claim, after traversing the right so far as it is claimed to [801] be used with carriages, set forth an act of Parliament, under which they say a haling or towing path was set out by the Trent Navigation Company, before the commencement of the period of twenty years mentioned in the pleas, and another act under which that path was discontinued as a haling-path and another made and used instead of it, within the twenty years; and then allege that the occupiers of the Breast Field continued to use the former after its abandonment, and that the way so used is that alleged in the pleas; and that the defendant has no other right except under the act of Parliament. But that is not the right claimed by the pleas; what they claim is a drift-way in respect of the occupation of the Breast Field. The plaintiffs ought to have traversed the right of way as alleged. Again, the replication does not shew that the defendant has any connexion with the Trent Navigation Company, but only that he has in fact used the path. [Alderson, B. What is the replication but a denial of the defendant's user as of right?] Yes—but it is an argumentative instead of a direct denial. [Lord Abinger, C. B. It seems to me that the plaintiffs should, at all events, have shewn in their replication that the right of the defendant was connected with the user of the towing-path under the act: that, however, would only have been an argumentative denial of the right alleged.] The Court then called on

Waddington to support the replications. The question in this case turns on the construction of the Prescription Act, 2 & 3 Will. 4, c. 71, and it becomes necessary to refer to that act, and to the cases decided on it, to shew that, in the present case, the plaintiffs could not have pleaded otherwise in confession and avoidance of the pleas. The 2nd section of the act provides, that no claim to any way or other easement, &c., when it shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be [802] defeated or destroyed by shewing only that it was first enjoyed at any time prior to such period of twenty years, &c. Then the 5th section prescribes the mode of pleading and replying to such rights:—enacting, “that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable to the case, &c.; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, &c., or on any

cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." Now, here the facts alleged in the replication, are consistent with the simple fact of enjoyment by the defendant, as of right and without interruption. It confesses a user of twenty years; but shews that, before the commencement of the twenty years, a certain state of things existed which gave rise to and authorized that user; that that state of things ceased to exist within the twenty years; but that the defendant's user, notwithstanding continued. It admits an adverse enjoyment down to the commencement of the suit—but an enjoyment originating under the authority of the act of Parliament, and in no other right. It is clear, that up to the period of the abandonment of the first haling-path, this was a strictly rightful enjoyment, under the 23 Geo. 3, c. 48, s. 92: then the replication goes on to state a continuance of the user after such abandonment; but it cannot be said that the same right which existed only by virtue of a kind of parliamentary contract between the owners of the land and the [803] Canal Company,—could continue after the legal abandonment of the way by the latter. When the land could not be otherwise used, it was reasonable that the way should be enjoyed; but inasmuch as, by the act of parliament (23 Geo. 3, c. 48, s. 25), the soil of the haling-path remained in the owner of the land, why should the easement continue, when it was no longer used as a haling-path, and the owner had it in his power to resume all his original rights? It reverted to him free from the easement, which was no longer necessary. This is not such a user as could have been inferred from prescription or a lost grant before the act; but the circumstances disclose (in the words of s. 2), "a way in which the easement is defeated, other than by shewing that it was first enjoyed before the twenty years;" and therefore they may be given in evidence to defeat it,—but not without pleading them. There is a user throughout, "as of right, and without interruption:" first, under the act of Parliament, and then as an adverse enjoyment claimed in continuation of the former right. No doubt, if the latter had continued for twenty years, it could not have been avoided. In *Bright v. Walker* (1 C. M. & R. 211), the qualities of the enjoyment necessary to clothe the party with the right, under this statute, were fully considered. Parke, B., says—"In order to establish a right of way, and to bring the case within this section, (s. 2), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which (by s. 5) such a claim must be pleaded; and the like evidence would have been required before the statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall [804] have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' The same doctrine is laid down in *Tickle v. Brown* (4 Ad. & Ell. 382; 6 Nev. & M. 230), and *Beasley v. Clarke* (2 Bing. N. C. 705; 3 Scott, 258). The enjoyment necessary to give a title, therefore, does not mean enjoyment adversely, but enjoyment openly, without force or fraud—*nec vi, nec clam, nec precarie*. [Alderson, B. You say you could not safely traverse the right, because there has been a continuous adverse user for the whole period.] Yes—a continuous user as of right; but which is shewn, by the facts averred in the replication, not to be such as that a title by prescription or lost grant could be inferred from it. Then is it sufficiently avoided? It clearly is, if the right ceased on the abandonment of the haling-path; which is a matter to be replied, because it does not, like leave asked, break the continuity of the twenty years' user, but is consistent with it. The plaintiffs admit that the defendant's user was an enjoyment under a claim of right, (which is what is meant in s. 5), although not such as to confer a right in law, when inquired into. This is, in truth, an agreement beginning before the commencement of the twenty years, but extending over only a part of that period. Unity of possession for a part of the time may be shewn under the general traverse: because, there the easement is not enjoyed as an easement: *Onley v. Gardiner* (4 M. & W. 496). [Lord Abinger, C. B. Was it necessary to do more than to put upon the record the right under which the defendant was entitled, and the determination of it?] At all events, the rest of the replication is only surplusage. It is objected that an issue could not be taken on it; but the defendant

might have denied the abandonment, or that his right was solely under the act. Then it is said the replication is [805] double; but it only consists of a number of facts making up one defence. Again, it is said that it sets out a different way from that stated in the plea; if so, the defendant should have traversed it.

Bayley, in reply. It may be admitted that the replication confesses the user as of right; but it does not avoid it. It avers that the original haling-path has ceased; but it does not state that the act of Parliament is repealed; nor is any connexion shewn between the occupier of the Breast Field and the Trent Navigation Company. Further, the Dunham Bridge Act does not expressly substitute the new for the old haling-path. The argument for the plaintiffs amounts to this, that the discontinuance of it as a haling-path by the Company necessarily deprived the defendant of his right. But if so, the general traverse would have been sufficient, and the plea, being divisible, might have been found partly for the plaintiff and partly for the defendant: *Higham v. Rabett* (5 Bing. N. C. 622, 7 Scott, 827). If this replication amounts to anything, it is to the statement of a different right of way from that which the defendant has claimed.

LORD ABINGER, C. B. I am of opinion, on consideration, that the replication is sufficient. If the plaintiffs had simply traversed the right as alleged, and then shewn on the trial the facts as they are set forth in the replication, the answer would have been, that they ought to have been pleaded, because they admit a continued adverse user during the twenty years. The replication is not vitiated by the admission of the right during a part of the time; it is only putting on the record more than is necessary. Here the plaintiffs have confessed the whole, and avoided the whole. Another question arises, as to whether the right given by the act to use the haling-path has ceased. That is a question of [806] law, and if the plaintiffs have failed to shew that, they have shewn nothing. I am of opinion that it has ceased. [His Lordship read the 92nd section.] The intention of the act was, that, so long as there was a haling-path, the owners and occupiers of the land over which it passed should have a right to use it, and no longer. I think, therefore, that the plaintiffs are entitled to judgment.

ALDERSON, B. I am of opinion that the proper construction of Lord Tenterden's act is that for which Mr. Waddington has contended. If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years. The 5th section creates the difficulty. The act, however, does not alter the nature of the right necessary to give a legal title. The party who avers the right must mean such as could be inferred to exist by custom, prescription, or non-existing grant: and the other party must shew in his answer that there is no right of that nature. Here the replication states, that, within twenty years before the commencement of the suit, the haling-path was shifted, and the previous one abandoned. If so, according to the act of Parliament, the defendant's right to use it ceased. So that the replication shews that the defendant could not have exercised the right either by custom, prescription, or grant, and is therefore sufficient.

GURNEY, B., and ROLFE, B., concurred.

Bayley then applied for leave to amend, by pleading that the defendant had enjoyed the right for forty years.

Leave to amend on payment of costs; otherwise,

Judgment for the plaintiffs.

[807] GRIPPER AND OTHERS *v.* BRISTOW.(a) Exch. of Pleas. 1840.—The defendant having agreed to give the plaintiffs a warrant of attorney to secure his debt to them, the plaintiffs employed P., an attorney, to prepare it. P. called with it on the defendant, and told him it must be signed in the presence of some professional man, and that he should procure Mr. S. to attest it; and the defendant accordingly went to procure S.'s attendance, but met him in the street, when P. told him they were coming to his, S.'s, office, that he might witness the execution of a warrant of attorney by the defendant. The defendant then suggested that they had better go to P.'s office, which was nearer. They went there accordingly; P. placed the

(a) This case was decided by Alderson, B., sitting alone on the last day of the term.

paper in S.'s hands, and S. then read over and explained the warrant of attorney to the defendant, and asked him whether he wished him to witness the execution of it as his attorney. The defendant replied that he did, and then signed it, and S. attested it. P. offered to pay S. for his attendance, but he said, as it would come out of the defendant's pocket, he should make no charge; for which the defendant expressed himself obliged:—Held, that S. was not expressly named by the defendant, and attending on his behalf, so as to satisfy the stat. 1 & 2 Vict. c. 110, s. 9; and the warrant of attorney and judgment signed thereon were set aside.—Sembles, that this is an objection which cannot be waived by the defendant.

[S. C. 8 Dowl. P. C. 797; 9 L. J. Ex. 324.]

Kelly had obtained a rule to shew cause why the warrant of attorney given by the defendant in this action should not be set aside, and why the writ of fieri facias issued herein should not be set aside for irregularity; on the ground that the warrant of attorney was not duly attested according to the stat. 1 & 2 Vict. c. 110, s. 9. The affidavit of the defendant (an innkeeper at Hertford), on which the application was founded, stated, in substance, that, in consequence of an application by the plaintiffs to him for some security for his debt to them, it was agreed that he should sign a warrant of attorney for £250, and the plaintiffs undertook to give instructions to Mr. Prangley, their attorney, to prepare it: that, on the 25th April last, Prangley called on the defendant, and told him that "he had prepared the thing to be signed by him," and requested him to call at his office for the purpose, and an appointment was made accordingly for 8 o'clock that evening; but before that hour, Prangley called on the defendant with the warrant of attorney, and stated that it must be signed in the presence of some professional man, and that he should procure Mr. Edward Robert Spence to attest it; and accordingly he took with him the warrant of attorney for the purpose of procuring Mr. Spence's attendance: that the defendant afterwards attended at Prangley's office, and executed the warrant of attorney in the presence of Prangley and Spence, whom Prangley had [808] so of his own accord procured to attend for the purpose of attesting it: that Prangley placed the warrant of attorney in Spence's hands, without the defendant's having previously consulted Spence on the subject, and without his having himself read the warrant of attorney: that Prangley, after the execution of the warrant of attorney, offered to pay Spence for his attendance, but he declined making any charge for it. The defendant deposed also, that, if he had been allowed to use his own discretion in the nomination of an attorney to attest his execution, he should have employed a Mr. Sworder, to whom he was under obligations, and who resided very near him, and whom he had consulted on all former occasions; that Spence was expressly named by Prangley, and not by him the defendant, and that he believed that Prangley, knowing that the defendant was indebted to Sworder, engaged Spence to attend in order that Sworder might not be informed of the nature of the security which the defendant was required to sign. On the 13th May, judgment was signed under the warrant of attorney, and execution issued. The present rule was obtained on the 9th of June.

The affidavit of Spence, in opposition to the rule, stated, that in the evening of the 25th April, he met Prangley in the street of Hertford, in company with the defendant with whom he was well acquainted, when Prangley stated to him, in the defendant's hearing, that they were coming to his, Spence's, office, that he might witness the execution of a warrant of attorney by the defendant; that the defendant suggested that they had better go to the office of Prangley, which was nearer; that the deponent accordingly went with them to Prangley's office, and there read over and explained the warrant of attorney to the defendant, and asked him whether he wished him, the deponent, to witness the execution of it as attorney for him the defendant, to which he replied that he did; and the deponent witnessed it accordingly: that Prangley offered to pay the [809] deponent for his attendance; but he said that, as it would come out of the defendant's pocket, he should make no charge, and the defendant thereupon expressed himself much obliged to the deponent. No affidavit was produced from Prangley, but it was sworn that he had left Hertford in consequence of pecuniary embarrassments, and that the plaintiffs were unable to have any communication with him, or to procure an affidavit from him.

R. V. Richards and Bramwell shewed cause against the rule. First, the attestation

by Spence was sufficient to satisfy the statute. It is not sworn by the defendant that he had no previous communication with Prangley, and the statement of Spence, that he met the defendant coming to his office for the purpose, is a contradiction of what the defendant intended should be inferred from his affidavit, viz., that the calling in of Spence was entirely the act of Prangley. Then it appears that the defendant, on being asked by Spence whether he wished him to attest the instrument on his behalf, answered in the affirmative, and so clearly adopted him as his attorney. This case is not distinguishable from those of *Oliver v. Woodruffe* (4 M. & W. 650), *Bligh v. Brewer* (1 C. M. & R. 651), and *Taylor v. Nicholls* (ante, p. 91). These cases establish, that from whatever quarter the suggestion of the attorney's name comes, if there be any expression of the defendant, shewing affirmatively that he recognises him as his attorney for the purpose, it is sufficient. [Alderson, B. There does not appear to have been an exercise of any option in the present case; it looks like an express naming by Prangley. The difficulty arises from that part of the defendant's affidavit being left unanswered. Suppose Prangley had made an affidavit, and admitted that part of it?] It is consistent with all the defendant states, that [810] he did expressly assent to the nomination of Spence as his attorney. It was in effect an attendance at the request of the defendant; he had the option of answering in the negative to Spence's question. If the party has an election at any time before the irrevocable act of signature, it is sufficient.

But further, this is an irregularity only, and the plaintiff has waived it by his delay in making this application. If he had applied earlier, the plaintiffs might have agreed to set aside the instrument, and have proceeded against him on the original consideration. [Alderson, B. If the warrant of attorney be void under the statute, the plaintiff has signed judgment without authority; how can it be waived? it is the same as if a stranger had signed judgment.] [They argued also, that the defendant had waived the invalidity of the warrant of attorney, by a subsequent arrangement with the sheriff for the sale of his goods.]

Kelly (with whom were Knowles and W. H. Watson) contra. It is an entirely new principle of law, that a non-compliance with a statute can be waived or cured. This is no irregularity within the meaning of the rule of H. 2 Will. 4; it is the signing of a judgment on a void instrument, i.e. without authority, and, for this purpose, by a mere stranger. Such a defect as that cannot be cured. In a recent case in the Court of Queen's Bench, an annuity was set aside for want of enrolment, after a lapse of 27 years. Where a statute requires certain forms to give validity to an instrument, if they be not observed, the instrument is void, and must be set aside at any time if the Court be satisfied that the statute has not been complied with. If it were otherwise, parties might always defeat the statute by swearing to some supposed assent or waiver, which could not be contradicted.

With regard to the other point, it has always been held [811] that the statute must be strictly and substantially complied with, for the benefit of the debtor; *Rice v. Linsted* (6 Scott, 895; 7 Dowl. P. C. 153). The words "expressly named" are used in contradistinction to a naming by implication from the circumstances: *Taylor v. Nicholls*. Here there was no naming by the defendant, either express or implied. The defendant positively swears that Spence was not named by him, but expressly named by Prangley; and where the party thus brings himself directly within the words of the statute, the Court will call for some direct contradiction on the other side: here there is none. It is consistent with the whole of Spence's affidavit, that the plaintiffs themselves had named him; and Spence is called upon actually to attest, before there is anything to shew any nomination or assent by the defendant. Prangley, although he informs the defendant that a professional man must attest the execution of the instrument, does not tell him that he is to be named by the defendant, and attending on his behalf. *Barnes v. Pendrey* (7 Dowl. P. C. 747) is in point, where Coleridge, J., distinguishes the cases cited on the other side. Again, with regard to the "attending at the request" of the defendant, the cases cited are distinguishable. In all of them the defendant himself went voluntarily to the attorney for the purpose; here he went with Prangley to his office, and there Spence was introduced by Prangley. [Alderson, B. *Walker v. Gardner* (4 B. & Adol. 371) is much nearer to this case than any of those which have been cited, and is a case a multo fortiori to the present.] If this be held sufficient, the plaintiff's attorney might always introduce an attorney of the plaintiff's own nomination, and if the question were only asked—"Do you wish me

to attest as attorney for you?" and an affirmative answer were given, it would be enough.

[812] ALDERSON, B. I think this rule must be made absolute. The true rule appears to me to be this: that, in order to make the party an attorney expressly named by the defendant, and attending on his behalf, there must be something different from what may be called an implied naming, or implied attendance, i.e., where it is to be collected only from the circumstances of the case that the attorney was named by or attending on behalf of the defendant. There is another criterion: that he be expressly named, or expressly attending, under such circumstances as to shew that the defendant is cognizant of the fact, and that he has an option in the matter. It is not necessary that he should beforehand name or request the attendance of the attorney, if, with full knowledge that he has an option, he adopts him as his attorney. That I take to be the rule established in *Bligh v. Brewer* and *Taylor v. Nicholls*. In those cases the defendant was informed that he had an option. In *Bligh v. Brewer*, his answer shewed that it was present to his mind that he could exercise an option, and that he did exercise it with his free will. In *Taylor v. Nicholls*, the defendant was expressly informed that he had a right to appoint any person, and answered that he had no wish to have any particular attorney, his only desire being that the transaction might not become known. There, also, he knew he had an option, and exercised it. In *Barnes v. Pendrey*, the defendant had a full option; but it was not shewn that he expressly adopted the party as his attorney. Here all the transaction apparently arose out of an application by the plaintiff's attorney to Mr. Spence. If the defendant had expressly adopted him, the case would have fallen within those of *Bligh v. Brewer* and *Taylor v. Nicholls*; but he does not appear to have known that he had an option to select an attorney on his behalf. The original information came from the plaintiff's attorney, and it did not communicate that the defendant had the right, but rather implied that the plaintiffs had. This statement is not con-[813]-tradicted, and therefore I cannot but presume it true. Then, if the defendant merely answered Spence's question in the affirmative, under the impression that Prangley had a right to nominate, how can it be said, unless the act of Parliament is to mean nothing, that Spence was an attorney "expressly named by the defendant, and attending on his behalf," when he is originally suggested by Prangley, is expressly named by him, and only attests by the mere assent of the defendant. It appears to me, therefore, that the objection is well founded, and that this warrant of attorney is invalid.

But it is said the objection has been waived. In the first place, the warrant of attorney being without validity, and the judgment therefore signed without authority, it is a strange thing to say that it can stand; not merely by reason of an ordinary irregularity, but because the foundation on which it rests is wholly without validity. Without, however, saying positively that the defect may not be waived, the circumstances do not justify the conclusion that it has been waived in the present instance. The rule must therefore be absolute.

Rule absolute.

PYLIE v. STEPHEN. Exch. of Pleas. 1840.—In an action for the breach of warranty of a horse, the Court will not order the plaintiff to give particulars of the unsoundness complained of.

[S. C. 8 Dowl. P. C. 771.]

This was an action of assumpsit for the breach of a warranty of soundness of a horse. The declaration was in the usual form, containing a general allegation that the horse was unsound.

Bull, for the defendant, moved for a rule to shew cause why the plaintiff should give particulars of the unsoundness, upon an affidavit stating that the defendant was not aware of the nature of the unsoundness complained of. He urged that particulars were as necessary for the infor-[814]-mation of the defendant, in such a case, as in actions for treaties of covenant.

Per Curiam. We cannot grant such an application. It would be very unfair to the plaintiff to confine him to a particular statement of the cause of unsoundness. Though it may be clear that the horse is not sound, there may be some difficulty in

saying in what the unsoundness consisted. Two or three veterinary surgeons might have been called in, who might all agree as to the defect, but differ as to the cause of it. The object of a bill of particulars is to give a better statement of the cause of action; but if we granted this application, it might in effect amount to a stay of proceedings.

Rule refused.

SYMES v. AMOR. Exch. of Pleas. 1840.—Where, in answer to a rule for judgment as in case of a nonsuit, the plaintiff deposed that since action brought he had been informed by the defendant's neighbours, and which he believed to be true, that the defendant was insolvent:—Held, that this was not sufficient to compel the defendant to accept a *stet processus*, but that the defendant was entitled to a peremptory undertaking.

[S. C. 8 Dowl. P. C. 773; 4 Jur. 562.]

Gray shewed cause why a rule for judgment as in case of a nonsuit, on an affidavit of the plaintiff, which stated, that at the time the action was brought, the plaintiff had reason to believe that the defendant was in good and solvent circumstances: but that he had lately been informed by the defendant's neighbours, and which information he believed to be true, that the defendant was in insolvent circumstances, and had declared, that if the plaintiff should recover judgment against him, he would go to prison, and take the benefit of the Insolvent Debtors' Act. Under these circumstances, the defendant ought to be compelled to accept a *stet processus*.

Best, *contra*, insisted, that as the plaintiff spoke only to his belief from hearsay information of the defendant's insolvency, the affidavit was not sufficient to entitle him to a [815] *stet processus*, but that he ought to give a peremptory undertaking.

ALDERSON, B. I think, that as the plaintiff speaks only from hearsay, and to his belief, he has not entitled himself to a *stet processus*.

Rule discharged on a peremptory undertaking.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF LUDLOW v. CHARLTON, ESQ. Exch. of Pleas. 1840.—A municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal.

[S. C. 10 L. J. Ex. 75; 4 Jnr. 657: at *Nisi Prius*, 8 Car. & P. 242. Followed, *Arnold v. Poole Corporation*, 1842, 4 Man. & G. 860; 5 Scott (N. R.), 741; 2 Dowl. (N. S.) 574; *Lamprell v. Billericay Union*, 1849, 3 Ex. 282; *Paine v. Stroud Union*, 1846, 8 Q. B. 326; *Austin v. Bethnal Green Guardians*, 1874, L. R. 9 C. P. 91. Discussed, *Young v. Leamington Spa Corporation*, 1883, 8 A. C. 517. Referred to, *Mayor of Kidderminster v. Hardwick*, 1873, L. R. 9 Ex. 24; *Wells v. Kingston-upon-Hull*, 1875, L. R. 10 C. P. 409; *Hunt v. Wimbledon Local Board*, 1878, 3 C. P. D. 214; *Lawford v. Billericay Rural District Council*, [1903] 1 K. B. 786.]

Covenant. The declaration stated a demise dated the 25th day of March, 1820, by the bailiffs, burgesses, and commonalty of the borough of Ludlow, of certain lands called the Foldgate Farm, to the defendant, for a term of twenty-one years, at a yearly rent of £150, and a covenant by the defendant for payment of such rent. Breach, in nonpayment of arrears of rent, to the amount of 37*l.* 13*s.* 5*d.* Pleas, 1st, payment; 2ndly, a set-off for £500, agreed to be paid by the corporation to the defendant, for pulling down and altering the site of a house called the Charlton Arms, in the town of Ludlow, and for altering a roadway there, and also for work, labour, and materials, and for money lent; 3rdly, a special plea, stating in substance that it was agreed between the old corporation of Ludlow (before the passing of the 5 & 6 Will. 4, c. 76), and the defendant, that the defendant should alter the situation of the Charlton Arms, and should be paid by them the sum of £500 for making such alterations, which should be set against the rent payable by the defendant to the corporation; and the plea then went on to aver, that the defendant had made the alterations accordingly. Replications, taking issue on each of the pleas.

At the trial before Gurney, B., at the last Shrewsbury [816] Summer Assizes,

1839, the defendant offered in evidence the following resolution, entered in the corporation books at a meeting of the old corporation :—

“ 28th of October, 1835.

“ Resolved—That £500 be paid to Mr. Charlton, to alter the Charlton Arms according to the plan produced by Mr. Atkins, if he will give his consent to the alteration.

“ Mr. Charlton then addressed the meeting, and stated that he had no objection to the Charlton Arms Inn being altered according to the plan produced, and on receiving £50 to alter the present road to the stables, if Mr. Stead thought that such sum would be necessary to make a convenient approach to the stables.

“ The thanks of the meeting were then given to Mr. Charlton, for the readiness he has shewn to accommodate the public.”

The plaintiff's counsel objected to the reading of this entry, on the ground that it ought to have been stamped as an agreement. The learned Judge received the evidence, subject to the objection. It was proved also that the defendant had made the alterations agreed on, at the Charlton Arms and in the road, which were finished early in the year 1836, and that the expense of them exceeded £500. The learned Judge, in summing up, expressed his opinion that the third plea was not proved, and left it to the jury, upon the second issue, to say whether there was an agreement between the old corporation and the defendant, whereby they agreed to pay the defendant the sum of £500 to alter the Charlton Arms, and whether the defendant had performed the agreement on his part. The jury found these questions in the affirmative; and the learned Judge then directed a verdict to be entered for the plaintiffs for £300, (the balance of rent in [817] arrear, after deducting payments proved by the defendant), giving the defendant leave to move to enter a verdict for him on the second issue, if the Court should be of opinion that the entry in the corporation book did not require a stamp.

In Michaelmas Term, Talfourd, Serjt., obtained a rule nisi accordingly; against which, in Easter Term last,

Ludlow, Serjt., (Wheateley with him), shewed cause. [The argument on the question as to the stamp is omitted, as the judgment of the Court turned on another point.] Assuming that there was evidence of a contract between the old corporation and the defendant, it was invalid, not being under the corporation seal. It is clear law, according to all the authorities, that a corporation cannot bind itself by a contract which is to have the effect of vesting or divesting corporation property, except under its common seal. 1 Bla. Comm. 475; Com. Dig. “Franchise” (F.), 12, 13, 14; Bac. Abr. “Corporation” (E.), 3; *Wilmott v. Coventry* (1 Y. & C. 518). It is laid down, indeed, in the books, that certain small insignificant acts, not affecting the revenues of the corporation, may be done by the head alone, without using the common seal; such as appointing a butler, cook, or bailiff; *Carey v. Matthews* (1 Salk. 191), *Smith v. Birmingham Gas Light Co.* (1 Ad. & E. 526; 3 Nev. & M. 771). The only other exception to the general rule is in cases where the legislature has invested particular officers of trading corporations with the power of drawing bills in the name of the entire body: *Slark v. Highgate Archway Co.* (5 Taunt. 792), *Broughton v. Manchester Waterworks Co.* (3 B. & Adol. 1). In this case, the contract divests a considerable interest out of the corporation. [Parke, B. I doubt [818] whether any case has gone so far as to shew that a corporation can bind itself by such a contract as this, not under seal. The old cases permitted it as to certain small things, which must of necessity be done without that formality, and this exception has been extended by the modern cases to things which the corporation, by the nature of its constitution, must do to carry on its concerns: but that principle does not apply to the case of a municipal corporation; it cannot be necessary for the purposes of its constitution, that it should part with so much of its property. The cases decided in the Court of King's Bench (*Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Church v. Imperial Gas Co.*, id. 846) have broken in upon the old law, but not to this extent. The American law has entirely abrogated the old doctrine (see Story's Commentaries on the Law of Agency, pp. 45, 46), but we have not.] The Court then called on

Talfourd, Serjt., and R. V. Richards, to support the rule. The distinction on this subject is between contracts executed and executory. A corporation cannot be sued on an executory contract, unless it were entered into by an instrument executed

under the common seal; but where the contract has been actually executed, and the corporation has enjoyed the benefit of the consideration for it, an implied assumpsit arises against them. *East London Water Works Co. v. Bailey* (4 Bing. 283; 12 Moore, 533); *Mayor of Stafford v. Till* (4 Bing. 75); *Mayor of Carmarthen v. Lewis* (6 C. & P. 608). Suppose, instead of agreeing with Mr. Charlton, the corporation had contracted by parol with a road contractor who did the work,—could he not have sued them in assumpsit? In the case last cited, the subject of the action was tolls—things incorporeal, which could not properly be let at all without deed; yet the benefit of the parol demise having been enjoyed by the [819] defendant, they were held to be recoverable in assumpsit. The law on this subject has been much relaxed since Blackstone's work was written, and exceptions have been introduced quite beside the old notion of small insignificant matters, which must be done in haste. Where is the line to be drawn between important and unimportant acts? is it to vary with the wealth and greatness of the corporation? There are, indeed, cases where trading corporations have even been held suable on executory contracts: *Church v. Imperial Gas Light Company* (6 Ad. & E. 846; 3 N. & P. 35). [Alderson, B. Those are cases in which the corporation is called into existence solely for the purpose of trading. The case of *Taylor v. The Dulwich Hospital* (1 P. Wms. 655) is an authority against the general proposition you contend for. Is not this a contract binding the corporation to pay money out of their revenues?] So would every contract of every kind. The argument for the plaintiffs would go to this, that in no case could repairs, however trifling, be done for a corporation, unless the order or contract were under seal. The solution of the difficulty appears to be contained in the observation of Coleridge, J., in *Church v. Imperial Gas Light Company* (6 Ad. & E. 853): "The truth seems to be, that the rule on this subject has been relaxed, in consequence of the necessity produced by changes in the circumstances of the times. It is difficult to reconcile all the decisions with strict legal principles." Actions may be maintained against a board of guardians. [Rolfe, B. They are only corporations for particular purposes. The cases in which it has been said that a cook or butler need not be appointed under the common seal, rest on a fiction that some individual has been duly authorized to make contracts of that nature on behalf of the corporation.]

Cur. adv. vult.

[820] In this term, the judgment of the Court was delivered by

ROLFE, B. The principal point on which we reserved our judgment in this case, was as to the right of the defendant to set off a sum of money, alleged to be due to him from the plaintiffs, against their demand for rent sought to be recovered in this action. It appeared at the trial, that, after the rent in question had become due from the defendant to the corporation, a resolution was entered into at a corporate meeting, holden soon after the passing of the Municipal Reform Act, whereby it was resolved, that a sum of £500 should be paid to the defendant, in consideration of certain improvements to be made by him in altering the Charlton Arms Inn. To this resolution the defendant, who was present, assented, and a memorandum of such assent was duly entered in the books of the corporation. The defendant has since made the proposed alterations, and he now seeks to set off the £500 against the sum due for rent.

Whether the resolution of the corporation required a stamp as an agreement, or as evidence of it, was one point reserved by my Brother Gurney, and discussed at the bar. It becomes unnecessary to decide that point; because we are of opinion that, if the agreement be taken to have been duly proved, the defendant has no right to make such a set-off; and we come to this conclusion upon grounds wholly independent of any considerations arising from the Municipal Reform Act. The alleged contract between the corporation and the defendant is not founded on deed, but rests wholly on what is to be found in the corporate books: and we are of opinion that such a contract does not bind the corporation.

The rule of law on this subject, as laid down in all the old authorities, is, that a corporation can only bind itself by deed. See Comyns' Digest, tit. "Franchise" (F.), 12, 13, [821] and the authorities there referred to. The exceptions pointed out rather confirm than impeach the rule. A corporation, it is said, which has a head, may give a personal command, and do small acts; as it may retain a servant. It may authorize another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little

admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems, from the earliest time, to have been considered as delegated by the rest of the members to act for them.

In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by Royal Charter, more frequently by act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held that they would imply in those who are, according to the provisions of the Charter or act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench, in *Beverley v. Lincoln Gas Light and Coke Company* (6 Ad. & El. 829).

The present case, however, was argued at the bar, as if, by the decision in that last case, the old rule of law was to be considered as exploded, and as if, in all cases of executed contracts, corporations were to be deemed bound in the same manner as individuals. But this would be pressing the decision in question far beyond its legitimate consequences; and that the Court of Queen's Bench had no such [822] meaning, is plain from the subsequent case of *Church v. Imperial Gas Light Company* (6 Ad. & El. 846). Lord Denman, in delivering the judgment of the Court in that case, says, (p. 861,) "The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will, or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be of convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions: on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

To every word of this we entirely subscribe, and, applying the language of Lord Denman to the present case, it is quite clear that there was nothing to enable the corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode, under the corporate seal.

In contracting without a seal, there was no paramount convenience so great as to amount almost to necessity. To have required a seal would certainly not have tended to defeat the object for which the corporation was formed, nor was the subject-matter of the contract one either of frequent ordinary occurrence, or of urgency admitting no delay.

[823] Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the legislature in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation know, that by such an act, the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is

done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

We have made these remarks, in consequence of the very great length to which some of the arguments addressed to us, as to allowing corporations to contract otherwise than under seal, would go. The case, however, under discussion [824] does not call on us to do more than say, that none of the authorities warrant us in giving effect to the resolution relied on by the defendant, and consequently the rule nisi for setting aside the verdict must be discharged.

Rule discharged.

WAUGH v. COPE. Exch. of Pleas. 1840.—The plaintiff, an attorney, had done professional business of various kinds for the defendant, in 1827 and several subsequent years. In July 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2l. 2s. and 10s. 6d., inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2l. 2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to £289, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5 cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in Jan. 1839:—Held, that the letters given in evidence did not sufficiently shew that the 2l. 2s. and 10s. 6d. were paid in part discharge of the debt for which the action was brought, so as to take the case out of the Statute of Limitations, as to any part of the demand.

[S. C. 10 L. J. Ex. 145. Explained, *Nash v. Hodgson*, 1856, 6 De G. M. & G. 474. Followed, *In re Boswell*, [1906] 2 Ch. 359.]

This was an action for the work and labour, &c., of the plaintiff as an attorney, and on an account stated. The defendant pleaded, 1st, non assumpsit; 2ndly, the Statute of Limitations, and 3rdly, a set-off: on which issues were taken and joined. At the trial before Lord Abinger, C. B., at the Middlesex sittings after Easter Term, 1839, it was agreed that the amount of the plaintiff's bill of costs, and the liability of the defendant, should, in the event of a verdict being found for the plaintiff, be referred to the Master; and the only question which was entered into at Nisi Prius was, whether the Statute of Limitations applied to the whole or any portion of the plaintiff's claim. The bill of costs delivered by the plaintiff amounted in the whole to the sum of £289, and all the items were dated above six years before the commencement of the action; beginning in the month of June, 1827, and the two last items being as follows:—

| | |
|---|------|
| "25th Sept. 1830. Cash advanced | £3. |
| 10th March, 1831. Attending you on application for loan of £5 | £5. |
| —Cash advanced | £5." |

[825] All the previous items were charges for various kinds of professional business done by the plaintiff for the defendant. It appeared that in the year 1832, an inquiry took place as to the lunacy of a Miss Bagster, in which the defendant was a witness: and the plaintiff, who was the solicitor concerned on this inquiry, having written to him to ask him what his expenses on that occasion were, the defendant wrote to him, in answer, a letter dated 21st July, 1832, which was read on the part

of the plaintiff, requesting the plaintiff "to allow what was usual, and place the same to his (the defendant's) account." A letter, was then put in, from the plaintiff to the defendant, dated 13th March, 1833, which was as follows:—

"Dear Sir,—The allowance for your coach-hire, &c., in attending at Westminster on Miss Bagster's case, is two guineas, for which I send a receipt for your signature, and shall be obliged by its immediate return, as I have to produce it before the Master at 10 o'clock on Saturday morning. I also send a receipt for half-a-guinea, the sum allowed for the like purposes, for your attendance at Doctor's Commons. As a gentleman, nothing is allowed for loss of time. I will give you credit for the sums in my account against you, agreeably to your note of the 21st of July last. —Yours truly,
"GEO. WAUGH."

In the defendant's reply to this letter, which was also produced, he inclosed the receipts signed by him, and merely stated, that he hoped, for the future, something would be allowed for the attendance of a gentleman. The receipts were put in and read, and it was proved that the 2l. 2s., and 10s. 6d. were paid to the plaintiff. It was further proved, that on the 26th January, 1838, the plaintiff applied to the defendant for £10 or £20 on account of his bill, and it was stated by the plaintiff's counsel, that shortly afterwards a sum of £10 was paid by the defendant to the plaintiff, which the defendant himself, in his [826] particulars of set-off delivered to the plaintiff's attorney, claimed as having been paid in February, 1838. It being alleged, however, on the part of the defendant, that this was a miscopying of 1838 instead of 1830, and the original particular of set-off having been referred to as shewing this to be the case, it was agreed that it should also be referred to the Master to make an interlocutory report to the Lord Chief Baron, whether such payment of £10 was made after and in pursuance of the plaintiff's letter of January, 1838. The plaintiff's bill was delivered in November, 1838, and this action was commenced on the 7th of January, 1839.

A verdict was then taken for the plaintiff for the amount claimed, with leave for the defendant to move (subject to such interlocutory report of the Master) to enter a nonsuit; which failing, the liability of the defendant, and the amount due, were also to be referred to the Master.

On the 7th November, 1839, the Master made his interlocutory report accordingly, finding that there was not any payment of the £10 in the year 1838, after and in pursuance of the plaintiff's letter. And thereupon

Erle, for the defendant, obtained a rule nisi for entering a nonsuit, on the ground that the letters and payments proved in evidence were not sufficient to take the case out of the Statute of Limitations; for that it did not sufficiently appear that there was part-payment of a larger sum admitted to be due; and he cited *Williams v. Griffiths* (2 C. M. & R., 45), and *Waters v. Tompkins* (id. 723). In Easter Term,

Kelly (Ogle with him) shewed cause. The only question now is, whether the payment to the plaintiff of the two sums of 2l. 2s. and 10s. 6d., in the month of March, 1833, was sufficient to take this case out of the operation of the Statute of Limitations: and it is submitted that [827] it clearly was. Those sums were paid under the express direction of the defendant, and with his consent placed to his account in the plaintiff's books. There had been, for some years, to the defendant's knowledge, an account against him in the plaintiff's books; and although the precise amount of it was not then known to him, that can make no difference. The first letter of the defendant, although it was before the six years, is important as shewing his authority, under which, within the six years, the payments were made. If the plaintiff could then have assessed the defendant's charges for his attendance as a witness, that letter was a direct authority to the plaintiff to place the sum so assessed and allowed to the defendant's account. Then, when the charges were assessed and allowed, and the defendant was informed thereof in March, 1833, he does not revoke his former direction to place the amount to his account, but acquiesces in the plaintiff's having done so. The transaction is the same as if there had been direct payment of the money by the defendant to the plaintiff, in part discharge of his bill. The defendant might have deducted these sums under a plea of payment. It is not pretended that there was more than one account existing between the parties, and this was clear evidence of payment on account of the only demand the plaintiff could have on the defendant.

Erle and Montague Smith, contra. [Parke, B. Is it not rather a question of fact than of law, viz., what account the defendant believed to be referred to in the plaintiff's letter of the 13th March, 1833? The transaction is equivalent to payment of 2l. 12s. 6d. on some account; on what account is a question of fact. In order to take the case out of the statute, the defendant must have believed himself to be paying on account of some larger demand, which he admitted to be due.] There was no evidence to go to the jury of a part-payment to satisfy the statute, [828] viz., a payment in part of a greater amount thereby admitted to be due. It appears that there were two demands—one for the business done, and the other for money lent; can it be said there was evidence to take either out of the statute, and which? The cases shew, that in order to have that effect, it must appear, first, that the payment was made on account of a debt; next, that it was made on account of the particular debt in dispute; and, lastly, that it was made as part-payment of a greater debt. *Tippits v. Heane* (1 C. M. & R. 252), *Williams v. Griffiths*, *Waters v. Tompkins*, *Routledge v. Ramsay* (8 Ad. & Ell. 221; 3 N. & P. 319). The defendant's words are only "place the sums to my account." It does not at all follow from these words on which side the balance was, still less that it was the balance sought to be recovered in this action. [Parke, B., referred to *Mills v. Fowkes* (5 Bing. N. C. 455; 7 Scott, 444). Lord Abinger, C. B. If it were proved by extrinsic evidence that a larger demand was due, would not the letters be evidence that it was not all paid? Perhaps so; but the burthen of proof is on the plaintiff to prove affirmatively such a payment as is necessary to satisfy the statute. If the words used in the letters are equally consistent with the account being in favour of the defendant, that is not sufficient. The plaintiff is bound to give evidence of words written by, or acts of, the defendant, from which an acknowledgment of the debt is legitimately to be inferred. If this be held a sufficient proof of payment to prevent the operation of the statute, the effect is, that if there be one debt twenty years old, and several others of a different nature also beyond the six years, one recent small payment, not applied to any one of them in particular, will have the effect of reviving the whole.

Cur. adv. vult.

The judgment of the Court was now delivered by

[829] LORD ABINGER, C. B. [After stating the facts of the case, he continued:] The question is, whether there was in this case a sufficient payment on account to take the case out of the operation of the Statute of Limitations. Since Lord Tenterden's act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing from which a promise to pay can be inferred, or a part-payment of principal or interest. Now there have been several cases in which it has been considered, after much discussion, and adopted by all the Courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in part-payment of the debt in question: if it stands ambiguous whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party; if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the Statute of Limitations. And we think it does not satisfactorily appear, from the letters given in evidence in this case, that the defendant admitted that there was any existing account against him, more than the sum he was paying: all that he admits is, that the money, when received, is to be applied in discharge of the account which the plaintiff had against him; but there is no distinct admission that that was an existing debt of which that was a payment in part. We think, therefore, that the case falls within the principles of the decisions in this Court, and also in the Court of Common Pleas, and that the rule must be made absolute to enter a verdict for the defendant on the plea of the Statute of Limitations.

Rule absolute accordingly.

[830] METCALFE v. FOWLER. Exch. of Pleas. 1840.—In an action by the intended purchaser against the vendor of an estate, the declaration stated articles of agreement between the defendant and the plaintiff, whereby the defendant, in consideration of £2115, agreed that he would, on or before the 25th day of March next, well and effectually convey the estate to the plaintiff &c., with a good title;

and the plaintiff agreed that, on the said 25th day of March, on having such conveyance, he would pay the defendant the purchase-money; and that in case the purchase should not be completed on the said 25th day of March, the plaintiff was to pay interest on the purchase-money before it was completed. Breach, that, although the plaintiff was always, from the making of the agreement until and upon the said 25th day of March, ready and willing to accept a conveyance, and to pay the purchase-money, whereof the defendant had notice &c., yet the defendant did not, on the day and year last aforesaid, or at any other time whatsoever, make a good title to the plaintiff of the estate, nor had he at any time any such title, &c.: alleging damage by expenses incurred in investigating the title, and loss of interest on the purchase-money while lying at a banker's:—Held, that upon this declaration the plaintiff could not recover for any expenses or loss of interest subsequent to the 25th of March.

[S. C. 10 L. J. Ex. 84.]

Assumpsit. The declaration stated, that, by articles of agreement made the 16th February, 1838, between the defendant and the plaintiff, the defendant in consideration of £2115 to be paid to him by the plaintiff at the time and in manner thereafter mentioned, did thereby (amongst other things) agree with the plaintiff that he the defendant, or his heirs, should or would, on or before the 25th day of March then next ensuing, together with all proper and necessary parties, well and effectually convey, surrender, and assure unto and to the use of the plaintiff and his heirs, or unto such other person or persons as he or they should appoint, with a good title, and free from all incumbrances whatsoever, (except as therein and hereinafter mentioned) a certain estate, lands, and premises of the said defendant, lying in Kirton in the county of Lincoln, in the said agreement particularly specified, together with the appurtenances thereto belonging, subject to the footway or footways over the same, as in the said agreement in that behalf mentioned; and the plaintiff did thereby, for himself, his heirs, executors, and administrators, agree with the defendant, his heirs and assigns, amongst other things, in manner following, that is to say, that the plaintiff, his heirs, executors, or administrators, should or would, on the 25th day of March then next, on having such conveyance, surrender, and assurances duly made and executed to him as aforesaid well and truly pay or cause to be paid unto the [831] defendant, his heirs, executors, or administrators, the said sum of £2115, in full for the absolute purchase of the said estate and premises; and it was mutually agreed between the said parties thereto, that the expenses of making out the title to the said estate and premises, and of a covenant for the production of the original title-deeds, if required, should be paid by the defendant and his heirs; and that the expenses of the conveyance and surrender of the estate and premises to be made in pursuance thereof, should be paid by the plaintiff and his heirs: and it was further mutually agreed between the said parties thereto, that in case the purchase of the said estate should not be completed on the said 25th day of March then next, then and in such case the plaintiff was to pay interest on the said purchase money, at and after the rate of £4 per cent. per annum, from that time until the said purchase should be completed. The declaration then (after setting forth other stipulations, which it is not necessary to state, and averring mutual promises) alleged as a breach, that, although the plaintiff was always, from the time of the making of the agreement until and upon the said 25th day of March, ready and willing to accept from the defendant, and at the expense of the plaintiff, a good and proper conveyance, &c., of the said premises, in the manner stated in the said agreement, and to pay him the said purchase-money or sum of £2115, as in the agreement also mentioned, and in all things to perform the said agreement on his the plaintiff's part, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and the plaintiff then requested the defendant to deduce and make, or cause to be made, to the plaintiff a good and sufficient title to the said tenements (except as in the said agreement mentioned), enabling the defendant to convey and assure the same to the plaintiff; yet the defendant did not nor would, on the day and year last aforesaid, or at any other time whatsoever, deduce or make or cause to be made to the plaintiff a good [832] and sufficient title to the said tenements, &c.; and the defendant further deceived the plaintiff in this, to wit, that he had not, on the day and year last aforesaid, or at any other time since the making of his said promise, any such title as aforesaid; by reason of which said several

premises the plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the said completion of the said purchase, &c., but was put to great charges and expenses, amounting in the whole to, &c., in and about the negotiating and agreeing for the purchase of the said tenements, as aforesaid, and in and about the investigating the title to the same, &c., &c.; and also thereby the plaintiff lost and was deprived of the interest and profit which he might and otherwise would have made and acquired from using and employing the said sum of £2115, provided and kept by him for the completion of the said purchase, amounting to &c., and the plaintiff hath been and is otherwise injured. There was also a count on an account stated.

Pleas—1st, non-assumpsit; 2ndly, as to the first count of the declaration, payment into Court of £20, and no damages ultra. Replication thereto, damages ultra.

At the trial before Lord Abinger, C. B., at the sittings at Guildhall after last Hilary Term, the plaintiff claimed to recover a sum of 71l. 4s. 9d.; viz., for the expenses of investigating the title, 38l. 0s. 4d., and for loss of interest on money paid in to a banker's for the purpose of completing the purchase of the property in question, (which consisted of freehold and copyhold lands, of borough English tenure, at Kirton in Lindsey, in Lincolnshire), 33l. 4s. 5d. It appeared, however, that the expenses of investigating the title, incurred up to the 25th March, 1838, the day on which the purchase was, according to the contract, to have been completed, did not amount to £20, the sum paid into Court; but much negotiation took place between the parties after that period, [833] and it was not until the 12th January, 1839, that the plaintiff served the defendant with a notice of his abandonment of the contract, on the ground of defects in the title. It was objected for the defendant, that upon the declaration as framed, the plaintiff was not entitled to recover any damages accruing after the 25th March, the material day specified in the written contract for the completion of the title, the ground of action being its non-completion on that day, and the subsequent expenses and loss of interest not being a consequence of that default. The Lord Chief Baron reserved the point, and a verdict was found for the plaintiff, damages £41, leave being reserved to the defendant to move to enter a nonsuit.

In Easter Term, R. V. Richards obtained a rule nisi accordingly, citing *Flureau v. Thornhill* (2 W. Bl. 1078), and *Sherry v. Oke* (3 Dowl. P. C. 349): against which

Bayley (with whom was Kelly) now shewed cause. The plaintiff is entitled to recover, on this declaration, the expenses of investigating the title, and also the loss of interest which accrued between the 25th March and the day when the contract was ultimately broken off. The declaration contains a sufficient averment of the non-performance of the contract by the defendant, subsequently to the 25th March. It is averred, that the plaintiff was ready and willing to perform his contract on the 25th March; but that the defendant did not, on that day or at any other time whatsoever, deduce a good title to the premises; and that he had not, on that day or at any other time since the making of his promise, any such title. [Alderson, B. The words "at any other time whatsoever," must be taken to mean at any other time before the day appointed for the completion of the purchase.] [834] Time was not of the essence of the contract; and it was a question for the jury to determine, on all the circumstances of the case, whether the parties did not treat it as one which was to be completed subsequently to the day originally limited, and whether all the subsequent negotiations did not take place with the assent of the defendant. He cited *Morton v. Lamb* (1 T. R. 125).

R. V. Richards and Gurdon, in support of the rule, were not called upon: and

Per Curiam. The objection made on the part of the defendant is, that the plaintiff, not having averred in his declaration that he was ready and willing to complete the purchase after the 25th March, cannot recover in respect of the expenses of investigating the title, or the loss of interest which accrued subsequently to that day; and we think the objection must prevail. Time is clearly of the essence of such a contract; and if the plaintiff sought damages for loss incurred subsequently to the period limited by the contract for the completion of the purchase, he ought to have framed his declaration accordingly. He was under no necessity of keeping his money at the banker's under the 25th March. The rule must be absolute to enter a nonsuit.

Rule absolute.

[835] POOLE v. HILL. Exch. of Pleas. 1840.—A declaration in covenant by the vendor against the intended purchaser of lands, for non payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance: inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution.—By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c.:—Held, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.

[S. C. 10 L. J. Ex. 81.]

Covenant. The declaration stated, that, by articles of agreement, dated the 11th October, 1839, made between the defendant of the one part, and the plaintiff of the other part, [profert], after reciting that the defendant, on the 19th day of April, 1838, entered into four several contracts or agreements with Mr. T. W. Jones, as agent for and on behalf of the plaintiff and other owners of the hereditaments thereinafter described, for the purchase of a messuage or dwelling-house, outbuildings, gardens, orchard, and premises, with nine several fields, closes, pieces or parcels of land or ground thereunto belonging, in the said indenture more particularly described, lying and being in Hough, in the parish of Wybunbury in the county of Chester, and which were then in the several holdings or occupations of the plaintiff, T. Hassall, George Glover, and Anne Steele, their respective assigns or under tenants, for the several prices or sums of £800, £510, £260, and £350, making together the sum of £1920, exclusive of the timber trees, and saplings of the value of 2s. 6d. and upwards, growing on the said lands; and that all the objections to the title of the said purchased messuage, lands, and premises, (except the want of a conveyance from Miss Anne Maria Hopkins, of the legal estate affecting one moiety of the said messuage, land, and premises, which was outstanding in her as the infant heiress at law of the party in whom such legal estate was last vested), having been cleared up and obviated, the defendant was then desirous, and had proposed and agreed to complete his said purchase and contracts, and to accept a conveyance of the said purchased premises from the plaintiff and the other [836] parties beneficially interested therein, without requiring the said A. M. Hopkins to join in such conveyance, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, provided he was allowed till the 1st day of January then next for that purpose, which arrangement the plaintiff had acceded to, as she did admit and acknowledge by being made a party to and executing the said articles of agreement: it was by the said articles of agreement witnessed, that, in consideration of the premises aforesaid, as also for putting an end to all further disputes touching the title to the said messuage, lands, and premises, or the fulfilment and performance of the contracts or agreements so entered into by the defendant, for the purchase of the said premises as thereinbefore was mentioned, he the defendant did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, her heirs, executors, and administrators, and also to and with the several other parties beneficially interested in the said messuage, lands, and premises, their respective heirs, &c. in manner following; that is to say, that he the defendant, his executors and administrators, should and would, on or before the said 1st day of January, 1840, fulfil and perform the said several purchase-contracts or agreements so by him entered into as aforesaid, by paying the purchase-mones thereby agreed by him to be paid for the said messuage, lands, and premises to the plaintiff and the several other parties beneficially interested therein as aforesaid, and by accepting a conveyance of the said purchased premises from such parties, without requiring the said A. M. Hopkins to join therein, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, anything contained in the said purchase-contracts or agreements to the contrary thereof in anywise notwithstanding; as by the said agreements

will more fully appear. And the plaintiff saith, [837] that the purchase-monies by the said several purchase-contracts or agreements agreed by the defendant to be paid for the said messuage, lands and premises to the plaintiff and the said other parties beneficially interested therein as aforesaid, were and are the said several sums of £800, £510, £260, and £350, making together the said sum of £1920, &c., &c. : and although the plaintiff hath performed and fulfilled all things in the said articles of agreement contained on her part to be performed and fulfilled, and although she and the several other parties beneficially interested in the said messuage, lands, and premises, have always, from the time of the making of the said articles of agreement, been ready and willing to execute and make the defendant a conveyance of the said purchased premises, so to be executed and made as aforesaid, and although the said 1st day of January, 1840, the time for the payment of the said purchase-monies, had elapsed before the commencement of this suit, nevertheless the plaintiff in fact saith, that the defendant hath not yet hitherto paid the said purchase-monies so by the defendant agreed to be paid as aforesaid, or any part thereof, to the plaintiff and the other parties beneficially interested in the said messuages, lands, and premises, or any or either of them, and the said purchase-monies remain wholly due and unpaid.

General demurrer, and joinder. The points stated in the margin on the demurrer were as follow :—The defendant intends to argue that the action should have been brought by the plaintiff and other persons interested, the covenant being joint and not several ; and that the declaration is bad in not averring that the plaintiff, and the other persons mentioned, conveyed or executed any conveyance, or tendered any conveyance to the defendant, such conveyance being a condition precedent, or a concurrent act to be done by the plaintiff and the said other persons ; and that the said supposed covenant is void in law, the other [838] persons not being named, nor bound by any covenant to convey.

Whitehurst, in support of the demurrer. First, the declaration is bad, for not stating a conveyance, or an offer to execute one. There is nothing in the declaration to shew that the purchaser was bound to prepare the conveyance ; but even assuming that the defendant was the party to do so, the plaintiff should have averred that she was ready and willing, and offered to execute it. It never could be the intent of the agreement, that the defendant should pay before having a conveyance. Where mutual covenants go to the whole consideration, they are mutual conditions, and the plaintiff cannot recover in respect of any breach, unless he proves performance on his part. Com. Dig. "Covenant" (A. 2), (D. 1) : *Portage v. Cole* (1 Saund. 320 b.). It is clear there is an implied covenant by the vendor to convey. If it be held to be sufficient to state merely that the vendor is ready and willing to convey, the purchaser may be saddled with an action, although he may be ever so desirous to complete the purchase. The declaration must state all that is necessary to the due performance of the covenant ; and the plaintiff was bound at least to have shewn that she made an offer or tender of a conveyance. The allegation of readiness and willingness does not imply any step taken on her part. In Com. Dig. "Covenant" (A. 2), it is said—"Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part." In *Peeters v. Opie* (2 Saund. 346), which was an action upon a covenant that the plaintiff should do certain work for the defendant, for which the defendant was to pay him £8, the declaration contained an [839] averment, that the plaintiff "always from the time of making the agreement hitherto, was ready, and offered to perform the said agreement in all things on his part to be performed." In *Goodson v. Nunn* (4 T. R. 761), which was debt on an agreement by the plaintiff to sell the defendant an estate for a certain price before a day named, in consideration whereof the defendant agreed to pay that sum on that day, and in failure thereof to pay £21 : it was held that these were dependent covenants, and that the plaintiff could not recover the £21 without proving that he had executed or tendered a conveyance. *Glazebrook v. Woodrow* (8 id. 366), and *Jones v. Barkley* (2 Dougl. 684), are authorities to the same effect. The Court then called on

Crompton to support the declaration. It was not necessary to aver a tender of the conveyance. No doubt, where the party suing is, by the agreement, to do some concurrent act, the performance of it must be averred in the declaration ; but that rule cannot be applicable to a case like the present where the initiative is to be done by

the other party. The purchaser is always the party to prepare the conveyance, unless it be otherwise expressed in the contract, *Barter v. Lewis* (Forrest, 61); he, therefore, and not the vendor, is the party who is bound to tender the conveyance for execution. Sugd. Vendors and Purchasers, (6th edit.) 222. The averment, therefore, that the plaintiff was ready and willing to execute the conveyance, is quite sufficient. In *Price v. Williams* (1 M. & W. 6), where, in an agreement for a lease, it was stipulated that the lease should be drawn, prepared, and executed by and between the parties, if required by either of them, at the sole expense of the lessor, it was held that it was not necessary for the lessee to tender a lease [840] for execution by the lessor. It is sufficient that the plaintiff is ready and willing to execute the conveyance, when the defendant, whose duty it is to prepare it, puts him in a situation to do so.

Whitehurst, in reply. This is a covenant very peculiar in its terms. The defendant does not know who the conveying parties are to be; the contract appears to have been entered into by Jones, as the agent for all the parties beneficially interested, whoever they might be. But even if it were the defendant's duty to prepare the conveyance, non constat that it was not prepared; the objection is, that the plaintiff should have shewn that she had offered to execute it. Here the concurrent acts are, payment by the purchaser, and the execution of a conveyance by the vendor. Whether the defendant could have brought an action for the non-completion of the contract, without averring a tender of the conveyance, is a different question. The cases of *Goolisson v. Nunn* and *Glazebrook v. Woodrow* clearly decide, that a conveyance must be either made or tendered by the vendor, before he can sue for the purchase-money. He cited also *Phillips v. Fielding* (2 H. Bl. 123), and *Ferry v. Williams* (8 Taunt. 62). There is another objection—that the other persons beneficially interested are in law parties to the covenant, and ought to have been joined as plaintiffs. Although they have not sealed the deed, they have made themselves parties to it by adopting the benefit of it. A covenant may be made with persons who are not parties to the deed. This covenant is joint, and therefore all should have joined in the action: *Slingsby's case* (5 Rep. 19).

LORD ABINGER C. B. The interest of these parties is clearly several, and there is no ground for supporting the [841] demurrer as to their nonjoinder. On the other point we will take time to consider.

Cur. adv. vult.

A few days afterwards, the judgment of the Court was delivered by

LORD ABINGER, C. B. [Having stated the declaration, his Lordship continued:] We were at first disposed to think that the averment that the plaintiff was ready and willing to convey was insufficient; but after hearing the point discussed by Mr. Crompton, we are satisfied that it was not necessary to aver more than this. On a contract for the sale of lands, unless it be expressly stipulated otherwise, the conveyance is to be at the expense of and to be prepared by the purchaser. Here it was for the purchaser to make out the conveyance in the usual course; that being done, his agreement is on a given day to pay the purchase-money, and the plaintiff's to execute the conveyance and complete the title. The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tendered a conveyance. He was to perform the initiative, before the plaintiff could be called upon to offer a conveyance, and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution. The declaration is therefore good, and the judgment will be for the plaintiff.

Judgment for the plaintiff.

End of Trinity Term.

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of EXCHEQUER and EX-
CHEQUER CHAMBER, from Trinity Vacation,
3 VICT., to Hilary Vacation, 4 VICT., both
inclusive. By R. MEESON, Esq., and W. N.
WELSBY, Esq., of the Middle Temple, Barristers-
at-Law. Vol. VII. London, 1841.

- [1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF
EXCHEQUER, AND EXCHEQUER CHAMBER, VACATION SITTINGS AFTER TRINITY
TERM, 3 VICTORIE.

DOE ON THE SEVERAL DEMISES OF JOHN RICHARD DUNNING, THOMAS FERNEE,
AND THOMAS TOWNSEND *v.* THE RIGHT HONOURABLE JAMES EDWARD BARON
CRANSTOUN. Exch. of Pleas. 1840.—A testator by his will devised as follows :—
“Whereas it appears to me, that one part of my said freehold lands, viz. those lands
which I hold in the parishes of W., B., and M., were held for a considerable period
of time by my father’s ancestors in the male line, bearing the name and arms of D.,
as hereditary proprietors of the same, I therefore consider it just and equitable
that those lands should continue to be held, if possible, by persons of the same
name and family. I therefore give, bequeath, and devise, the freehold lands
which I hold in the three parishes aforesaid, to” &c. The property which the
testator possessed in the parish of M. was freehold, but that in the parishes of
W. and B. was all leasehold, which he had derived from his father’s ancestors
in the male line :—Held, that the leasehold lands in the parishes of W. and B.
were sufficiently ascertained by the will, and therefore, though incorrectly
described as “freehold,” passed under the devise.

[S. C. 9 L. J. Ex. 294 ; 4 Jur. 683.]

This was an action of ejectment, to recover possession of certain lands respectively
situate in the several parishes of Meavy, Walkhampton, and Buckland Monachorum,
in the county of Devon. The defendant suffered judgment by default as to the
portion of the said lands which were situate in the parish of Meavy, and of which
Richard Barré Baron Ashburton, at the time of making his will, and at the time of
his death as hereinafter mentioned, was seised in fee, and as to the residue of the
lands in the declaration [2] mentioned, which were respectively situate in the several
parishes of Walkhampton and Buckland Monachorum, the defendant pleaded not
guilty, on which plea issue was joined. The latter lands were all leasehold, held by
the said Lord Ashburton at the times aforesaid, for the residue of the term of 1000
years, as hereinafter mentioned. The cause came on to be tried before Coleridge, J.,
at the last Summer Assizes for the county of Devon, when a verdict was found for
the defendant, subject to the opinion of this Court upon the following case.

On or about the 21st of January, 1820, Richard Barré Baron Ashburton made his
last will and testament in writing, duly executed and attested for passing real and
personal property, which said will contains, amongst other things, the following
devises and bequests :—“I give, bequeath, and devise all my freehold lands, manors,

estates, and real property whatever, situated in the county of Devon, to my wife, the Right Hon. Anne Selby Lady Ashburton, to hold and enjoy the same for the term of her life: and whereas it appears to me, that one part of my said freehold lands, namely, those which I hold in the parishes of Walkhampton, of Buckland Monachorum, and of Meavy, were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of Dunning, as hereditary proprietors of the same: I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family; and although I have no son nor brother, nor other heir male known to myself, yet whereas it is possible that some distant heir male may exist, although unknown at present to me; I therefore give, bequeath, and devise, the freehold lands which I hold in the three parishes aforesaid, to that person who may, at the moment of my wife's death, in case of her surviving me, or at the moment of my own death in case [3] of my surviving my wife, to my nearest collateral heir male of the name of Dunning, to hold the same to him and the heirs male of his body for ever whom failing, to his collateral heirs male for ever; and to prevent all mistakes, I declare that by the phrase 'collateral heir male,' I intend to denote a person whose consanguinity with myself can be traced altogether through males alone, without counting his pedigree in any case through a female; and I declare it to be my wish that, as soon as conveniently may be after my death, an advertisement may be three times inserted in two of the principal London newspapers, and may also be three times inserted in some newspaper published in the city of Exeter, for the purpose of calling on all persons bearing the name of Dunning, who may consider themselves entitled to benefit by this devise, to appear for their interest and produce their respective claims. And if no person can produce a valid claim within three years after the insertion of the said advertisement in the newspapers, in that case I hereby revoke this special devise of the lands situated in the aforesaid three parishes, and declare that the said lands shall be deemed to be included in the general devise of my lands situated in the county of Devon, which is hereinafter inserted. And whereas it appears to me, that the residue of the lands which I hold in the county of Devon was never held by any of my ancestors in the male line more remote than my father, by whom indeed the greatest part of the said lands was acquired by purchase: I therefore do not consider that any remote and unknown heir male of the name of Dunning, as such, possesses any claim upon the said residue of my lands, of such a nature as in reason, conscience, or equity, to call upon me to respect it; and I therefore strictly confine and limit what I am doing in behalf of such a remote heir male within the bounds of the parishes of Walkhampton, of Buckland Monachorum, and of Meavy aforesaid. Whereas [4] by the death of my father's only sister, Mrs. Mary Dunning, I am now become, to the best of my knowledge and belief, the only existing descendant of my great grandfather in the male line, John Dunning, who died, if I am not mistaken, in the reign of Queen Anne; I therefore consider it impossible that any person should exist so nearly related to me on the side of my father, either through female or mixed consanguinity, as to possess any claim upon my property, of such a nature as to make it incumbent on me to respect it. And whereas the fortune that was brought to my father in marriage to my mother, amounting to £10,000 sterling, was much more than repaid to my mother by the sums which she received during the latter part of her life, in consequence of the additions which I made to her income when I reached the age of twenty-one years; I therefore do not consider that any persons related to me through my mother possess, merely as such, any claim upon my property which it is at all incumbent on me to respect, any further than I may voluntarily think fit so to do, of my own free choice. Considering, therefore, all these facts, and considering moreover that my title as a peer of Great Britain will become extinct at my decease, if I never have a son, I think myself fully authorized, not only in point of law, but in point of conscience and reason, to dispose of my property as I think fit in my voluntary choice to do, excepting so far as the claims of my wife, in the event of her surviving me, and the claims of a remote male heir, if any such person should exist, to the ancient patrimonial part of my landed property, are respectively concerned, for both of which I have hereby already provided. Wherefore I give, bequeath, and devise all my freehold lands, manors, estates, and real property whatever, situate in the county of Devon, excepting only, in case of the existence of a collateral male heir, those lands which are situated in the parishes of Walkhampton, [5] of Buckland

Monachorum, and of Meavy, from and after the death of my wife, first, to the Right Hon. James Lord Cranstoun, to hold and enjoy the same for the term of his life :³— with remainders over to four other persons for life, bequeathing the ultimate reversion in fee to the survivor of them. The testator then gave and bequeathed all his leasehold manors and estates to his wife Lady Ashburton, to hold and enjoy the same until his interest in the said leasehold expired ; but in case his wife died before that period, he then devised the same over.

And the said Richard Barré Baron Ashburton did, by his said will, appoint his wife, Anne Selby Lady Ashburton, his sole executrix ; and died without issue, and without having revoked or altered his said will, on or about the 22nd day of March, 1823, leaving his widow, the said Anne Selby Lady Ashburton, surviving him.

At the time of the making of the said will, and from thence to the time of his death, the said Richard Barré Baron Ashburton was in possession of the said leasehold lands included in the consent rule as aforesaid, and held the same for the residue of a certain term of 1000 years, which was created by an indenture, bearing date the 23rd day of December, 1650, made between Elize Chrymes of the one part, and Willmotte Dunning, widow, of the other part, whereby the said Elize Chrymes demised the said lands to the said Willmotte Dunning for the term of 1000 years from thence next ensuing, without impeachment of waste, yielding and paying, at the feast of St. Michael yearly during the said term, unto the said Elize Chrymes, his heirs and assigns, five shillings, if it were lawfully demanded ; and also the said Willmotte Dunning, her executors and assigns, doing suit at the two law courts of the said Elize Chrymes, his heirs and assigns, twice in the year to be holden within his or their manor of Buckland Monachorum. By indenture, bearing date the 5th of [6] December, 1659, the said Willmotte Dunning assigned the said term of 1000 years to her son Richard Dunning. The said Richard Dunning, by his will, dated the 12th of November, 1692, devised all his lands in Meavy to his son John and his heirs lawfully begotten, and if he should die without any issue lawfully begotten, then to his daughters for life, and after their decease to his brother John Dunning and his heirs male lawfully begotten, and for want of such issue to his right heirs for ever ; and the said testator gave to his son John, after the decease of his mother, all the right and term of years which he had in the said lands included in the consent rule, and appointed Mary (his wife) and John (his son) executrix and executor of his will. The testator died the 17th of November, 1692, and his will was proved by the executor and executrix. The said John Dunning, the son, by indenture of the 5th of October, 1695, made in contemplation of his marriage with Mary Prowse, settled a part of the said leaseholds, describing them properly as such, in default of his having sons, on the daughters of the marriage. The said leaseholds afterwards passed from executor to executor, or were otherwise transferred as chattel interests, and ultimately vested in the said Richard Barré Baron Ashburton as aforesaid. The said Richard Barré Baron Ashburton was descended from the said John Dunning, son of the said Richard Dunning, and his collateral heir male herein mentioned was descended from the before-mentioned John Dunning, the brother of the same last-mentioned Richard Dunning.

The said Richard Barré Baron Ashburton had not, at the time of making his will, or at the time of his death, any other lands, either freehold or leasehold, in the parishes of Walkhampton and Buckland Monachorum, or either of them, than those included in the consent rule in the ejectment. The only lands which his lordship held at [7] the time of making his will, and at his death, in the parish of Meavy, were the freehold lands for which the defendant did not defend as aforesaid. His lordship was also seised, at the time of making his will, and at his death, of divers freehold lands, manors, and estates, besides the said freehold in Meavy, situated in the county of Devon, and which he devised to his wife as aforesaid. His lordship also held, at the time of making his will, and at his death, certain leasehold lands, situate in the county of Devon, which had been purchased by his father, for the residue of a term of ninety-nine years, determinable in November 1845, and which are now in the possession of Miss Margaret Baring, as surviving legatee under his lordship's will.

The steward of the late Lord Ashburton proved at the trial, that he was steward from 1808 to the death of his lordship, and as such steward had the custody and entire control of the title-deeds in Walkhampton and Buckland Monachorum ; that he prepared leases of those lands, which were executed by Lord Ashburton, reserving rent to his lordship and his heirs, and that he the steward did not know the state of the

title to such lands, until the year 1824. This evidence of the steward was objected to by the counsel for the defendant: and if the Court, upon the argument, shall be of opinion that it is not evidence upon the construction of the will of Lord Ashburton, it is to be considered as struck out of the case.

After the death of the said Richard Barré Baron Ashburton, and in or about the month of May, 1823, the said will was proved in the Prerogative Court of Canterbury, by the said Anne Selby Lady Ashburton.

John Dunning, late of Gerard Street, in the city of Westminster, wine-merchant, duly made out his claim, shewing that he was the nearest collateral heir male of the said Richard Barré Baron Ashburton.

Immediately after the death of the said Richard Barré [8] Baron Ashburton, the said Anne Selby Lady Ashburton entered into the possession of the said leasehold lands, included in the consent rule in this ejectment, and held and enjoyed the same for her own use and benefit, and continued in such possession from the time of the death of the said Richard Barré Baron Ashburton, to the time of her own death.

On or about the 8th of July, 1835, the said Anne Selby Lady Ashburton died, having first made her will, dated the 28th October, 1834, by which she gave and bequeathed unto the defendant, by the name and description of the Right Hon. James Lord Cranstoun, his executors, administrators, and assigns, for his and their own absolute use and benefit, all her leasehold estates in the counties of Devon and Middlesex, or elsewhere, and all the rest, residue and remainder of her personal estate whatsoever and wheresoever: and the said Anne Selby Lady Ashburton did, by her said will, appoint the said defendant sole executor thereof. At the time of the respective deaths of the said Richard Barré Baron Ashburton, and Anne Selby Lady Ashburton, the said John Dunning, late of Gerard Street, wine merchant, was the nearest collateral heir male of the said Richard Barré Baron Ashburton.

On or about the 6th of May, 1839, the said John Dunning, late of Gerard Street, wine merchant, died, leaving John Richard Dunning, one of the lessors of the plaintiff in this ejectment, his eldest son and heir at law, surviving him, and also leaving Thomas Fernée and Thomas Townshend, the two other lessors of the plaintiff, executors and residuary legatees of his said last will and testament.

The question for the opinion of the Court is, whether the leaseholds in the parishes of Walkhampton and Buckland Monachorum aforesaid, included in the consent rule in this ejectment, did, after the decease of the said Anne Selby Lady Ashburton, pass by the will of the said Richard [9] Barré Baron Ashburton to the said John Dunning, late of Gerard Street, wine-merchant, as nearest collateral heir male of the said Richard Barré Baron Ashburton, or not; if the Court shall be of opinion that the said leaseholds did pass to the said John Dunning, then the verdict to be entered for the plaintiff; but if the Court shall be of a contrary opinion, then a nonsuit to be entered.

Fitzherbert, for the plaintiff, was stopped by the Court, who called on

Butt, for the defendant. The question depends upon the construction to be put upon this will; and there are several authorities to shew, that under such a devise, nothing but the freehold manors and lands would pass to the devisee. [Parke, B. Is not this case governed by *Day v. Trigg* (1 P. Wms. 286)? There a testator devised all his freehold houses in Aldersgate Street, when in fact he had no freehold houses there, but leasehold only, and it was held that the leasehold houses passed.] In that case there was not any property but leasehold to satisfy the devise; but here there is other property on which it could operate. The case of *Davis v. Gibbs* (3 P. Wms. 26; Fitzgib. 116) is precisely in point. There a testatrix, seised of lands in Kent in fee and possessed of a mortgage for a term of years of the manor of Cranbroke in Essex, devised all her lands, tenements, and real estate in Kent and Essex to J. S. and his heirs; and it was held that the will would not pass the term, especially if there were any other clause in the will which disposed of the personal estate. Now, here there is personal property, and a residuary clause to dispose of it. The leaseholds would pass under the residuary clause, and therefore the Court is not driven to the construction contended for on the part of the plaintiff. If it be a question of intention, that [10] must be collected from the will itself, and not from any extrinsic evidence. *Rose v. Bartlett* (Cro. Car. 292), *Miller v. Travers* (8 Bing. 244). In these cases, the question is not what the testator meant to do, but what is the meaning of the words he has used in the will. In this clause, he deals only with the freehold lands. All that he could entail was the freehold property in Meavy, and that satisfied

the devise. To give effect to the construction contended for, it will be necessary to strike out the words "freehold," and insert "leasehold" wherever that word occurs. There are several cases to shew that, where a devise contains clear words of reference to a particular species of property, this court will not construe it to include other kinds unless there be a distinct expression of the intention of the testator in favour of such a construction. *Doe dem. Conolly v. Vernon* (5 East, 51), *Doe dem. Tyrrell v. Lyford* (4 M. & Selw. 550), *Doe dem. Ashforth v. Bower* (3 B. & Ad. 453), *Hobson v. Blackburn* (1 Mylne & K. 571), *Thompson v. Lawley* (2 Bos. & Pull. 303), *Doe dem. Brown v. Brown* (11 East, 441).

PARKE, B. This is a case which is perfectly clear. The rule is, that where any property described in a will is sufficiently ascertained by the description, it passes by the devise, although all the particulars stated in the will with reference to it may not be true. The question here is, does this testator mean to devise any particular estate which can be ascertained from the will? If he does, then the describing it to be freehold instead of leasehold would not affect the devise; for the maxim is,—*Falsa demonstratio non nocet*. Then, does not this will clearly point out certain distinct and separate lands? The testator says, "Whereas it appears to me, that one part of my said [11] freehold lands, namely, those which I hold in the parishes of Walkhampton, of Buckland Monachorum, and of Meavy," (which is, in other words, those lands which I hold in each separate parish), "were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of Dunning, as hereditary proprietors of the same; I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family, &c., &c." It appears to me, that he ascertains the lands very clearly, by specifying them as lands held by his father's ancestors as hereditary proprietors. There are lands in each of those parishes which have been held by those ancestors from generation to generation for a long period of time; and though those lands are leasehold, can there be a doubt that he points to them? If not, then we have only to reject as surplusage the words indicating them to be freehold, and the devise will be as complete as if the lands were set out by metes and bounds, or by the tenants' names, or by any other peculiar marks by which they might be designated. The term "freehold" is a description of the tenure, and not of the lands themselves, and may be rejected, as was done in the case of *Day v. Trig*, which is precisely in point to the present case. In Com. Dig. Fait, E. 4, it is said, "If the thing described is sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man conveys his house in D. which was R. Cotton's, when it was Thomas Cotton's." *Davis v. Gibbs* was the case of a general devise of the testator's lands, tenements, and real estate, and is distinguishable from the present case, with respect to which there is no room for any doubt whatever.

ALDERSON, B. I am of the same opinion. It appears to me to be quite clear that all the lands in the three parishes, held by the Dunnings as their hereditary property, [12] passed by the devise, although they were not of freehold tenure.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

ROWCLIFFE v. EDMONDS AND WIFE. Exch. of Pleas. 1840.—A declaration for the following words, alleged to have been spoken by the defendant's wife, of the plaintiff:—"You robbed me, for I found the thing you have done it with:—" Held, that the words were actionable per se, without any colloquium or innuendo to explain the sense in which they were used.

[S. C. 9 L. J. Ex. 278; 4 Jur. 684.]

This was an action of slander, for the following words alleged to have been spoken by the defendant's wife of the plaintiff:—"You (meaning the plaintiff) robbed me, for I found the thing you (meaning the plaintiff) have done it with." The defendant demurred specially to the declaration, on two grounds: first, that it did not appear of what thing the alleged robbery was committed, or whether the discourse concerned a subject matter, in respect of which a felony could be committed in law; secondly, that it did not appear whether the defamatory language was spoken before or after the marriage of the defendants; for if spoken after the marriage, no action would lie,

inasmuch as no felony could be committed of the goods of a feme covert, who cannot be understood to have any. Joinder in demurrer.

Butt, in support of the demurrer,—cited *Charnel's case* (Cro. Eliz. 279) as an authority in support of the latter objection. [Alderson, B. The wife may be robbed of her husband's goods. She does not say they were her goods.] Secondly, the word "robbed" does not necessarily import an imputation of felony. In *Tomlinson v. Brittlebank* (4 B. & Adol. 630; 1 Nev. & M. 455), the words, "he robbed J. W.," were certainly held actionable, as imputing an offence punishable by law, unless the de-[13]-fendant shewed that they were used in some other sense: but there Littledale, J., differed, and said he did not think the term "to rob" necessarily meant taking goods from another by force in the sense of the statute. There, also, the question arose after verdict: here it is on special demurrer. [Parke, B. That can make no difference, as to this argument.] In *Day v. Robinson* (1 Ad. & Ell. 554; 4 Nev. & M. 884), a count laying these words, "you have robbed me of one shilling tax money," was held bad after verdict. [Parke, B. An indictment for robbery has been held sufficient, in which it was merely alleged that the defendant "feloniously robbed A. B." It would be strange if more particularity were required in a declaration for slander than in an indictment. *Prima facie*, a robbery means an unlawful taking with violence, and must be so understood, unless it appears from the context, or is shewn by the defendant, that it was meant in some other sense, which is not the case here.] It should be stated what was stolen, that the Court may judge whether it was a felony. [Parke, B. Suppose the words had been, "You robbed A. B. on the highway, put him in bodily fear, and took something from him, but I do not know what," would they not be actionable? Alderson, B. Or suppose they were, "You have been guilty of murder," without saying of whom, could it be contended the murder alluded to might be of a sheep, and not of a man?]

PARKE, B. You have no authority to cite for your position, and we not are disposed to make one.

The rest of the Court concurring,

Judgment for the plaintiff.

[14] WEETON AND OTHERS v. WOODCOCK AND OTHERS. Exch. of Pleas. 1840.

—The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.—Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor:—Held, that they had no right so to remove it, and that the lessor might recover it in trover.—And semble, such would have been the case even without such finding of the jury.

[S. C. 10 L. J. Ex. 184. Followed, *Leader v. Homewood*, 1858, 5 C. B. (N. S.) 546. Discussed, *Burff v. Probyn*, 1895, 64 L. J. Q. B. 557. Referred to, *Ex parte Brook*; *Re Roberts*, 1878, 10 Ch. D. 109; *In re Glasliff Copper Works, Limited*, [1904] 1 Ch. 819.]

Trover for a steam-engine boiler. Pleas, 1st, not guilty; 2ndly, that the plaintiffs were not possessed as of their own property: on which issues were joined. At the trial before Erskine, J., at the last Liverpool Assizes, it appeared that the defendants were the assignees of one J. F. Taylor, a bankrupt. The plaintiffs, together with one Philip Newton (since deceased), had demised to Taylor, by indenture, a cotton factory, with the warehouse, counting-house, engine, and engine-house, &c. &c. implements, tackle, furniture, and machinery, the property of the plaintiffs and Newton, to the said factory and steam-engine belonging, and therewith used and enjoyed, &c. &c., for a term of seven years from the 12th of May, 1836. The lease contained covenants by Taylor to keep the premises in repair, to keep up a good steam-engine, with a boiler of beaten iron of certain dimensions, and at the end or sooner determination of the term, to leave and deliver up possession of the premises, and all the things therein,

in good repair, or to pay the lessors the value of such as were not so left; with a proviso for re-entry in case of the bankruptcy of Taylor, and a fiat issuing thereon, or upon non-performance of any of the covenants. The steam-engine boiler in question was set up by Taylor during his tenancy, and annexed to the engine. It was built round with brick, and firmly fixed to the floor and walls of the engine-house; being according to the statement of the witnesses, more firmly annexed than it was usual at a subsequent period to annex such boilers. In April 1838, Taylor committed an act of bankruptcy, and on the 16th of that month a fiat in bankruptcy issued against him, under which the defendants were appointed [15] assignees, and took possession of the bankrupt's property. A breach of the covenant to repair had been committed previously to the issuing of the fiat; and on the 30th of May, 1838, the plaintiffs made an entry on the premises, in order to enforce the forfeiture. The assignees, however, retained possession, and about the 20th of June following sold the boiler, and it was subsequently removed from the premises. It was contended for the plaintiffs, first, that they were entitled to recover under the covenant, to keep up the engine and boiler, and to leave them on the premises at the determination of the term; and further, that independently of the language of this particular covenant, they were entitled to the boiler as being a fixture, and not having been removed during the term. The learned Judge left it to the jury to say whether the boiler was a fixture; and if so, whether it had been disannexed within a reasonable time after the entry of the plaintiffs. The jury found it to be a fixture, and that it had not been disannexed within such reasonable time; and a verdict was entered for the plaintiffs for £87, leave being reserved to the defendants to enter a nonsuit, if the Court should be of opinion that the plaintiffs were not entitled under the covenant, and that the defendants, as assignees of the lessee, had a right to remove the boiler so long as they remained in possession.

In Michaelmas Term, Wightman obtained a rule accordingly; against which, in Easter Term,

Cowling (Cresswell was with him) shewed cause. The plaintiffs shape their case in two ways: first, they allege, that they are entitled to recover under the general law relating to fixtures, this boiler being a trade fixture, left on the premises after the determination of the term, and the property in which revested in the lessors; or, secondly, that the defendants cannot claim it as assignees of the tenant, by reason of the covenant. First, this was a [16] fixture, and as such vested in the plaintiffs, on the determination of the term by their entry upon the forfeiture. This would clearly have been the case if the lease had expired by effluxion of time; but it will be argued on the other side that the rule is different in cases of forfeiture: the authorities, however, do not warrant any such distinction. It is by the default of the tenant that the term is determined, and he cannot be in a better position than if it had expired by mere lapse of time. It will be said that the general rule cannot apply, because the tenant must in such a case have a reasonable time in which to remove the fixtures. Here, however, the jury have expressly found that the boiler was not disannexed within a reasonable time after the plaintiffs' entry. But the law is correctly stated in Messrs. Amos and Ferard's Treatise on the Law of Fixtures, (p. 87), that a tenant must use his privilege in removing fixtures during the continuance of his term; for if he forbear to do so within that period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord. This was expressly recognised as the correct rule of law on the subject, in the case of *Lyle v. Russell* (1 B. & Adol. 394). So, in *Hollen v. Runder* (1 C. M. & R., 275), Parke, B., says:—"When chattels are fixed to the freehold by the tenant, they become part of it, subject to the tenant's right to remove them during the term, and thus reconvert them into goods and chattels." But it has in truth been decided in this very case, that this boiler was a fixture, and as such became the property of the landlord. During the argument on the question as to the joinder of a special count with the count in trover, Parke, B., said (*Weeton v. Woodcock*, 5 M. & W. 591):—"Does not the declaration aver that the boiler was fixed to the freehold? then, if so, it belongs to the landlord after the determination of the term." The only authority [17] which appears adverse to the plaintiffs is that of *Penton v. Robart* (2 East, 88), in which it was held that a tenant was entitled to remove a trade erection while he continued in possession of the land, although after the expiration of the term. But there the lessor was in possession only by relation of law, and the defendant was tenant at sufferance; here, by the entry of the plaintiffs

upon the forfeiture, the estate reverted in them, and the assignees from that time became trespassers. There, also, the defendant did not claim directly from the plaintiff. If the assignees could remove this boiler three weeks after the plaintiffs' entry, why could they not six months afterwards? It cannot be said that that was a reasonable time for the purpose, even supposing that the law allowed them such an indulgence.

But at all events, the covenant operated to prevent the defendants from acquiring any right of removal. It may be said it gives the lessors only a remedy in covenant; but it is submitted that it clearly operated to take away the common-law right of removal. [Alderson, B., referred to *Fairburn v. Eastwood* (6 M. & W. 679).] That case is distinguishable; there the parties were reversed, and the covenant was different in its terms from the present.

Wightman and Crompton, *contra*. The right of the plaintiffs, under the lease, lay wholly in covenant, and the learned Judge so thought at the trial. The main question however is, whether the defendants had a right of removal after the determination of the term by the forfeiture. In the cases cited on the other side, there was an attempt to remove the fixture not only after the term had determined, but after the tenant was out of possession: and his quitting the possession was rightly held to be evidence that he had abandoned his right of removal, and given the articles up to the landlord, since he could not repossess himself of [18] them without committing a trespass. But there is no such presumption where the lessee continues in possession: and *Penton v. Robert* is a direct authority that in such case he retains the right of removal. It has been attempted to distinguish that case from the present, on the ground that here there has been an entry upon the forfeiture; but there the plaintiff had actually recovered in ejectment against the defendant, so that the latter held over as a mere trespasser. In *Colegrave v. Dias Santos* (2 B. & Cr. 79), Abbot, C. J., referring to the judgment of Gibbs, C. J., in *Lee v. Risdon* (7 Taunt. 188), says,—“According to that opinion, nothing can now be done with respect to those things which may be considered as fixtures, whatever power the plaintiff might have had before he gave up the possession.” The authority of *Penton v. Robert* was recognised by this Court in the cases of *Minshall v. Lloyd* (2 M. & W. 456), and *Mackintosh v. Trotter* (3 M. & W. 184). In the former case Parke, B., said:—“One question is, whether, in strict law, the plaintiffs, who represent the lessee, could derive from him any greater right than to remove the fixtures during the term, or while they continued in possession after the term.” And in *Mackintosh v. Trotter* the same learned Judge laid it down as the rule of law, “that the tenant has a right to remove fixtures of this nature [tenants' fixtures] during his term, or during what may for this purpose be considered as an exerescence on the term.” The passage cited from *Amos & Ferard on Fixtures*, applies to cases where the tenancy is determined by the act of forfeiture itself. Here the tenant has not so given up possession as that the law presumes a gift to the reversioner. If this view of the case be correct, the question of the reasonableness of the time is wholly immaterial, and the finding as to it does not alter the right of the defendants.

Cur. adv. vult.

[19] The judgment of the Court was now delivered by

ALDERSON, B. In this case we took time to consider whether the assignees of the bankrupt had, under the circumstances, proved the right of removing the tenant's boiler, which was a fixture. It appeared that the landlord had made, on the 30th of May, 1838, an entry to avoid the lease after a forfeiture committed, and that subsequently to that entry, though not (as the jury have expressly found) within a reasonable time after it, the assignees, still continuing in possession, removed and sold the boiler in question. The point is, whether they had the right so to do.

The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. That was the rule on which this Court acted in *Minshall v. Lloyd* (2 M. & W. 460), in which Mr. Baron Parke, in giving his judgment, puts it on the ground that there was “no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants.” In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after

the assignees had ceased to have any right to consider themselves as tenants. And further, even if they had the right, in a case where the entry determining the tenancy is the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury have found that they did not avail themselves of that privilege. The rule, therefore, for a nonsuit must be discharged.

Rule discharged.

[20] *MORTIMER v. M'CALLAN*. Exch. of Pleas. 1840.—*Indebitatus assumpsit* for stock sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. Plea, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with the plaintiff for the transfer of the same in consideration of £531l. 5s., to be therefore paid to the plaintiff for the same; and that at the time of the making of such agreement the plaintiff was not actually possessed of or entitled to the stock in his own right &c., by means whereof the said contract became and was null and void:—Held, that the plea was no answer to the action, and that the contract was not within the 7 Geo. 2, c. 8, s. 8.

[S. C. 10 L. J. 136; 4 Jur. 633. For former proceedings see 6 M. & W. 58.]

Assumpsit. The first count of the declaration alleged, that the defendant heretofore, to wit, on the 7th day of October, 1839, was indebted to the plaintiff in the sum of £5000, for certain, to wit, £5000 interest or share in the joint stock of 3l. per cent. Annuities, transferable at the Bank of England, called the Consolidated 3l. per cent. Annuities, then sold and caused to be transferred by the plaintiff to the defendant, at his special instance and request, and by the said defendant, then, to wit, on the same day and year aforesaid, duly accepted.

Plea, as to the first count, that the said interest or share in the said joint stock in the first count mentioned, and therein alleged to have been caused to be transferred by the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff after the 1st day of June, 1734, viz. on the 7th day of October, 1839, for the transfer, on the day and year last aforesaid, by the plaintiff to the defendant, of the said sum of £5000 interest or share in the said joint stock in the said first count mentioned, for and in consideration of the sum of £531l. 5s. to be therefore paid to the plaintiff for the same; and the defendant further says, that, at the time of the making of such contract and agreement, the plaintiff was not actually possessed of or entitled unto, in his own right, or in his own name, or in the name or names of any trustee or trustees to his use, of the said interest or share in the said joint stock in the first count mentioned, or of any part thereof, by means whereof the said contract and agreement, and the said promise in the said declaration mentioned, so far as the same relates to the said first count, then became and was, and from thence hitherto, hath been and still is, according to the form of the statute [21] in such case made and provided, null and void to all intents and purposes whatsoever. Verification.

General demurrer, and joinder.

The point marked for argument in the margin of the demurrer-book was as follows:—The matter of law intended to be argued by the plaintiff is, that, to a cause of action for stock actually transferred and accepted upon a contract for payment, the matter stated in the second plea is not an answer.

The case was argued in Easter Term last, by

Cresswell, in support of the demurrer. First, the statute 7 Geo. 2, c. 8, s. 8, does not apply to a transaction of this nature, but was intended to apply to contracts, not for an actual transfer of stock, but merely for differences to be paid by the one party or the other, according as the stock may rise or fall; but, secondly, at all events, when the stock has been transferred pursuant to a contract of the nature stated on this record, and the defendant has accepted that stock, he is bound to pay for it. The act is intitled “An Act to prevent the infamous practice of Stock Jobbing,” and it recites “that great inconveniences have arisen, and do daily arise, by the wicked, pernicious, and daily practice of stock-jobbing, whereby many of his Majesty’s good subjects have been and are diverted from pursuing and exercising their lawful trades

and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce;" shewing that it was not directed against an intention in the one party to invest his money in the funds, and in the other to sell and transfer stock. The 1st section is directed against "contracts for liberty to put upon, accept, or refuse any public stocks or securities, and wagers relating to the value of stock," which it declares shall be void, and the money paid thereon restored; the 2nd, 3rd, and 4th sections are also directed [22] against transactions of the same nature. The 5th section imposes a penalty of £100 on giving or receiving money to compound differences relating to stock not actually delivered; again shewing that the intention was not to disturb transactions that are bonâ fide for the sale and delivery of stock. The 6th section provides, "that no person or persons who shall sell any public or joint stock or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock or other securities which shall be so refused or neglected to be paid for, to any other person or persons, for the best price which can be obtained." There was, perhaps, a doubt at that time, whether, after a contract had been made, and the stock was not received and paid for, it could be lawfully sold to another person; and it was to remove that doubt that the 6th section was introduced; so, if a person contract for stock, and it is not tendered at the appointed time, he has a right to buy other stock, and sue the former person with whom he contracted for the difference. The 7th section is for equal relief to the buyer. Then comes the 8th section, which recites, that "it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed." Now it is apprehended that, considering the title, the preamble, and the scope of the different parts of the act, it was not intended to include such a transaction as the present, where a bonâ fide sale of stock was contemplated; but purely to prevent parties from bargaining with respect to stock in which they had no interest, and did not intend to acquire an interest—in fact, non-existing stock; which was the construction put by Lord Ellenborough on the statute. Then it is enacted, "that all contracts and agreements whatsoever which shall, [23] from and after the 1st day of June, 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever." Therefore it must be void as to both parties. If such a contract as is here mentioned is to be void to all intents and purposes, it must be a contract which the contractor to buy could never enforce, any more than the contractor to sell, and therefore it is impossible to suppose that such a provision should have been framed, to render a contract void which was made for the sale and actual transfer of stock, and not merely with reference to the differences; because, suppose the buyer, having money in his hand to invest, is desirous of buying stock, and he applies to a party to sell him a certain amount of stock, and that party contracts to do it, not doubting that he can immediately procure stock for the purpose of making the transfer, is the purchaser, who does not know but that the seller has stock standing in his own name, or in the name of a trustee for him, to suffer for it? and is it to be said, as against him, that the contract is void altogether? And yet, if the statute applies to a contract of this description, it will have that effect.

There are several cases which shew that this statute has not been construed literally, or as extending to bonâ fide transactions. In *Sanders v. Kentish* (8 T. R. 162), which was an action [24] for not transferring stock into the plaintiff's name, the plaintiff being possessed of £3000 4l. per cent. stock, empowered the defendant to sell the same for his own benefit, in consideration of which, the defendant agreed to transfer at the next opening £3000 4l. per cents. into the plaintiff's name; and it was held that this was not a case prohibited by the 7 Geo. 2, c. 8, s. 8, but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer. And Lord Kenyon, in giving

judgment, said:—"The case is shortly this: the defendant Kentish, who is a stock-broker, and who was therefore most probably acquainted with the statute on which his counsel has now relied, applied to the plaintiff, a clergyman, who was probably ignorant of that law, and obtained from him a loan of £3000 stock, on an undertaking to replace the same stock on a given day; from this transaction the plaintiff was to derive no advantage whatever. The plaintiff gave him a letter of attorney, empowering him to sell the stock; he then put the money into his pocket, and when the day of payment arrived, refused to pay the plaintiff, insisting that the statute of Geo. 2 rendered the contract void; and that therefore the plaintiff cannot enforce that contract in a Court of law. To be sure, if such were the positive provisions of that statute, the consequence must follow, however hard it might press upon the plaintiff; but before we assented to so monstrous a proposition, we would look with eagles' eyes into every part of the statute, to see that such was the intention of the legislature. Their intention is to be collected from the whole act taken together. The act is intitled, 'An Act to prevent the infamous Practices of Stock-jobbing.' But if the defendant's objection were to prevail, the title of the act ought to be altered, and it should run thus,—'An Act to encourage the wickedness of stock-jobbers, and to give them the exclusive privilege of cheating the rest of [25] mankind.' On considering the whole of the act together, I am clearly of opinion that its object was only to prevent gambling in the funds; but the legislature did not mean to prohibit a loan of stock, and an undertaking to replace it. I do not think that this case comes within the meaning of the prohibitory clauses in the act, but it is within the exception in the last section." In *Oliverson v. Coles* (1 Stark. 496), which was an action on a special undertaking, in consideration that the plaintiff would sell out Omnium to the amount of £2000, to replace the same in stock, or to give the plaintiff the current price for it if he required it: it was objected, at the trial, that the contract was illegal, as amounting to an agreement to replace stock in consideration of selling out Omnium which was not stock, and might never eventually become stock; for if default were made in one payment, the previous payments would become forfeited, and so whether it might eventually become stock rested upon a contingency. But Lord Ellenborough said, "A person who has Omnium is potentially in possession of stock. The case certainly differs from that of a sale of actually existing stock, but it does not come within the mischief intended to be guarded against by Sir John Bernard's Act." Lord Ellenborough therefore appears to have considered that the act was directed exclusively against the sale of stock which was not actually existing. He was then stopped by the Court, who called upon

Sir W. W. Follett, who appeared in support of the plea. According to the true construction of this act of Parliament, this action is not maintainable. It must be recollected that the plaintiff in this case is what is called a stock-jobber; that is, a person professing to sell without having the stock in his possession. It is not the case of a party buying *bonâ fide* of a person whom he supposes to possess the stock, but that of a person selling stock which he knows [26] he has not the possession of. The plaintiff not being possessed of any stock, and therefore, at least as far as he is concerned, the stock being non-existing stock, enters into a contract to sell or transfer a certain quantity of stock to the defendant; the defendant agrees to pay a certain price for it, and the stock is to be transferred. At the time when the transfer is to take place, the plaintiff does cause a transfer to be made; whether he gains or loses by that speculation does not appear, nor is it important. The question is, in the case of a party bargaining to transfer stock of which he is not the owner, whether that bargain is not made absolutely void by this act of Parliament; and for that purpose it will be necessary to consider its several enactments. The first seven sections are directed against bargaining for differences, putts, and refusals; and the 1st section declares all such contracts to be void. The 2nd obliges persons sued upon them to answer upon oath any bill filed for the discovery of such contracts. By the 3rd, the plaintiff, on filing a bill, is to give security for answering costs, otherwise the defendant may refuse to appear. Then, by the 4th, a penalty of £500 is imposed for making or executing any such putts or bargains; putts being contracts for the transfer of stock on a certain day, which the party may either accept or refuse on paying or receiving the difference—which are now called "time bargains." Then comes the 5th section: "And for preventing the evil practice of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter to be

agreed so to be, Be it further enacted, That no money or other consideration whatsoever, (except as hereinafter is provided), shall, from and after the said 1st of June, 1734, be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract [27] or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money or other consideration thereby agreed to be given and paid for the same shall also be actually and really given and paid:" and a penalty of £100 is imposed upon parties offending against this provision. Then in the 6th section there is a distinct enactment, that stock sold and not paid for at the time prefixed may be resold, and the party is to pay the damage sustained: and by the 7th, the buyer may purchase other stock and recover the damage. These sections of the act completely provide for what is contended on the other side to be the only object of the act, namely, the preventing time bargains or compounding for differences. And there is nothing extraordinary in supposing, when the legislature meant to put down every species of gambling in the public funds, that they should have enacted that no sale of government stock should be valid, unless the party was possessed of it at the time of the contract, in order to prevent anything with even the colour of gambling, which they intended to put down entirely. The act, to prevent gambling, or the colour of gambling, says, that no person shall sell stock unless he is the actual *bonâ fide* holder of it. Accordingly, after it has provided by the preceding sections for time bargains and differences, it then commences the 8th section with another preamble:—"and whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed:"—that is, of which they are not the actual holders at the time of sale,—parties bargaining for stock or securities of which they are not the holders,—of which they are not possessed. It then goes on to enact, "that all contracts and agreements made or entered into for the buying, selling, assigning, or [28] transferring of any public or joint stock or stocks or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not at the time of making such contract or agreement be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name and names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever."

Now, what is the meaning of these words, which, unless they are inconsistent with other parts of the act, must be taken in their plain grammatical sense? It is not pretended that this contract was made on behalf of any person who had the stock, but as these pleadings stand, a party who has no stock whatever, no interest in the public funds, and is not acting on behalf of any body who has, enters into a contract to transfer stock at a certain time, at a certain price; and the question is, whether the act has not said that in such a case the contract shall be null and void to all intents and purposes whatsoever. The cases which have been cited, instead of being authorities to shew that this transaction is legal, point the other way; they shew that unless it can be considered as a loan, and the retransfer is nothing more than restoring stock within the 11th section of the act, the case would be brought within the 8th section, and the contract would be void. In order to understand more fully the history of the law on this subject, it will be necessary to refer to the former acts. The first was an act of 8 & 9 Will. 3, c. 32, s. 10, which enacted, "for the further preventing the mischiefs that do daily arise to trade, by the ill practice of brokers, stock-jobbers and others, that every policy, contract, bargain, or agreement made and entered into, or to be made or entered into by any person or persons whatsoever, and which by the tenor thereof is to be performed, after the 1st [29] day of May, 1697, upon which any premium is or hereafter shall be given or paid for liberty to put upon or to deliver, receive, or accept, any share or interest in any joint stock, tallies, orders, Exchequer bills, Exchequer tickets, or Bank bills whatsoever, other than and except such policies, contracts, bargains or agreements, of the nature aforesaid, as are to be performed within the space of three days, is and shall be null and void, to all intents and purposes, as if the same had never been made; and every such premium and premiums shall be

paid back and restored to such person or persons who did give or pay the same." That enactment is directed against time bargains only, which are void, unless they are made to take place within three days: but it contains no provision relating to the sale of stock by persons not possessed of it. In *Smith v. Westall* (1 Lord Raym. 317), where the contract was actually performed, it was still held to be within the meaning of that act. *Mitchell v. Broughton* (id. 673) is another decision on the same act. It is well known that the practice of gambling in the funds had obtained to a very great height at the passing of Sir John Bernard's Act, as appears from the statute itself, and the object of it was to put down effectually all such gambling, by whatever means effected. It is enough to say that the legislature may have considered, that the only effectual mode of doing this would be to prevent a person from bargaining to sell stock, who had not got the actual stock in his possession. If such was their intention, it is no answer to say that here the parties were acting bona fide, and intended to transfer the stock. After the decision of this Court (*Hebblewhite v. M'Morine*, 5 M. & W. 462), it is not intended to argue that the opinion expressed by Lord Tenterden in *Bryan v. Lewis* (Ry. & M. 385), "that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has any prior contract to buy them, nor has any [30] reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract," can be supported on the ground of such a contract being illegal at common law. But suppose the legislature should think right, in such a case as that put by Lord Tenterden, with regard to any particular commodity in respect of which there was very mischievous gambling or speculation, to say, that no contract should be valid for that article, unless by a party who had the article in his possession, or in the possession of a trustee on his behalf, surely there could be nothing extraordinary in the legislature passing such an act. [Parke, B. Lord Tenterden would not have said, if a person had actually delivered the goods, that he was not entitled to be paid.] If such a transaction as this is valid, it would be so, upon this declaration, if the stock were agreed to be transferred six months afterwards; but surely that would be a speculation upon the price of stock, which the legislature might very well be supposed to have intended to prohibit. [Parke, B. The question is, whether the act of Parliament meant to prohibit anything but executory contracts. The first part of the 8th section appears to apply to cases where both parties are aware that they are contracting for the transfer and sale of that which the seller is not possessed of; otherwise the enactment at the end, that such contracts shall be void to all intents and purposes whatsoever, would be quite monstrous: for suppose I contract with another man who is entitled to stock, I meaning to buy existing stock at the time of the transfer, it never can be said that that contract should be void against me, if it turns out that the seller had no stock at that time: and therefore the words, "shall be null and void to all intents and purposes whatsoever," enable you to put a construction upon the first part of the section; and the first part of the section would [31] appear to apply to cases where both parties agree to buy, sell, or transfer stock which they know one of the parties has not. That is not this case.] There is a class of cases which has decided, that where the foundation of, or consideration for the contract is illegal, no action can be maintained to enforce it. Here the party seeking to enforce the contract is the person who violates the law. [Parke, B. That argument applies to the latter part of the section, in which a penalty is imposed upon every person "contracting or agreeing;" and the question is, whether the penalty is imposed upon the person selling, where there is an actual transfer of stock which he has contracted to sell, or only where he has contracted for a future sale of stock which he does not possess. This is a contract arising out of the actual transfer.] There are, undoubtedly, two points which it is incumbent on the defendant to make out,—first, that the 8th section applies to an actual sale of stock of which the party was not himself the owner, having the stock in his own possession or in that of a trustee; and next, that although that person, not having the stock to transfer, should have gone into the market and got the stock transferred, the transaction is so tainted with illegality that an action cannot be maintained for the price of it. If an act of Parliament says that a contract shall be void to all intents and purposes, and prohibits the making of it, then it is a common principle of law, that a party cannot maintain an action to recover payment in respect of it. With respect to the cases which have been cited, *Sanders v. Kentish* was the case of a person actually possessed of the stock, who transferred it to the defendants upon

an undertaking that they would replace it ; and the judgment of the Court is, that that was not a sale of stock within the meaning of the 8th section, but that it was a loan of stock which the parties were to replace. And Lord Kenyon says,—“On considering the whole of the act together, I am clearly of opinion that the [32] object was only to prevent gambling in the funds ; but the legislature did not mean to prohibit a loan of stock, and an undertaking to replace it. I do not think that this comes within the meaning of the prohibitory clauses in the act, but it is within the exception in the last section.” That section is, “That nothing in this act contained shall extend, or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money, or any public or joint stock, or other public securities,” &c. There is another case in the same volume, *Child v. Morley* (8 T. R. 610), which was cited at the trial as an authority for the plaintiff, that this action was maintainable ; but if an authority either way, it is rather in favour of the defendant. There a broker contracted for the sale of stock at a future day, by the authority of his principal, who afterwards refused to make good the bargain ; and it was held, that if the principal were really possessed of the stock so bargained to be sold, such contract was not illegal within the 7 Geo. 2, c. 8, although the broker did not disclose the name of his principal at the time of the bargain made ; and that the purchaser might maintain an action, for the difference, against the principal. The objection there was, that the broker was not possessed of the stock, and therefore it was illegal under 7 Geo. 2, c. 8 : the answer was, that “it is not a case within the statute regulating stock-jobbing ; for that only applies to cases where there is an agreement for the transfer of stock, the pretended seller having really no stock to transfer, nor any actual sale being within the contemplation of the parties, but a mere gambling for the difference of the price between the times of making and executing the bargain.” Now that is the argument which has been urged to-day ; but Lord Kenyon says,—“There is no pretence to say that this is a stock-jobbing transaction within the statute. [33] The parties intended a bonâ fide sale of stock, of which Morley, on whose account it was sold, was then actually possessed ; and the question is, whether this may not be done through the intervention of a broker, though he does not disclose his principal at the time, of which no doubt can be made.” Mr. Justice Lawrence goes even further : “My difficulty is this—if Child contracted to sell the stock on his own account, then the case falls directly within the prohibition of the act of Parliament, because he really was not possessed of the stock so bargained and sold.” Now there nobody doubted the bonâ fides of the transaction ; it was an actual purchase, an actual intended sale : one party intended to buy at a certain price, the other intended to transfer, bonâ fide, on a certain day. Mr. Justice Lawrence says, notwithstanding, that if Child had been the actual vendor, the case would have been within the words of the act of Parliament ; but he makes the distinction which Lord Kenyon had made, that it was a sale on behalf of Morley, and therefore it was a good sale. So here, if the plaintiff had sold the stock on behalf of another person who was possessed of it, that case would be an authority : but he sells it on his own account, without being possessed of it, and upon a speculation of what the price may be ; he then goes into the market and obtains it, and then transfers it.

There is one other case upon this subject, that of *Heckscher v. Gregory* (4 East, 607). It was there held, that in an action on the 7 Geo. 2, c. 8, s. 6, to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought : and proof alone of a contract to sell to such other person before the action brought, though followed up by an actual transfer afterwards, is [34] not sufficient to sustain the action. Lord Ellenborough says :—“The object of the act was to prevent radically all dealings in stock by persons who were not proprietors, and who should not actually make a transfer of their interest in the stock. And therefore, to entitle the proprietor to recover damages in any case for the non-performance of a contract for the purchase of his stock, he must either specifically carry that contract into execution, by first making a transfer to the party with whom he contracted, according to the fifth section ; or, in case of the insolvency or inability of the latter, by first making an actual transfer to a substituted purchaser, according to the provision of the sixth section, and then he may recover the difference against the original contractor. But in no case shall any consideration be voluntarily paid for the compounding any difference for the not transferring of stock ; but there must be an actual transfer, and then the difference between the purchase-money contracted

for and that actually received shall be the measure of the damage to be recovered." The whole of this judgment goes entirely upon the ground that there must be a real transaction; that is, a transaction with the actual owner of the stock at the time. All the cases, indeed, proceed upon the assumption that the contract, to be valid, must be a contract made by the actual owner of the stock, or some person on his behalf.

The doctrine laid down by Lord Tenterden, in *Bryan v. Lewis*, first came under review in two cases of *Wells v. Porter* (2 Bing. N. C. 722) and *Oakley v. Rigby* (ibid. 732), and afterwards in a case of *Elsworth v. Cole* (2 M. & W. 31), in which this Court expressed their concurrence with the two former decisions, and in which it was held that time bargains in foreign funds are not within the prohibition of the 7 Geo. 2, c. 8, nor illegal at common law. *Wells v. Porter* was an action for work and labour, to which there was a plea, that the work and [35] labour was done by the plaintiff as a broker and agent, in and about the delivery of foreign stock, so as to bring it within the statute. All the cases of actions brought by brokers are for work and labour actually done, and yet no question has ever arisen that the act of Parliament might not be pleaded as an answer. If a broker is employed upon an illegal transaction, although he actually does the work, and actually lays out his money, he cannot recover. Why? Because he cannot establish his right, except by virtue of having done something in contravention of the act of Parliament; and the fact of the work being actually done is no answer whatever to the objection. [Parke, B. No doubt, if the thing is prohibited; the doubt in this case is, whether an actual transfer of the stock, and a contract to pay for the stock so actually transferred, is prohibited by the statute. If it is, you cannot sue for it.] The argument is, that it is distinctly prohibited by the act of Parliament. But in *Wells v. Porter*, the Court were of opinion that this act applied only to the British funds. And Tindal, C. J., says, with reference to what fell from Lord Tenterden in *Bryan v. Lewis*, "I do not see my way with sufficient clearness to say that any part of the transaction would be illegal at common law;" and he expressed the same doubt in *Oakley v. Rigby*.

The other point is, whether the stock's having been actually transferred makes any material difference in the case. It is submitted, that the effect of this statute is to make void altogether—that is, to declare illegal, for that is sufficient—a contract entered into for the sale of stock by a party who is not the absolute owner of it at the time. It is not necessary to contend, that if a person goes into the stock-market and buys stock of another whom he supposes to be possessed of stock at that time, but who turns out not to be so, he cannot maintain an action against that person for not performing the contract. It may be that the Court would hold that a person entirely ignorant of the fact might enforce the contract, and would not allow the defendant to set up the illegality of his own conduct. It is unnecessary for the defendant to contest that; but it is contended, that a person who is himself aware of the facts, and is guilty of a violation of the act knowingly, cannot make that contract a ground of any claim in a court of law, whether it be carried into effect or not. The 8th section begins by reciting, "Whereas it is a frequent and mischievous practice for persons to sell and dispose of stock or other securities of which they are not possessed." There is the opinion of the legislature distinctly expressed, that it is a mischievous practice. It then goes on to enact as before stated. In the first place, there is a distinct statement, that a contract entered into by a person not having stock either himself or by a trustee for his benefit, shall be null and void. Then, further, it enacts, "That all and every person and persons whatsoever, contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their name or names, or in the name or names of a trustee or trustees to their use, and in their own right as aforesaid, shall forfeit and pay the sum of £500, to be recovered by action in any of his Majesty's Courts of Record." In the first place, the contract is declared to be void, and in the next place, the party so selling is liable to a penalty of £500. So heavy a penalty being imposed, the Court will no doubt look at the act of Parliament very closely, to see that the case comes clearly within it; but when it is examined, the Court will be constrained to adopt the construction, that a party who sells stock not being the owner of it, is liable to the penalty. And there can be

no hardship in this. If the legislature, having created public [37] stocks, had said, no one shall make a bargain for the sale of those stocks unless his name as the owner be inscribed in a book; if a party does so in direct violation of the act, there can be no hardship in his being compelled to pay the penalty. It is a mistake to suppose that the title of the act has anything to do with the question. It has been held in various cases that the title is no part of the act, and is no guide at all in the construction of it. [Lord Abinger, C. B. The title cannot restrain the act, neither can the preamble.] It was so decided in *Rex v. Williams* (1 W. Bl. 95) and *Cameron v. Cameron* (2 Mylne & K. 292). But it is said, that the stock having been in fact transferred, the action is therefore maintainable; but where the thing is prohibited and made illegal by act of Parliament, that can make no difference: as has been held in cases where penalties have been imposed for the breach of certain revenue regulations, for instance, with respect to the sale of bricks; or in the case of printers omitting to print their names on papers or books printed by them; or in the case of money expended in treating at elections. [Lord Abinger, C. B. Those cases would be very applicable to this act of Parliament, if it had said that it should be illegal to transfer stock sold under such a bargain.] It is apprehended that it does say so in effect, when it says that the contract shall be void, and imposes a penalty. The acts relating to the matters before mentioned do not say in terms that those things shall not be done; they only impose a penalty, if any one does what the act describes. It is *malum prohibitum*, and so it is here. There is a variety of cases where it has been determined that, under such circumstances, no action can be maintained. [On this point he cited *Ribbins v. Crickett* (1 Bos. & P. 264), *Bensley v. Bignold* (5 B. & Ald. 335), *Cope v. Rowlands* (2 M. & W. 149), *Wilkinson v. Loudonsack* (3 M. & Selw. 117), [38] *Law v. Hodson* (11 East, 300), *Little v. Poole* (9 B. & Ch. 192).] [Parke, B. The sole question is, whether the act of Parliament prohibits a transfer of stock in pursuance of that contract, or prohibits an executory contract only.] The question rather is, whether the act of Parliament meant to prohibit the sale and transfer of stock by persons who are not the owners of it; for if the act did so intend, then a transfer under such a contract is illegal. This is a case in which the plaintiff says the defendant was indebted to him for certain stock then sold and transferred to him. It is sold by a party who does not state that he is the owner, and caused to be transferred, which seems to assume that he was not the person transferring it; and the plea then states, "that the said stock so caused to be transferred from the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff," (therefore the plea alleges the transfer to have taken place under that contract), after the day mentioned in the act of Parliament, for the transfer of so much stock in the first count mentioned, "for and in consideration of the sum of 4531l. 5s. to be therefore paid to the said plaintiff for the same. And the defendant further says that, at the time of the making of such contract and agreement, the plaintiff was not actually possessed of or entitled unto, in his own name or in the name or names of any trustee or trustees, to his use of the said interest or share in the said stock, or of any part thereof." The declaration says the defendant is indebted to the plaintiff in a certain sum, "for stock sold and caused to be transferred." The defendant says, that was done in pursuance of a contract made illegal by act of Parliament. That is the case on which the Court has to decide: and it is submitted, that upon this act of Parliament, if a person enters into a con-[39]-tract for the sale of stock of which he is not possessed, and transfers it, such transfer is illegal. [Alderson, B. And the other is to pocket the stock without paying for it?] So he may in all similar cases. The same hardship arose in the cases which have been cited—the vendee had got the coal and burnt it, or ate the provisions; the vendee had the value of the bricks or the books; the coal, or the provisions, or the bricks, or the books, might be worth as much as this stock. Still the same question arises: if the act of Parliament has prohibited the transaction, and the party has knowingly violated that act of Parliament, he cannot come into a Court of justice to enforce the contract. The defendant contends, therefore, that the right construction of this act is, that, although the first seven sections apply to putts and refusals and differences, the sale of stock by a person not the owner of it at the time, is expressly prohibited by the 8th section, and the seller cannot maintain an action for the price of it. [He also cited *Hitchins v. Lander* (Cooper's Cha. Ca. 84), where a plea of the stat. 32 Hen. 8, c. 9, s. 3, against buying pretended titles, without having been in possession by the

space of one whole year, was held a good answer to a bill in equity filed for a discovery.]

Cresswell, in reply. This contract is by no means made void by the statute, and even if it were, no case has been cited to shew that, after an actual transfer and acceptance, a new contract would not arise to pay for that stock, although the original contract might have been void, and could not be enforced in a Court of law. Some such case would surely have occurred, if such a construction had ever been put upon these acts of Parliament before. But, looking to these provisions from the beginning, the learned counsel for the defendant is not correct in his view, either of this [40] act or the other acts he has brought before the Court. It will be found that the 10th section of the 8 & 9 Will. 3, c. 32, as well as the earlier part of the 7 Geo. 2, c. 8, relates to contracts in which the party has no interest in the stock whatever. By the 10th section of 8 & 9 Will. 3, c. 32, it is "declared and enacted that every policy, contract, bargain, or agreement, made and entered into, or to be made and entered into by any person or persons whatsoever, upon which any premium already is, or at any time hereafter shall be given or paid, for liberty to put upon &c., any share or interest in any joint stock, &c., other than and except such policies &c., as are to be performed within the space of three days &c., is and shall be utterly null and void to all intents and purposes." What is here prohibited is neither more nor less than a policy of insurance as to the price of stock at a future day. It seems to apply to transactions in which the person insuring may have no interest in and no contract for the stock, except that he undertakes that upon a certain day the stock shall be at a certain price. There are no words relating to any actual transfer of stock as between them; and therefore that statute, and the decisions upon it in Lord Raymond, may be entirely laid out of the question, with this observation only, that in both the cases cited, the action was founded upon an executory contract. The 1st section of the 7 Geo. 2, c. 8, will be found to be applicable to transactions of the same nature, upon which a premium of insurance had been paid. The 2nd section applies to a discovery, the 3rd to security for costs, and the 4th to a penalty for making or executing any putts or bargains, again alluding to a premium of insurance; and it will be found that the legislature has not completely prohibited all transactions properly called time bargains—speculations in the funds not to be followed up by real transfer of existing stock—without the 8th section; because in the 5th section the legislature says, "and for preventing [41] the evil practice of compounding or making up differences for stocks or other securities, bought, sold, or at any time hereafter to be agreed so to be, be it further enacted, &c., that no money or other consideration whatsoever, (except as hereinafter is provided), shall from and after the said 1st day of June, 1734, be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for not delivering, transferring, having, or receiving any public or joint stock." In order to preclude, as far as they could, these time bargains, which are clearly nominal and not real bargains for the purchase and sale of stock, they provide that no money shall be voluntarily held paid, and therefore that the bargain shall be specifically performed. Then the 6th section provides nevertheless, "that no person or persons who shall sell any public or joint stock &c., to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock, &c., which shall be so refused or neglected to be paid for, to any other person or persons for the best price which can be obtained; and after such sale, to receive (if the parties can agree) or to recover, as aforesaid, from the person or persons who first contracted for the same, all the damage which shall be sustained thereby." It is very true, that Lord Ellenborough, in an action brought upon that section (*Heckscher v. Gregory*, 4 East, 607), where there had been no resale and transfer, says, you cannot ascertain the damage the statute has given you, until you have transferred the stock and got the market price for it. With respect to the notion that the statute was directed to prohibit every thing like speculation in the funds, if the legislature had intended to do this effectually, they must have prohibited all speculations in the funds for the transfer of stock in [42] futuro, although it were in the party's own name, because that is just as much a risk. If I sell my stock to-day, and undertake to transfer it in a week, I run the risk of its rising, in which case I lose, and the buyer runs the risk of its falling, in which case he loses. What object could the legislature have in view, in

prohibiting a transaction of this nature? in saying that a party shall not contract to sell and transfer that which he really intended to sell and transfer, where in fact it is intended by both parties to be a *bonâ fide* sale and transfer? It is easy to understand an intention to prevent gambling in non-existing stock, where none of the parties may be worth a farthing in the world; where no money is to be paid on the one hand, and no stock to be transferred on the other. What then has the act prohibited? Contracts for differences to be voluntarily paid. It therefore allows an actual sale, and a recovery of the differences upon the actual transfer; and the 8th section was introduced in order to remove all doubt which might exist as to contracts to be made for the sale of stock which neither party contemplated parting with or receiving. The words of the section will fully warrant that construction. It is admitted that the Court ought not to consider the hardship of the case; but it is a first principle in construing all penal acts of Parliament, that you should not impose a penalty but by the clearest possible words: nor will the Court enable a party to retain stock to the value of £5000, unless there is something in the act of Parliament which is clearly imperative upon them. Now, if the Court look at this section, they will see it is nowhere made unlawful to sell and transfer. [He then read the first part of the section.] Now a party may contract to buy, not intending to have the transfer; he may contract to sell or assign, not intending to make the transfer; he may contract to transfer, not intending to make a *bonâ fide* sale; but it is nowhere provided, that a contract *bonâ fide* made for the sale and transfer of [43] stock shall be void, although the party has not the stock at the time in his own name. The true construction is therefore this:—if a person merely enters into a contract for a sale, not to be followed up by an actual transfer, it is void; but if the parties really contract to sell, and it appears, that the transaction is that of an actual sale coupled with an actual transfer—that is a good transfer, and the transferee is bound to pay the price. But it is said that the plaintiff cannot come into Court, and allege that he made the contract for that transfer, in defiance of the act of Parliament. But the cases which have been cited on the other side, and particularly that of *Ribbans v. Crickett* (1 B. & P. 264), establish incontestibly that a party may shew that his contract was made in defiance of an act of Parliament. And the case of *Hitchins v. Lander* is another illustration to refute the doctrine advanced on the other side, that a party cannot set up as a defence to an action his own participation in an illegal transaction; for there the defendant pleaded his own grant of the lease mentioned in the bill praying a discovery, in defiance of the statute of Hen. 8; and that plea was held to be good. If the legislature had intended to make such dealings altogether void, they would have said that any transfer made under such a contract should be void; but the defendant will not argue so, because if the transfer were to be void, as forming part of an illegal transaction, it would prevent him from keeping the stock without making payment for it. But, surely, when the act in the 1st section provides that premiums paid for insurances which are illegal shall be paid back, so with respect to differences paid that they shall be recovered back, would it not have provided that money paid for stock should be paid back; or, in the case of stock transferred under such a bargain, that the transfer should be void, and therefore the stock remain the property of the party transferring?

[44] It is unnecessary to advert to the case of *Bryan v. Lewis*, because this Court has distinctly decided, that contracts for the sale of goods cannot be considered illegal and void, merely because the party may not have them until after the time of making the contract. Then the case of *Sanders v. Kentish* was endeavoured to be distinguished from the present, on the ground that the plaintiff there had not sold stock but lent it. But what the plaintiff had done had nothing whatever to do with the case; the question was, what the defendants had contracted to do, and whether they were bound to do that which they had contracted to do, if the plaintiff proved a consideration for the defendants' promise. It is true the plaintiff gave stock, with a power of attorney to sell the stock in order that the defendants might receive the proceeds of it, and that was the consideration for a future transfer of stock by the defendants to the plaintiff, of which the defendants were not then possessed. The counsel for the defendants, in argument, certainly endeavoured to take a distinction on the ground of its being a loan of stock; but that distinction can have no bearing upon the construction of the 8th section, for it is expressly stated in the case, "that the defendants, at the time of making the agreement to transfer the stock as aforesaid, were not, nor

was either of them possessed of, or entitled to, in their or either of their own name or names, &c. &c., of any such stock as is in the contract or agreement mentioned, or any 4l. per cent. annuities whatsoever." Now suppose, instead of being a loan of £3000, 3l. per cents. to receive back £3000 4l. per cents., it had been a contract that the defendants might take so much 4l. per cent. to replace so much 3l. per cent. afterwards, surely it could have made no difference for this purpose. [Alderson, B. That decision only goes the length of saying, that the words are to be construed "a contract to transfer under a sale," and that a contract for a transfer to make good a loan is not a contract for a transfer under a sale.] It may [45] be a contract to replace, not a contract to sell; but it is apprehended that in truth it is a contract to sell. It was clearly not within the terms of the 11th section; it was not a loan of money upon the security of stock, and the stock to be transferred; it was not a mortgage of stock; but it was a power given to turn that stock into money, and to use the money, the defendant agreeing to buy other stock with that money for the purpose of transferring it to the plaintiff in lieu of the other. In *Child v. Morley*, the plaintiff never had any interest in the sale whatever; he was never to sell on his own account: he was merely a broker. It was clear from the case there stated, that Child had no right to pay Morley's debt, and make himself, whether he would or not, his creditor for that amount, and to put that difficulty upon him. The only mode of arguing to shew that Child had a right of action, would be that Child himself was compelled to pay the debt, and therefore might recover over; as was held in *Exall v. Partridge* (8 T. R. 308), where one man, to redeem his goods from distress, paid the debt of another, and it was held he had a right of action. And it is with reference to that argument that Mr. Justice Lawrence says—"My difficulty is this, if Child contracted to sell the stock on his own account, then the case falls directly within the prohibition of the act of Parliament, because he really was not so possessed of the stock so bargained and sold." Nor was he to have any actual interest in the contract; it was not his contract; it was Morley's contract with the transferees, and not Child's, and though Child might undertake to make it in his own name, he had no legal authority to do so, nor would the statute enable him to do so; because the only interest he could have in the transfer was the interest in the differences. It is to be observed, however, that no such observation is made by any of the Judges, except Mr. Justice Lawrence.

[46] [He then remarked on the cases of *Law v. Hodson*, *Bensley v. Bignold*, *Ribbans v. Crickett*, *Wilkinson v. Loudonsack*, and *Little v. Poole*, cited by Sir W. Follett, and distinguished them on the ground that those were contracts directly prohibited by law, and therefore illegal and void.]

But suppose the 8th section did relate to contracts of this description, and that no action could be maintained for the breach of such a contract, still an action would lie for the price of the stock when transferred. The statute nowhere says that the transfer of stock, made in pursuance of such a contract, is to be void or illegal; the policy of the act does not seem to extend to it. It may be very true, as is contended on the other side, and as is alleged in the plea and admitted by the demurrer, that the stock was transferred in pursuance of that original contract; but if the act done in pursuance of that contract is itself a legal act, there is nothing to make such transfer illegal. No principle or decision has been adduced for such a position. There is no equity in it. If I make a contract which in itself is contrary to the act, to transfer stock; but, having made that contract, I do that which is in itself a lawful act, at the request of the party, and he avails himself of it, and the thing is transferred under the sale, how can he say the law does not imply a promise to pay for it? Suppose the contract to be void, still the price is ascertained; the seller, at the request of the purchaser, makes the transfer, which is legal, and having done that, why is he not to be paid for it? The case is distinguishable from all those cases which have been so much relied upon, because there the very act was illegal; here there is nothing to shew that the transfer was illegal, and therefore the plaintiff must be entitled to recover. As an instance of the application of such a principle, the Ship Registry Act may be referred to. Formerly that Act, (the 34 Geo. 3, c. 68, s. 14) prescribed that no transfer, contract or agreement for transfer, of property in a vessel, should be valid, unless the transfer, or contract [47] for transfer, contained a recital of the certificate of registry. Suppose that had been limited to the contract,—that no contract should be valid without such recital, but that it should be void to all intents and purposes; and that,

the contract having been made without that recital, a bill of sale had afterwards been executed, transferring the ship from one owner to the others; could it be said the seller was not to recover the value of the ship? According to the argument on the other side, he could not. The agreement in the first instance could not be enforced; but if afterwards the parties do that which is a legal act, neither *malum in se*, nor *malum prohibitum*, surely the party transferring is entitled to recover. If indeed the sale were made void, unless the certificate were recited in the bill of sale, then the parties are put in *statu quo*; the one takes back the ship, and the other his money:—but here the defendant wishes to keep the stock without paying for it. It is apprehended, however, that no mischief can arise in applying this act of Parliament to sales of non-existing stock only, and that the plaintiff is, on that ground also, entitled to recover.

Cur. adv. vult.

PARKE, B., now said:—In the case of *Mortimer v. McCallan*, which was very fully and ably argued by Sir William Follett and Mr. Cresswell last term, we have taken time to consider; and as we find that the very point was decided upon the motion for a new trial, we think we are bound to adhere to that decision, whatever doubts as to the propriety of some part of it may exist in the minds of some members of the Court.

Judgment for the plaintiff.

[48] ROBINSON v. LEAROYD. Exch. of Pleas. 1840.—Where the plaintiff, being the owner of a woollen mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room:—Held, in an action for double value, under stat. 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included.

[S. C. 10 L. J. Ex. 166.]

This was an action of debt, on the statute 4 Geo. 2, c. 28, for the recovery of double the annual value of a woollen-mill and premises, situate at Huddersfield, brought by the plaintiff as the owner against the defendant as the tenant of the premises, for holding over six months after the expiration of a notice to quit.

At the trial before Coleridge, J., at the last York Assizes, it was proved that the mill and premises, including a steam-engine therein, were the property of the plaintiff; that the plaintiff, in the year 1830, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a shaft revolving in the room, the amount of rent to be regulated by the amount of machinery which the defendant should from time to time introduce into and require to be worked in the mill. The rent varied in amount until the year 1835, since which time it had invariably continued at the sum of £451; and it was proved that the defendant had, in various notes and figures in his own handwriting, debited himself with the half-year's rent in one entire sum of £225, 10s. The custom of the trade appeared to be for the owner of a mill to fit up the steam-engine, and supply the power or first motion, and then to let it to his tenants at one entire sum. The counsel for the defendant contended, that as the statute only gave double value for “lands, tenements, and hereditaments,” the value of the power supplied by the steam-engine did not come within the meaning of those words, and that the verdict ought to be reduced to such a sum as should be shewn to be double value of the room above, when severed from the steam power. The learned Judge, however, was of opinion that they could not be separated, as they were let together, as in the case of a furnished dwelling-house: but gave the defendant leave to [49] reduce the damages by such sum as the value of the steam power should be ascertained to be, in case the Court should be of opinion that the plaintiff was entitled to recover double the value of the room only; it being agreed that the amount should be left to the decision of an arbitrator. Dundas having, in Easter Term last, obtained a rule accordingly,

Cresswell (Knowles was with him), now shewed cause. The defendant, by taking the room and the engine power, had the benefit of the latter; and by holding over he prevents the landlord from getting the value from some other tenant, and therefore

the plaintiff is entitled to recover double the value of the whole under the statute. The statute meant to give the landlord double the value of that which was withheld from him by his tenant. If the tenant had given the notice, the landlord would clearly have been entitled to double rent under the 11 Geo. 2, c. 19, s. 18. [Parke, B. Might not the landlord have cut off the shaft communicating with the room?] It appears to have been a horizontal shaft, to which the gearing is attached, and that could not have been done without injuring the occupiers of the other rooms in the mill. It is true the plaintiff was the occupier of the other rooms, but that makes no material difference; it does not lie in the defendant's mouth to say,—“True, I have continued in the possession of this power, but you might have prevented me by cutting off the shaft.” The question is, what the defendant continued wrongfully to occupy and hold over. Suppose the case of a tenant of a ready-furnished house; could it be said that the tenant was not to pay double the value of it as such, because the landlord had power to enter and take away the furniture? Would not the defendant be liable to be rated for this power? It has been so held in the case of a weighing-machine. [Parke, B. Suppose it [50] had been a mill worked by a horse; could you recover for the use of the horse?] Perhaps not. In *Rex v. Bradford* (4 M. & Selw. 317), a canteen in barracks was demised to B. by the barrack-board for a year, at a rent of £15 for the canteen and buildings, and also the further sum of £510 for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c., usually sold by suttlers, with power of distress for the aggregate sum; and this was held to be one entire rent for the canteen, and therefore that B. was rateable to the relief of the poor as occupier of the canteen, in respect of the £525 aggregate rent, and not merely in respect of the £15. In that case the lessors had actually reserved two distinct rents; but Lord Ellenborough, after saying that he could not look at the reservation in any other view than as a mode of dividing the rents, adds,—“It does appear to me that this is as much a profit appurtenant to the tenement, arising from its local situation, as was the profit of the weighing or carding machine to the tenements there rated. And it has not been improperly likened to the case of a soke mill, which is let at a higher rent, because it has a right to the sole multure of all the corn and grain in the neighbourhood. Can it be doubted that this would form a part of the rateable value of the mill itself?” This room is scarcely of any value without the power being applied to it. The question is, what does the tenant prevent the landlord from enjoying? It is not for the tenant who has held it, to say, You might have taken a step to prevent me from enjoying it. Suppose this had been a small tenement, of which the landlord might have got possession through the intervention of a magistrate, the tenant could not be allowed to say that the landlord was not entitled to double value, because he did not adopt that measure. [Alderson, B. The landlord might be a great [51] loser if he could not recover in this way, but he might still recover the single value. Parke, B. He might recover what he has lost in an action on the case; but the question is, whether he can recover under the words “double the value of the lands, tenements, and hereditaments so detained,” in the statute.] That which is to be recovered must surely be double the value of that which is withheld.

Dundas and —— contra. The landlord is not without remedy, as he might recover any damage actually sustained by an action on the case. But he cannot claim double value under 4 Geo. 2, c. 28. Lord Ellenborough, in *Lloyd v. Rosbee* (2 Camp. 453), says:—“This is a penal statute, and is to be construed strictly.” There is a distinction between the two statutes: in the statute where double rent is given, the party is called a tenant; in this he is treated as a trespasser. The same distinction is pointed out by the Court in *Soulsby v. Neving* (9 East, 313). Here the landlord puts the tenant into possession of this power, and continues to supply him with it after notice to quit; he thus knowingly enables him to commit the wrong; he cannot afterwards sue him for the penalty. Such power is not “lands, tenements, or hereditaments.” In *Newman v. Anderton* (2 N. R. 224), where it was held that a landlord had a right to distrain for the rent of ready-furnished lodgings, Mansfield, C. J. says,—“It must occur constantly, that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods. In *Spencer's case*, 5 Co. 17, it is resolved, that if a man lease sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants

for him and his assigns at the end of the time to deliver the like cattle or [52] goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee: for it is but a personal contract: and it is added, 'the same law, if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term; yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect to the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only.' Where land is leased with stock upon it, the rent still continues to issue out of the land only." The stock itself is no part of the value of the subject of occupation.

In *Rex v. The Inhabitants of Mellor* (2 East, 188), where power was supplied, and there was a contract for a standing-place in another's mill for a carding-machine, (the party's own property), which was fastened to the floor and the roof, for the purpose of being worked by the steam-engine of the mill: it was held not to be a taking of a tenement, but a mere license to use the machinery of the mill, and that no settlement could be derived under it. [Alderson, B. That turned upon his not being in possession of the room; there the miller was in possession of the room.] In *Rex v. The Inhabitants of Seacroft* (2 M. & Selw. 472), where a person engaged himself as a waiter at an hotel, and had the tap, or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance, and of which he kept the key, and paid for his situation of waiter and the tap and cellar the yearly sum of £60; it was held that that was not such an occupation of the cellar as to confer a settlement. [Alderson, B. The Court there said there did not appear to be any taking of the cellar as a tenant, but the use of it was only a privilege allowed him [53] in respect of the hiring himself as a waiter.] Here the plaintiff might have stopped the power; he has no right to supply it *de die in diem* to a trespasser, and afterwards, to recover double value under the statute, to indemnify himself for the wrong he has himself enabled such trespasser to commit. [Alderson, B. In *Rex v. Whitechapel* (2 Bott, 102, pl. 146; 2 Nolan, 37), it was held, that, where the sessions find that the amount of the rent paid is more than £10 per annum, the Court will conclude that the tenement is of that value, although it is stated that some personal chattels were likewise demised, unless the value at which they are rented is expressly stated. That seems to imply that if the value had been found, they would have deducted that amount. Parke, B. The criterion seems to be, whether this could be recovered in the shape of rent by distress.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The question in this case is, whether, in estimating the double value of a room in a factory, held over by the defendant, the value of the power of a steam-engine, which was supplied by the landlord to turn the machinery in that room by means of a shaft revolving in it, can be included. We think it cannot. By the express terms of the statute, the tenant holding over is to pay at the rate of double the yearly value of the lands, tenements, and hereditaments so detained. The value of the soil itself, and every thing which, by having been attached to it, becomes part of the soil, is no doubt to be estimated for this purpose, as well as that of all easements, rights, and appurtenances thereto belonging, or enjoyed therewith; and that value is what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and every thing connected with it, during the time that the [54] possession is withheld. But where a compensation is paid jointly for the use of the tenement and its appurtenances, and for something else, as, for instance, for the landlord's performance of a contract to do something which would be beneficial to the occupier; the compensation so paid, though an entire sum, is not entirely for the value of the occupation, though by the contract of the parties the portion applicable to each is not ascertained. If, by the contract of the parties, a separate sum was fixed as a compensation for each subject, there would be no difficulty in the case; and the omission to make that apportionment, in truth, makes no other difference than that it renders it less easy to ascertain the value of each part.

If a landlord demises a public-house at rack-rent, and contracts to supply it with specified quantities of ale, which the tenant agrees to take at reasonable or fixed prices, the landlord is paid the value of the house in the shape of rent; and the com-

pensation for the supply of ale, in the shape of profit on each transaction. It could not be contended, that the amount of both together was the value of the house; nor would it make any difference if the tenant had agreed to pay for both by one fixed sum. In like manner, if the landlord agrees to supply the tenant with horses, to be used on or off the tenement as a moving power, or with steam for the like purpose, whether at separate sums for each, or one sum for both, the compensation for the power can in neither case form a part of the value of the subject of the occupation. If the landlord, by means of the tenant having held over, is prevented from using his power beneficially, and deprived of profit thereby, he has a remedy on his contract with the tenant, to give up at the end of the term, or for a trespass in continuing to occupy, and may recover a compensation for his loss by way of special damage. But on the statute, which is penal, and is to be construed strictly, he can only recover double the value of the occupation of the tenement [55] and its appurtenances. The rule must therefore be absolute.

Rule absolute.

KING v. GILLETT. Exch. of Pleas. 1840.—To a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performances thereof.

[S. C. 10 L. J. Ex. 164.]

Assumpsit for the breach of a promise to marry the plaintiff in a reasonable time. The declaration was in the usual form, alleging mutual promises to marry. Plea, that after the making of the promise in the declaration mentioned, and before any breach thereof by the defendant, to wit on &c., the plaintiff wholly absolved, exonerated, and discharged the defendant from his promise and the performance of the same. Verification.

Special demurrer, assigning for causes, that the plea consists wholly of matter of law, on which no assumpsit nor material issue can be taken; that the facts which constitute the discharge alleged by the defendant ought to have been set out, in order that the judgment of the Court might have been taken as to their constituting such discharge or not, or otherwise that issue might have been taken on some material fact so alleged; and that the allegations in the plea are much too general, and therefore no traverse can be safely taken, so as to bring any distinct matter of fact in issue, &c. Joinder in demurrer.

The following points of argument were stated in the margin:—The plaintiff will contend that a contract founded on mutual promises can only be rescinded before breach by mutual consent; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant will contend that a promise may be discharged by parol before breach, and that it is not necessary in pleading to state the evidence of such discharge, or the special circumstances under which it arises, or that there was any consideration for the same.

The case was argued in Trinity Term, by

[56] E. Perry, in support of the demurrer. This plea may be proved in many different ways, and the plaintiff is left entirely in the dark as to what is the real ground of defence. [Alderson, B. There is no allegation that the defendant agreed to the discharge.] The Court then called on

Montague Smith, in support of the plea. The plea is not pleaded as a rescission of the contract: but the plaintiff cannot enforce an action against the defendant, after she has dispensed with the performance of it. There are many cases in which a party is debarred from maintaining an action by a certain act or declaration of his own. [Alderson, B. How can there be a dispensation before breach?] It is a kind of leave and license not to perform the contract. [Alderson, B. Does the contract cease or continue? If it ceases, it is rescinded; if it continues, there may be a breach of it.] *Langden v. Stokes* (Cro. Car. 383) is an authority for the defendant. There the plaintiff declared in assumpsit, that whereas the defendant on the 2nd of April, and for such a valuable consideration, assumed to go such a voyage in such a ship before the August following, and alleged a breach in the non-performance. The defendant pleaded, that before any breach, the plaintiff, on the 4th of April, at such

a place, *exoneravit eum* of the said promise; and on demurrer the plea was held good, on the ground that as this was a promise by words, it might be discharged by words before breach; "*eodem modo quo quitur, eodem modo dissolvitur.*" There, no more consideration was shewn for the discharge of the defendant from his promise, than there is here. So in Com. Dig., Action upon the Case upon Assumpsit, G., it is said—"if a man make a promise, he to whom it was made, before a breach may discharge it by parol:" citing *Treswallter v. Keyne* (Cro. Jac. 620), and several other [57] authorities. Many instances might be put, in which a party debars himself from bringing an action against another; as by giving another leave to go over his ground; or by the gift of a horse, lent for a specific time, before that time is over; yet in such cases there is no consideration for so doing. Before breach, it is a sort of license, which may be without consideration. It is a maxim of law, that *ex nudo pacto non oritur actio*—but a party may debar himself of an action without consideration. After breach, no doubt, nothing is sufficient but accord and satisfaction. [Alderson, B. The case of *Langden v. Stokes* certainly appears to be directly in point.]

E. Perry. The pleadings are not fully set out in that case, and it is quite consistent with all that appears in the report, that the plea may have shewn an agreement, and a mutual exoneration of each party by the other. The rule of the civil law there referred to is this:—"Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur." (a)¹ So, also, Pothier states the rule of the civil law:—"With respect to those obligations contracted by the consent of the parties, the release might be made by a simple agreement, by which the creditor agreed with the debtor to hold him acquitted, and such agreement extinguished the obligation *pleno jure.*" (b) In *Treswallter v. Keyne*, which was assumpsit on a promise by the defendant to pay the plaintiff £4, in consideration that the plaintiff would travel with him from London to York, to help him to search for a will; the plea stated that, after the promise, and before any preparation made for the journey, it was accorded and agreed between them that the plaintiff should forbear his journey, and that the defendant should be discharged from the pay-[58]-ment of the £4, and that accordingly he discharged the plaintiff of his journey and search. However, that case was decided for the plaintiff on another point. So, in *Hurford v. Pyle* (Cro. Jac. 483), it was held that a contract founded on mutual promises could not be discharged but with consent of both parties. Where the consideration for the promise is executed, but something remains to be done by one party, there a discharge by the other before breach may be a discharge in toto; but where it is a contract founded on mutual promises, it can be discharged only by mutual consent, and the plea of *exoneravit eum* does not apply to such a case. On this principle rest the decisions in *Leigh v. Paterson* (2 Moore, 588) and *Phillpotts v. Evans* (5 M. & W. 475), where it was held that a contract to deliver goods on a certain day cannot be got rid of by a notice from the seller, before that day, that he shall not deliver the goods, unless it be assented to by the buyer.

M. Smith referred to *Edwards v. Weeks* (1 Mod. 262; 2 Mod. 259).

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the Court was this:—Whether, to an action founded on mutual promises to marry within a reasonable time, the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement [59] had rescinded the contract previously made between them. No doubt such a plea would be good; but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries, (a)² and there are two decided authorities, *Holland*, and *Conier's case* (2 Leon. 214), and *Langden v. Stokes* (Cro. Car. 383). And we think this latter case explains the matter, and reconciles the present plea with

(a)¹ Dig. xvii. 35.

(b) Pothier on Obligations, part iii. ch. 3, art. 1.

(a)² Rast. Entr. 685; Brown's Entr. 67 (fol. edit.); Hern's Plead. 31.

general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is: for, although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succeed upon it at *Nisi Prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant; but the plaintiff should have liberty to amend on payment of costs.

Leave to amend accordingly.

BRAGG AND ANOTHER v. RYLAND. Exch. of Pleas. 1840.—A testator devised among his children (naming them), one half of his property at his decease, whether in houses, lands, or other effects, to be equally divided among them and their heirs, according to the judgment of his executors, whom he empowered to sell or dispose of the whole or any part, according to their opinion, for the benefit of his children, as they severally arrived at the age of twenty-five, and not before, unless his executors should think it prudent to divide it before. The testator then gave the remaining half of his property to his wife for her life, and to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children and their heirs:—Held, that the power of sale given to the executors extended only to the moiety first devised among the children and their heirs.

[S. C. 10 L. J. Ex. 186.]

The following case was stated under a Judge's order, by consent of the parties, for the opinion of this Court.

[60] The plaintiffs are the executors of the will of Sampson Tomlinson, deceased, who, at the date of his will hereinafter set forth and at the time of his death, was seized in fee-simple in possession of a close or piece of land, situate in the parish of Ashton, in the county of Warwick. The said Sampson Tomlinson, by his last will and testament, bearing date the 23rd of December, 1822, properly executed and attested for the passing of real estates (after some bequests not material to this case), devised as follows:—"And I give among my children Sampson, Mary, and James, one half of my property, whatever it may be, at my decease, and in whatever it may consist, whether in houses, lands, or other effects, and whether freehold or leasehold, to be equally divided among them and their heirs, according to the judgment of my executors hereinafter named, whom I empower to sell or dispose of the whole or any part, according to their opinion, for the benefit of my said children, as they severally arrive at the age of twenty-five, and not before, unless my executors think it prudent to divide it before; in which case they are hereby empowered to give it them after they arrive at the age of twenty-one years, and not before: And I declare, in case of sale, their receipt shall be effectual discharges to the purchasers for their purchase-money." The will then contained some further bequests of personalty, and then proceeded:—"The remaining half of my property, as above described, I leave to my wife Martha, during her natural life, and to leave it at her death by will among my three children, in such proportions as she shall think proper; but if she does not make her will, then to be equally divided among my three children, and their heirs. I also desire that the half of my daughter's fortune, of which my wife has the power to dispose, may, if my wife shall not give any directions respecting it, be settled upon her during her life; and to be equally divided amongst her children, and their heirs and executors, at her decease, [61] without any influence over it by her husband, if she should marry. And as my son Sampson does not very well comprehend conversation, and is also imperfect in speech, I wish my executors to settle two-thirds of his fortune upon him during his life, and to be equally divided amongst his children, or their heirs and executors at his death."

The testator then appointed the plaintiffs executors of his said will, and afterwards died without making any alteration in the above devise, and the will was duly proved by the plaintiffs. Mrs. Tomlinson, named in the will, afterwards died without making any appointment of any part of the property in question. The plaintiffs, becoming

desirous of selling the whole of the close or piece of land hereinbefore mentioned, on the 2nd day of December, 1839, entered into the agreement with the defendant upon which this action is brought, whereby they agreed to sell and convey the fee-simple of the whole of such land to the defendant for the sum of £1000, and to produce a good and marketable title to the same.

The defendant, after perusing the abstract of the plaintiff's title, refused to complete the purchase, on the ground, that the power of sale given by the will of the said Sampson Tomlinson to his executors extended only to a moiety of the lands devised by the will, and that therefore no valid and marketable title could be made by the plaintiffs under such power of sale to the whole of the close or piece of land comprised in the contract of sale.

The plaintiffs, on the other hand, contend, that upon the true construction of the whole of the will, with reference to the objects which the testator appears to have had in view, the power of sale must be considered to extend to the entire estate devised by the will, and not to a moiety of it only. And the plaintiffs accordingly offered to convey the whole of the close or piece of land in question to the defendant under the above power of sale, but the defendant declined to complete the purchase upon those terms.

[62] The question for the opinion of the Court is, whether the plaintiffs, as executors of the will of the late Mr. Tomlinson, can convey to the defendant a valid title to the whole of the said close or piece of land comprised in the contract of sale. If the Court should be of opinion that the plaintiffs can convey such a title to the same, judgment is to be entered for the plaintiffs by confession, for the sum of £ ; if otherwise, a judgment of *nolle prosequi* is to be entered.

The case was argued at the present sittings, by Cowling for the plaintiffs, who contended that the power of sale was clearly intended to extend to the entire property devised, all of which was ultimately to be equally divided among the testator's children or their representatives; and by Goulbourn, Serjt., for the defendant, who argued that it was confined to the moiety first given to be divided by the executors among the children, and to be sold according to their opinion for the benefit of the children, on their arriving at the specified ages.

The Court took time to consider, and on a subsequent day the judgment of the Court was delivered by

PARKE, B. The question in this case was, whether the executors named in the will of Sampson Tomlinson had a power of sale over the whole of the property or not. We have had considerable doubt upon it, but have come to the conclusion, after consideration, that they had not. The words of the will should be construed according to their ordinary import: and we think the natural meaning of the words by which the power is given, in the place in which they occur in the will, is to give the executors power to sell only that half of the property which is given directly to the children. The words are—"whom I empower to sell or dispose of the whole or any part"—If the will had stopped there, it might well be said that the power extended to all the property; but it goes on—and we must read all the words together—"ac-[63]-cording to their opinion, for the benefit of the said children, as they severally arrive at the age of twenty-five," &c. We think, therefore, that the testator must have meant to include in the power the whole of that half of his property only which he had given to his children, and that consequently there must be

Judgment for the defendant.

WICKHAM v. HAWKER AND OTHERS. Exch. of Pleas. 1840.—By deed, A. and B. conveyed to D. and his heirs certain lands, excepting and reserving to A. B. & C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl:—Held, that this was not in law a reservation properly so called, but a new grant by D. (who executed the deed), of the liberty therein mentioned: and therefore that it might enure in favour of C. and his heirs, although he was not a party to the deed.—The grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure; and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., by his servants in his absence.—Such

a liberty is, therefore, a profit à prendre within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

[S. C. 10 L. J. Ex. 153. Adopted, *Musgrave v. Forster*, 1871, L. R. 6 Q. B. 592; *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475; *Eeroyd v. Coulthard*, [1897] 2 Ch. 551. Not followed, *Irvine v. Osborne*, 1891, 25 Ir. L. T. 36. Applied, *Reynolds v. Moore*, [1898] 2 Ir. R. 641. Referred to, *Sowerby v. Smith*, 1874, L. R. 9 C. P. 549; *Allygood v. Gibson*, 1876, 34 L. T. 883; 25 W. R. 60; *Goodman v. Mayor of Saltash*, 1882, 7 A. C. 654; *Thellusson v. Liddard*, [1900] 2 Ch. 645.]

Trespass for breaking and entering several closes of the plaintiff, and with horses and dogs hunting and searching therein for game, &c. and seizing, taking, and carrying away game being in and upon the said closes, &c.

Pleas, 1st, not guilty; 2ndly, that long before the several times when &c., and before the plaintiff had any title or interest in the said closes, to wit, on the 14th October, 1712, Stephen Vidler and Richard Cox were seised in their demesne as of fee and in the manor of Bullington, with the appurtenances, in the county of Southampton, in trust for one Richard Widmore: and being so seised, the said Richard Widmore, Stephen Vidler, and Richard Cox, by a certain indenture then made between them of the one part, and one John Wade of the other part, [profert], did, according to their several estates and interests, release and convey unto the said John Wade, his heirs and assigns for ever, certain premises situate in East Bullington in the said county, then being in the actual possession of the said John Wade, by virtue of a lease thereof for one year theretofore made to him by the said R. Widmore, S. Vidler, and R. Cox, which said last-mentioned premises had been and were, before and at [64] the time of making the said indenture, part and parcel of the demesne of the said manor, and of which said last-mentioned premises so released and conveyed as aforesaid, the said closes in which &c., in the said declaration mentioned, then were and still are part and parcel; excepting and always reserving out of the said release and conveyance, unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the said last-mentioned premises so released and conveyed as aforesaid, or any part thereof, and there to hawk, hunt, fish, and fowl, at any time thereafter, at the will and pleasure of the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, or any or either of them, without any let or contradiction of the said John Wade, his heirs and assigns: and the said John Wade did thereby, in and by the same indenture, grant unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, the said liberty so mentioned therein to be excepted and reserved as aforesaid; as by the indenture fully appears: whereupon and whereby, the said R. Widmore, S. Vidler, and R. Cox, became and were seised as of fee and right of and in the said liberty, by the said indenture so granted to them as aforesaid. And the defendants further say, that after the making of the said indenture, and while the said S. Vidler and R. Cox were seised of and in the said manor with the appurtenances as aforesaid, and while the said R. Widmore, S. Vidler, and R. Cox were so seised of and in the said liberty, to wit, on the 1st day of December, A. D. 1713, the said S. Vidler and R. Cox, by indenture under their hands and seals, which said last-mentioned indenture having been by accident lost, the defendants cannot produce the same to the Court here, released and conveyed unto the said R. Widmore, his heirs and assigns for ever, the said manor with the appurtenances, then being in the actual possession of the said R. Widmore, by virtue of a lease thereof for one year, [65] theretofore made to him by the said S. Vidler and R. Cox; and in and by the said last-mentioned indenture demised, released, and for ever quit-claimed to the said R. Widmore, his heirs and assigns for ever, all the right, title, and interest of the said S. Vidler and R. Cox, of and in the said liberty so expressed to be excepted and reserved, and so granted in and by the said indenture first above mentioned as aforesaid; whereupon and whereby the said R. Widmore then became and was solely seised in his demesne as of fee, and of and in the said manor, with the appurtenances, and solely seized as of fee and right of and in the said liberty: and the said R. Widmore being so seised, afterwards, to wit, on the 1st day of January, 1720, died so seised of and in the said manor with the appurtenances, and liberty aforesaid. [The plea then proceeded to deduce the title to the manor and liberty from Widmore to the defendant Col Hawker, and concluded as follows:—] Wherefore the defendant Peter Hawker in his own right,

and the other defendants as his servants, and in his company, and by his command, at the said several times when, &c. broke and entered the said closes in which, &c. in the declaration mentioned, for the purpose of using and exercising the said liberty; and for that purpose, and upon those occasions, with the horses, dogs, and guns in the said declaration mentioned, being the horses, dogs, and guns of the defendant Peter Hawker, hunted and searched in the said closes for the game in the said declaration specified, and killed, seized, took, and carried away the bares, pheasants, &c. therein mentioned, and converted and disposed thereof to the use of the said Peter Hawker, &c. &c. as they lawfully might for the cause aforesaid, which are the said supposed trespasses, &c. Verification.

Third plea, that the defendant Peter Hawker, long before and at the said several times when &c., was and still is the lawful possessor and occupier of a certain manor called the manor of Bullington, in the county of South-[66]-ampton, and that the occupiers for the time being of the said manor now have, and for and during the full period of sixty years next before the commencement of this suit, have of right had and enjoyed, without interruption, and been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and the defendant Peter Hawker, as such occupier of the said manor as aforesaid, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the free liberty and privilege, with servants or otherwise, to come into the said several closes, or any part thereof, and there to hawk, hunt, fish, and fowl, at any time, at his and their free will and pleasure: Wherefore the defendant Peter Hawker, being such possessor and occupier of the said manor as aforesaid, and the said other defendants as his servants, and in his company, and by his command, &c. &c. [justifying the trespasses as before].

The plaintiff joined issue on the first plea; and replied to the second, that the said John Wade did not, in or by the said indenture in the plea in that behalf mentioned, grant unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, the said liberty in that plea mentioned to be excepted and reserved, in manner and form as in the said plea alleged: and to the third plea the plaintiff replied, traversing the right as alleged: on which replications issues were joined. The plaintiff also new assigned to the second and last pleas, that he issued his writ &c., not only for the trespasses in those pleas attempted to be justified, but also for that the defendants Heath and Ralph, as such servants of the said Peter Hawker as in those pleas mentioned, at other and different times than those in the said pleas respectively mentioned, and therein respectively attempted to be justified, broke and entered, &c. the said several closes in the declaration mentioned, &c. &c., the said Peter Hawker not being in fact present or in company with the said two other de-[67]-fendants on any of the occasions or times in this new assignment mentioned: which are other and different trespasses, &c. &c.

To this new assignment the defendants pleaded, first, a plea setting forth the same title as in the second plea to the declaration, but concluding thus:—Wherefore the defendants Charles Heath and Charles Ralph, as servants of the defendant Peter Hawker, and by his command, and for his use and benefit, on the said several occasions and times in the said times in the said new assignment mentioned, broke and entered the said closes in which &c., for the purpose of using and exercising the said liberty, and for that purpose and upon those occasions committed the said several supposed trespasses by the plaintiff above newly assigned, as they lawfully might for the cause aforesaid, which are the same supposed trespasses whereof the plaintiff has above in his new assignment complained, &c.

The defendants pleaded to the new assignment, secondly, a plea in the same terms as the third plea to the declaration, except that they alleged the trespasses to have been committed by the defendant Hawker, as such possessor and occupier of the manor as aforesaid, and by the other defendants as his servants and by his command, and for his use and benefit, although not in his actual presence or company.

The replications to these pleas respectively traversed the grant by Wade of the liberty of sporting, and the right claimed in respect of the manor, in the same manner as the replications to the second and third pleas to the declaration: and thereupon issues were joined.

The cause was tried before Coleridge, J., at the Hampshire Summer Assizes, 1839. The deed of 1712 was put in, and evidence was given on the part of the defendant, to shew that the defendant Col. Hawker, as owner of Bullington, and his predecessors

in estate, and their gamekeepers, had for upwards of sixty years past shot over the lands [68] in question. Several depositions of gamekeepers were produced, which described the parties by whom they were appointed as lords of the manor. For the plaintiff it was contended, that the reservation in the deed of 1712 did not operate to vest in Widmore, Vidler, and Cox, the liberty therein mentioned, inasmuch as one of them, Widmore, was no party to the deed: or if it did, that the words of the reservation, "to themselves, and their heirs and assigns, liberty, with servants or otherwise," &c., did not authorize the grantees to send their servants to sport in their absence. And with regard to the issues on the sixty years' right, that the right claimed was a mere license of pleasure, and not a profit à prendre, and therefore could not be annexed to a manor, and was not within the operation of the Prescription Act, 2 & 3 Will. 4, c. 71. The learned Judge left it to the jury to say whether, de facto, the defendant Hawker, and those whom he represented, as owners of Bullington, had for sixty years exercised the rights set up in the third plea to the declaration and second plea to the new assignment; i.e., had they sported, &c., as of right, whether well founded or not, or had they done so only by permission? The jury found that Col. Hawker, and those whom he represented, had de facto exercised as of right, for sixty years, the right to sport on the plaintiff's lands by themselves and their servants, but not by their servants without themselves.^(a) The learned Judge thereupon directed the verdict to be entered for the plaintiff on all the issues (except that on the plea of not guilty), giving the defendants leave to move, on the construction and effect of the deed of 1712, to enter a verdict for them on the first special plea to the declaration, and the first plea to the new assignment; and also to enter a verdict for the defendants on the other special pleas, if the Court should think they ought to be so found.

[69] In Michaelmas Term, Erle moved accordingly; citing *Doe d. Douglas v. Lock* (2 Ad. & Ell. 705, 743; 4 Nev. & M. 807) as an authority to shew that a reservation and exception (so called) in a lease, of the liberty of hawking, hunting, fishing, and fowling, is not legally a reservation or exception, but a privilege granted to the lessor; and therefore, that the grant of such a privilege by Wade, in the deed of 1712, might enure to all the three grantees, though one of them was not a conveying party to the deed. As to the other issues, he contended that it was clear, upon the authorities, that a liberty to enter and hunt with servants or otherwise, as it implied a right to carry away the game taken, was a profit à prendre, and not a mere license. A rule having been granted, at the sittings after Hilary Term,

Rawlinson (with whom was Butt) shewed cause. The deed of 1712, as set out on the record, shewed that Widmore was a perfect stranger to the estate, to whom there could be no reservation: and there is not on the face of the deed any absolute grant of the liberty or privilege, but a reservation only. The words of the deed are—"Excepting and alway reserving out of the said release and conveyance unto the said Widmore, Vidler, and Cox, their heirs and assigns, free liberty, with or servants otherwise, to come into and upon the premises so released and conveyed as aforesaid, or any part thereof, and there to hawk, hunt, fish, and fowl at any time thereafter," &c. In *Chetham v. Williamson* (4 East, 469), A. being mortgagee in fee of lands, and B., the mortgagor, entitled to the equity of redemption, by lease and release, A. conveyed, and B. released the lands to C. in fee, who thereby covenanted with and granted to B. that it should be lawful for B., his heirs and assigns, at all times to enter on the lands to search and dig for coal, and to take and carry away the same to his and their own use. It was held that this was only a license, and convey-[70]-ed no interest in the soil, so as to exclude C. and those claiming under him from getting coal there; and that it could not operate as an exception or reservation out of the grant in respect to B., inasmuch as he had not the legal title in him at the time; he was in law no more than a stranger to the estate, and could not except or reserve that which he had not before. *Moore v. Earl of Plymouth* (7 Taunt. 614; S. C. on error, 3 B. & Ald. 66) was a decision to the same effect, on a right similar to that claimed in the present case. Being pleaded as a reservation, it cannot be construed as a grant. It is true that the plea goes on to state, that "by the said indenture Wade granted to Widmore, &c., their heirs and assigns, the said

(a) This was the statement in the report of the learned judge; the counsel on either side differed as to the terms in which the case was left to the jury.

liberty or privilege so mentioned herein to be excepted and reserved as aforesaid ;" but the deed itself contains no such absolute grant. In Sheppard's Touchstone (p. 80), it is laid down, that a reservation, to be good, must be made to all, some, or one of the grantors, and not to a stranger to the deed. So, a right of entry cannot be reserved to a stranger to the estate. In truth, therefore, nothing passed to Widmore by the deed of 1712.

But a further question arises on the construction of the deed, upon which depends the issue on the first plea to the new assignment, viz., whether the defendant Hawker had a right to enter on the land by his servants, he not being present. It will be contended that the reservation of the liberty to come on the land "with servants or otherwise," implies a right in the grantee to send his servants not in his presence. A license or grant of this description is construed strictly. The obvious and natural meaning of the words is, to give the licensee a right to enter on the land, either with or without servants accompanying him. Moreover, a right to send servants would have been contrary to the policy of the game laws, which at that time, before the passing of the statute 9 Anne, c. 25, allowed a lord of [71] a manor to appoint one gamekeeper only. Here the plea attempts to justify the shooting and carrying away of game by all the three defendants ; if it is not supported as to any one of them, it fails altogether.

Next, as to the second special plea to the declaration, and the second plea to the new assignment, which claim the respective rights therein mentioned, as having been enjoyed for sixty years by the occupiers of the manor. It is submitted that there was no evidence to support those pleas. The plea given by the Prescription Act is a mere substitution for the old plea of immemorial enjoyment, and must be supported by the same evidence. [Parke, B. The jury found the facts for the defendants, and no question is reserved as to the evidence.] A lord of the manor has no right, as such, to sport over the lands of others within the manor : *Pickering v. Noyes* (4 B. & C. 648). [Parke, B. This is not the case of a lord sporting over tenements within his manor.] The defendants' title arises, if at all, under the deed of 1712, and not in right of the manor. In truth, there was no sufficient evidence of the existence of a manor at all. These issues, therefore, were rightly entered for the plaintiff.

Erle and Smirke, contra. Three questions arise in this case ; two of them upon the construction of the deed of 1712, and the third as to the entry of the verdict on the pleas alleging the right by sixty years' user. The first question is, whether the deed is properly pleaded as amounting to a grant by Wade to Widmore, Vidler, and Cox, of the liberty in question ? Now, if, in a conveyance from A. to B., there be a reservation to C., a stranger, it clearly cannot operate as a reservation, and it will therefore, if it be possible, be construed as a grant. And, in *Doe d. Douglas v. Lock*, it was expressly held that a reservation (so [72] called) in a lease, of the same liberty as in the present case, viz., "of hawking, hunting, fishing, and fowling," is not legally a reservation or exception, but a privilege granted to the lessor. The cases cited on the other side do not conflict with this view of the case. *Moore v. Earl of Plymouth* is, indeed, an authority in favour of the defendants. There the plea was held bad only on the ground that it did not allege a grant, but a mere reservation of the liberty, and therefore did not set forth the deed according to its legal operation. The Court held it to amount to a grant, but could not construe it so because it was not so pleaded. [Parke, B. According to *Doe d. Douglas v. Lock*, reservations, properly so called, are only of rents or services, and a reservation of an easement or privilege, whether to a stranger or not, operates as a fresh grant. Alderson, B. The authorities there cited from Sheppard's Touchstone (p. 80) and Lord Coke (Co. Litt. 47 a.) are to the same effect ; that this is not at all a reservation, properly so called, but a grant.] *Chetham v. Williamson* is altogether distinguishable : that was an action of trover for coals, and the plaintiff could not succeed unless he shewed a property in them. There the terms of the deed did not purport to operate as a reservation, but merely as a covenant to permit the plaintiff to enter and dig for coals, which amounted to a mere license, and could not convey any interest in the soil, or property in the coals under it. *Pickering v. Noyes* has no application to this case. On the authority, therefore, of *Doe d. Douglas v. Lock*, this reservation operated as a grant of the liberty to the three parties named in the deed, and the deed being pleaded according to its legal effect, the issue on that plea (the first special plea to the declaration) ought to be entered for the defendants.

The next question is, whether the terms of the grant are to be construed so as to entitle the grantee to sport by [73] servants. The defendants contend, that it is a liberty or privilege to the same extent to which a lord of the manor would be entitled, if he had not conveyed away the land: i.e. by himself, or by a servant if he choose to appoint a gamekeeper. The words "or otherwise" are amply sufficient to include the right to this extent; and all the words of the grant ought to have their effect. The previous words would include the right to go alone. If the grant be construed otherwise, then, if the grantee became infirm, or fell ill, he could not enjoy the right at all. [Alderson, B. Or the manor might be in an infant or a woman.] It never could have been intended that the right should be incapable of user under such circumstances. It may be said, that unless a more limited construction be put upon the grant, the lord may send a great number of servants, so as to destroy all the game and do injury to the land; but he may do the same by taking as many with him. Or if that be unreasonable, he would be restricted to a reasonable use of the liberty. The grantor would have the security of the law for the non-abuse of the grant. [Alderson, B. What is the object of the reservation—pleasure or profit? If the former only, it would be personal.] The right to go on the land with servants shews that profit was contemplated. It was held in *Durieu's case* (3 Mod. 246), that a liberty for the lords of a manor, their tenants and farmers, to take fowl in the warren of another, was a profit à prendre in alieno solo, for which the tenants might prescribe in a que estate. In Com. Dig., Chase, H. 1, it is laid down, that if a party "has a license for him and his servants to hunt at his pleasure, he may also kill and carry away; for the license for the servants imports an interest in the thing." The authority cited is Manwood (p. 108), c. 18, s. 3:—"If a man have a license for himself and his servants to hunt and chase in a man's chase, park, or warren at his [74] pleasure, by these words, for him and his servants, shall be understood a license of profit, and the grantee may hunt, kill, and carry away; for these words, 'for him and his servants,' do imply that the grantee hath property in the thing hunted, because that by such a license, the grantee may justify for his servant to hunt, which is more than a license of pleasure." The distinction between a license of pleasure and of profit is more fully stated in a subsequent section (sect. 5) (p. 112). So, if I grant to a man to take trees in my field, he may send his servants to get them.

Lastly, as to the issues on the second special plea to the declaration, and the second plea to the new assignment. There was strong evidence of reputation of a manor, by the appointment of gamekeepers. But the replication does not put in issue the defendant's title to the manor, but only denies the exercise of the right as claimed, during the sixty years. The learned Judge left to the jury the question whether there had been an enjoyment for sixty years as of right, and they found it in the affirmative. That was a question of fact, and did not depend upon the deed, which was put in to prove the other issue. [Alderson, B. The jury have found the exercise as of right under the deed, and the question is, whether the deed gives the right. The finding could not have been as it was on this issue, but for the deed.] Even if the parties exercised the right under an erroneous notion that the deed gave it them, that is a case precisely within the Prescription Act, and after sixty years enjoyment the right became absolute. [Alderson, B. The question is, whether that can be so under this plea, which claims the liberty in right of the occupiers of the manor. Parke, B. The plea can only be supported by proof of a right exercised as appurtenant to the manor.]

Cur. adv. vult.

[75] In Trinity term, the judgment of the Court was delivered by

PARKE, B. This case was tried before my Brother Coleridge, at the last Summer Assizes at Winchester, when several points were reserved, which were fully argued before my Brothers Alderson, Gurney, and myself, at the sittings after Hilary Term.

It was an action of trespass qu. cl. fr. against the defendant Hawker and two others, for entering the plaintiff's closes, and hunting and searching for and killing game.

The special pleas were, first, that Vidler and Cox were seised of the manor of Bullington, in trust for Widmore, and that Widmore, Vidler, and Cox, by an indenture, in 1712, between them and Wade, and sealed by Wade, released parcel of the demesne lands of the manor of Bullington, comprising the locus in quo, to Wade, "excepting and always reserving to Widmore, Vidler, and Cox, their heirs and assigns, liberty,

with servants or otherwise, to come upon the lands so conveyed, and there to hawk, hunt, fish, and fowl at any time thereafter, at their will and pleasure: and the said John Wade did thereby grant to Widmore, Vidler, and Cox, their heirs and assigns, the said liberty so excepted and reserved." The plea then states a release and conveyance from Vidler and Cox to Widmore of the manor and liberty, and deduces from him a title to both to the defendant Hawker, and he and the others, as his servants and in his company, justify the trespasses by virtue of the liberty.

The second special plea states, that the occupiers of the manor had used and enjoyed, and Hawker as such occupier was entitled to use and enjoy, the right of hunting, hawking, and fowling, for sixty years, by themselves and with servants.

The replication to the first plea takes issue on the allegation of a grant. That to the second denies the user and enjoyment. There was a new assignment of the trespasses committed by the two other defendants, by command of Hawker in his absence, in hunting, &c.; and pleas to the new assignment—first, a reservation and grant of a liberty, in the like terms and by a similar deed to that in the second plea, to hunt, &c., by servants; secondly, a similar plea to the third, of sixty years' user, by the occupier and by servants.

The replication to the first plea to the new assignment denied the grant; to the second, denied the user and enjoyment.

The principal questions in the case were, how the issues raised by the replication to the first special plea to the declaration, and the first plea to the new assignment, ought to be found, and that depends upon the legal effect of the deed of 1712.

The liberty "of hawking, hunting, fishing, and fowling," is, by the terms of that deed, "excepted and reserved to Widmore, Vidler, and Cox;" but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed; nor is such a liberty, whether it be a mere easement or a profit à prendre, properly and in correct legal language, either an exception or a reservation. This point was expressly decided in the case of *Doe d. Douglas v. Lock* (2 Ad. & Ell. 743), where most of the authorities were cited and fully considered. Lord Denman, in delivering the judgment of the Court, says, "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a privilege or right granted to the lessor, though words of reservation and exception are used." As the indenture was executed by Wade, the words of reservation and exception operated as a grant by [77] him to the three—Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him. Consequently this issue ought to have been found for the defendant, and the verdict must be entered accordingly.

The next question is, how the verdict is to be entered on the replication to the first plea to the new assignment, and that depends upon the legal effect and operation of the words of a grant to persons, their heirs and assigns, "of free liberty, with servants or otherwise, to come into and upon the lands, and there to hawk, hunt, fish, and fowl." If these words authorize the grantee to send his servants to hawk, hunt, fish, and fowl for him, in his absence, the issue ought to be found for the defendant, otherwise not.

We are of opinion that this issue must be found for the defendant. The authorities upon this subject take this distinction: that if there be a personal license of pleasure, it extends only to the individual, and it cannot be exercised with or by servants; but if there is a license of profit, and not for pleasure, it may. This will be found so laid down in the case of *The Duchess of Norfolk v. Wiseman* (Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2), which appears to be the leading case on this subject.

The Duchess of Norfolk's case was this:—The Duchess brought an action for chasing in her park, against Wiseman and others. They pleaded that the Duchess licensed the Earl of Suffolk to hunt at his pleasure in the park, and they shewed, at the time of the trespass, the Earl came into the park, and the defendants with him, to hunt: and it was moved that the plea was bad, for by the license given to the Earl, which was only for pleasure and extended only to him, and no other could justify by that license; for if I give license to a man to eat with me, none of his servants can justify the entry into my house by reason of that license, for it is a license of pleasure; and so if I give leave to another to go at his pleasure into my orchard, none of [78] his servants can justify by that license: but if it is a license of profit, and not of pleasure, it is otherwise; for if one give leave to me to carry over his land with my cart, my

servants can justify by his license; and so if one gives me license to have a tree in his wood, my servants may justify the cutting of the wood, and the entry, for I shall have profit by that: and so was the opinion of the Court: and then the defendants said the Duchess gave license to the Earl to hunt, kill, and take with him the deer at his pleasure, and then they said that the Earl came there and they with him, and by his command, hunted and took away: and that was held good.

This case is cited, with others, in *Manwood*, c. 18, s. 3, p. 107, and the result is, that, if there be a personal license to an individual to hunt at his pleasure, he cannot take away to his own use the game killed, or go with servants, still less send servants to kill for him, or assign his license to another: but if the person is meant to have a property in the game which he kills, it is otherwise; and therefore if the license is to hunt, kill, and carry away, he may hunt with servants or by servants. And e converso, if there be a license for him and his servants to hunt, "by these words, for him and his servants, shall be understood a license of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a license the grantee may justify for his servant to hunt, which is more than a license of pleasure" (*Manwood*, 108).

This being the rule of law on the subject, the point to be decided here is, whether the liberty granted is a mere personal license of pleasure, or a grant of a license of profit—a profit à prendre.

The liberty of fowling has been decided, in one case, to be a profit à prendre, and may be prescribed for as such (*Davies's case*, 3 Mod. 246). The liberty to hawk is one species of ancupium (*Manw.* c. 18, s. 10, p. 117), the taking [79] of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit: it is common of fishing. The liberty of hunting is open to more question, as that does not of itself import the right to the animal when taken; and if it were a license given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal license of pleasure, to be exercised by the individual licensee. But this is a grant by deed, to persons, "their heirs and assigns;" it is clearly intended that not merely the particular individual named, but any to whom they or their heirs choose to assign it, should exercise the right; which seems to us to shew that it is an interest, or profit à prendre, which is intended to be granted. Whether the liberty is to be exercised by the licensee or his servants, or by the licensee or his assigns, makes no difference in this respect; both shew that not a personal license, but a license of profit, was intended to be granted. The case in the Year Book, 11 Hen. 7, fol. 86, bears materially on this view of the case. It is there said, "if one license me and my heirs to come and hunt in his park, I must have a writing (that is, a deed) of that license, for a thing passes by the license, which indures in perpetuity: but if he license me, one time to hunt, this is good without deed, for no inheritance passes."

It appears to us, that the liberties to hawk, hunt, fish, and fowl, granted to one, his heirs and assigns, are interests, or profits à prendre, and may be exercised by servants in the absence of the master; and further, we think that the addition "with servants or otherwise" does not limit the privilege, and exclude the exercise of it by servants. "Words tending to enlarge are not (unless the intention is very plain) to be taken to restrain" (*Earl of Cardigan v. Armitage*, 2 B. & C. 209).

[80] We therefore think that this issue must be found for the defendant.

The only remaining question is, how the verdict ought to be entered on the issue on the second special plea to the declaration.

The jury found that the usage had existed, and the right had been exercised, for sixty years; but whether they found that it had been exercised for sixty years by the occupiers of the manor, as such, which was a necessary fact to be found in order to support the pleas, though the existence of such a manor was not in issue, has been made a matter of dispute by the counsel at the bar, whose statements as to what passed materially differ. The inference from the Judge's note, and the impression of the learned Judge who tried the cause, is, that the jury meant to find that the right was exercised by the occupiers as lords of the manor, and we do not therefore think it right to grant any new trial to have this doubt cleared up, especially as the question relates only to the costs of the issue, and does not decide the cause. We need hardly add, that we think there was evidence for the jury in support of the plea.

The verdict, therefore, on this issue will be entered for the defendants. That on

the second plea to the new assignment remains as found by the jury, for the plaintiff.

Rule accordingly.

On this judgment being pronounced,

Butt moved for a rule to shew cause why judgment should not be entered for the plaintiff non obstante veredicto, on the several issues on which the Court had directed the verdict to be entered for the defendants. On the second plea to the declaration, and the first plea to the new [81] assignment, he contended that the reservation could not operate as such, but could only create a liberty in gross, and that in the pleas the liberty was claimed as appurtenant to the manor. The third plea to the declaration was framed upon the statute 2 & 3 W. 4, c. 71, s. 5, which in express terms applies only to rights which can be claimed by the occupiers of a tenement, in respect of it; in other words, as appurtenant to it. The right set out in this plea was one that in its nature could only be a right in gross—the claim being for the liberty by the occupiers of a manor to sport over lands not within the manor; and a grant of such a right could only operate (whatever words were used) to create a liberty in gross (see *Flight v. Thomas*, 10 Ad. & Ell. 590; 2 P. & D. 531).

The Court took time to consider whether a rule should be granted: and now

PARKE, B., said that the Court were clearly of opinion that a good title was deduced, on the face of the pleadings, to the liberty claimed by the defendants, and therefore there must be no rule.

Rule refused.

DANIEL WILKINSON AND ARCHIBALD WILKINSON v. LINDO. Exch. of Pleas. 1840.

—A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. & A. W., alleged that the policy was made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that one T. Z. and the plaintiff A. W., or one of them, were or was then, and from thenceforth until the loss, interested in the goods. To this declaration the defendant pleaded a release by D. W. for himself and his partner A. W. The plaintiffs replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the parties was to release only the sums set opposite their respective names in the schedule thereto annexed; and the declaration averred, that the money so released was due upon other and different contracts than those mentioned in the declaration:—Semble, that the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea.—Held, also, that the plea was a good answer to the action.

[S. C. 10 L. J. Ex. 94.]

Assumpsit. The first count was upon a policy of insurance made by the plaintiffs, under the name and style of D. & A. Wilkinson, as well in their own name, as for and in the name or names of all and every other person or [82] persons to whom the same did or should appertain, in the sum of £100, upon the goods in the ship "Glenaladale," on a voyage from Llanelly to Jamaica. And the declaration averred, that one Thomas Lee, and the plaintiff A. Wilkinson, or one of them, were, or was, then and from thence continually afterwards until and at the time of the loss therein-after mentioned, interested in the said goods in the said policy of insurance mentioned, &c., to the value of the monies by them ever insured or caused to be insured thereon: and that the said insurance was made for the use and benefit and on the account of the person or persons so interested. The declaration then averred an average loss by perils of the sea, whereby the assured were obliged to throw three-fourths of the goods overboard. There were also counts for money had and received to the use of the plaintiffs, and on an account stated with the plaintiffs.

Plea, that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the said Daniel Wilkinson, by his certain indenture, sealed with his seal, and now shewn to the Court here, did for himself and his partner the said other plaintiff, Archibald Wilkinson, acquit, release, and for ever discharge the defendant of and from the said several causes in the declara-

tion mentioned, and each and every of them, as by the said release, reference being thereunto had, will fully appear. Verification.

The replication craved oyer of the indenture, which was set out as follows:—This indenture made &c. between the several persons who, by themselves, their partners, or agents, shall execute these presents, being creditors of Elias Hiam Lindo, of &c., of the one part, and the said E. H. Lindo, of the other part. Whereas the said E. H. Lindo is indebted to the several other persons parties thereto in the several sums of money set opposite to their respective names in the schedule hereunder written; and he hath by divers losses and untoward circumstances become unable to pay [83] his debts in full; and whereas the several creditors of the said E. H. Lindo, parties hereto, have agreed to accept a composition of 5s. in the pound on the amount of their respective debts, and thereupon to execute the release to the said E. H. Lindo, hereinafter contained: and whereas the said sum of 5s. in the pound hath been paid to the several creditors executing those presents, at or immediately before their several executions of the same, as they the said several creditors do hereby respectively admit and acknowledge. Now this indenture witnesseth, that in pursuance of the said agreement, and of the sum of 5s. in the pound on the amount of the debts due to the said several creditors of the said Elias Hiam Lindo, parties hereto, so respectively paid to them as aforesaid by the said Elias Hiam Lindo, (the receipt whereof they the same several creditors do hereby respectively acknowledge), they the said several and respective creditors, who, by themselves or the persons respectively authorized by them, have signed, sealed, and delivered, or shall sign, seal, and deliver these presents, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, and their several and respective partner and partners, each and every of them for himself and his own acts or deeds, heirs, executors and administrators only, and for the acts and deeds of his partner or partners only, have, and each and every of them hath acquitted, released, and for ever discharged, and by these presents do, and each and every of them doth acquit, release, and for ever discharge the said Elias Hiam Lindo, his heirs, executors, and administrators, of and from all and all manner of actions, suits, causes of action and suit, bills, bonds, writings, obligations, debts, dues, duties, accounts, sum and sums of money, judgments, extents, executions, trespasses, losses or claims on policies of insurance, trusts, claims, and demands whatsoever, both at law or in equity, or otherwise howsoever, [84] which they the said creditors, or any of them, or their or any of their heirs, executors, or administrators, either separately from, or in conjunction with their or any of their partner or partners, now have or hath, or hereafter shall or may have, challenge, claim, or demand upon, from, or against the said E. H. Lindo, his heirs, executors, or administrators, or his estates or effects, or any part thereof, for or by reason or on account of all and every or any of the debts or sums or sum of money to them the said creditors, parties hereto, or any of them, either separately from or in conjunction with their or any of their partner or partners, due and owing from and payable by the said Elias Hiam Lindo, or any interest, exchange, or commission due or demandable for the same, or for or by reason or on account of any other matter, cause, or thing whatsoever, in respect of the said debts, sum or sums of money, or any part thereof. In witness whereof, &c.

The replication then set forth the schedule at the bottom of the deed, which contained, amongst others, the following signature:—"Daniel Wilkinson, for self and partner, £89, 15s. 4d.":—and then proceeded as follows:—"which being read and heard, the plaintiffs, for replication in this behalf, say, that the sum of £89, 15s. 4d. set opposite to the name of the plaintiff, Daniel Wilkinson, in the schedule under the said indenture written, was a sum of money wholly distinct and different from any of the sums of money in the declaration mentioned, and was due from the defendant for and in respect of certain dealings and contracts wholly distinct and different from the said contracts in the said declaration mentioned; and that the said monies, sought to be recovered by this action, were not, nor was any part thereof, included, or meant by the plaintiffs or by the defendant to be included, in the sum of £89, 15s. 4d. or in the said release; nor was the sum of 5s. in the pound, or any composition or sum, ever paid or agreed to be paid, to the plaintiffs, or to be accepted by them, for or in respect of the monies due and payable by and from the de-[85]-fendant to the plaintiffs, in respect of the causes of action in the declaration mentioned." Verification.

Special demurrer, assigning for causes, that the said indenture set out on oyer is a

release of the said causes of action in the declaration mentioned; and also that the averments in the said replication are an argumentative and indirect denial of the averment in the plea, viz. that the plaintiff, Daniel Wilkinson, had released the defendant from the causes of action in the declaration mentioned, whereas, by the rules of law, the said averment should have been directly and expressly traversed and denied. And also for that the said replication is double and multifarious, and avers several matters, upon not one of which singly the defendant could have safely taken issue; and also for that the said replication tends to an improper and unnecessary length of pleading.

Joinder in demurrer.

The plaintiffs' points for argument were as follows:—

The plaintiffs will argue that the plea is bad; because the deed set out on oyer does not release the causes of action mentioned in the declaration, inasmuch as the words of release are controlled by the recital, and cannot be extended to the sum payable on the policy in the declaration mentioned, the interest in which was not in the party executing the release.

Martin, in support of the demurrer. The replication is bad, as being an argumentative denial of the averment in the plea, that the causes of action were released. The plaintiffs should not have gone on to deny argumentatively that the causes of action were released, but should have said so at once in distinct terms. He was then stopped by the Court, who called upon

R. V. Richards, *contrâ*. The replication is good, and the plea bad. The recitals in the composition-deed shew what the release was intended to comprehend. This form [86] of replication was adopted in *Payler v. Homersham* (4 M. & Selw. 423), and not disapproved of. Lord Ellenborough there says:—"I do not find that Lord Holt, when he denied the authority of the case from Roll's Abr., denied also the position of Gregory, J., that the general words of a release may be restrained by the particular recital. Common sense requires that it should be so; and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." Looking at this deed, it applies only to the particular debts which are inserted against the seal of the particular creditors, and not generally. That could not have been shewn except by an averment setting forth the deed. *Payler v. Homersham* was recognised in *Simons v. Johnson* (3 B. & Adol. 175). There Lord Tenterden says:—"It appears to me, that *Payler v. Homersham* is well founded in law and common sense, and is not distinguishable from the present case. It is said, we must look to the recital of the release, and find something there sufficient to confine the effect of the general words. If I do so here, I find this was intended to operate as a qualified release." The same view was adopted by the other Judges. *Solly v. Forbes* (2 B. & B. 38) is an authority to the same effect. [Parke, B. You might have traversed the fact alleged in the plea, that one of the plaintiffs released the causes of action for himself and his partner, without setting out the release on oyer. You do not either traverse, or confess and avoid, the allegation in the plea that D. Wilkinson released. You may amend, and traverse the release.] Then, secondly, the plea is bad. It does not appear from the declaration, that the interest was in Wilkinson, and therefore the release by him would not extinguish the debt. It is only stated, that Thos. Lee and the plaintiff A. Wilkinson, or one of them, was interested. The interest may have been in Lee only. [Parke, B. Would not the release by Wilkinson put an end to [87] the contract, on the action being brought in his name? *Gibson v. Winter* (2 Nev. & Man. 737; 5 B. & Adol. 96) seems to me an authority that it would. The matter was there a good deal considered, and it was held, that whatever constitutes an answer to the demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others, who have no mode of enforcing their claim except by suing in the name of the plaintiff. It is quite enough if Wilkinson could not sue on account of there being a release.]

Richards then prayed and obtained

Leave to amend, on payment of costs.

THE EARL OF HARBOROUGH *v.* SHARDLOW. (a)¹ Exch. of Pleas. 1840.—Where a canal act enacted, in one clause, that after any land should have been set out and ascertained for making the canal, &c., it should be lawful for all persons seised or possessed of or interested in such lands, to contract for, sell, and convey them to the canal company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c. should be made at the expense of the company, and enrolled with the clerk of the peace, and copies thereof, signed by the clerk of the peace, should be evidence: and a subsequent clause enacted, that upon payment of such sum or sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury, in manner therein-before mentioned, the lands should be vested in the company:—Held, that, by reference to the former clause, the contract, in order to vest the lands in the company, must be in writing; and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company.

[S. C. 10 L. J. Ex. 245. See further, 8 M. & W. 265:]

Trover for timber and other trees, &c. Pleas, first, not guilty; secondly, that the plaintiff was not possessed as of his own property of the goods and chattels in the declaration mentioned: on which issues were joined. At the trial before Lord Denman, C. J., at the last assizes for the county of Rutland, the facts appeared to be as follows:—

The plaintiff is the owner of considerable estates in the parishes of Stapleford, Saxby, and Wymondham, in the county of Leicester, and resides at his mansion in Stapleford Park. The Oakham Canal, which was made in the year 1794, under the powers given by the 33 Geo. 3, c. 103, [88] runs through his lordship's lands in Saxby and Wymondham, and the towing-path was originally constructed on the west side of the canal, on the same side as his mansion and park. In the year 1830 the plaintiff enlarged his park, taking into it several inclosures in Saxby and Wymondham, and extended it to the canal. He at that time prevailed upon the canal company to allow him to change the towing-path from the west to the east side of the canal, and he made his park paling nearly close to the edge of the canal, on the west side of it, leaving, however, a small slip of land between the paling and the water, on which several trees and shrubs afterwards sprung up. Some of these were, in April 1840, cut down and carried away by the defendant, by the direction of the canal company, on the ground that they were likely to produce injury to the navigation of the canal; for which this action was brought. On the part of the defendant, evidence was given of the payment by the company of the purchase-money for the lands taken by them for the purpose of making the canal and the original towing-path, on the site of which the trees were growing, and the receipts given to them by the plaintiff's father for the land in question were put in. The Lord Chief Justice, in summing up, expressed his opinion, first, that upon payment of the money to the owners of the land, the land vested in the company; and secondly, that the change of the towing-path from the western to the eastern side of the canal did not affect their right. The jury having found for the defendant,

Hill obtained a rule nisi for a new trial, on the ground of misdirection, referring particularly to the 31st and 47th sections of the Canal Act, 33 Geo. 3, c. 103; (a)² and

(a)¹ This case was decided in Trinity Term, but the report of it has been unavoidably postponed.

(a)² Sect. 31 enacts, "That after any land, ground, or other hereditament, shall be set out and ascertained for making the said intended canal, &c., it shall be lawful for all bodies politic, corporate, or collegiate, &c., &c., and for all and every other person and persons whomsoever, who are or shall be seised, possessed of, or interested in any lands, grounds, or other hereditaments, which shall be so set out and ascertained as aforesaid, or any part thereof, to contract for, sell, and convey to the said company of proprietors, all or any part of such lands, &c.; and that all such contracts, agreements, sales, exchanges, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law, usage, or custom to the contrary thereof in anywise notwithstanding, &c., &c.: and all such contracts, agreements, sales, exchanges,

con-[89]-tending, also, that the simple possession of the plaintiff since the change of the towing-path was sufficient to entitle him to maintain this action.

[90] Adams, Serjt., and Humfrey appeared to shew cause, but upon the report of the learned judge being read, the Court called on

Hill (with whom was Mellor) in support of the rule. It cannot be said, under the circumstances of this case, that the company had a possession for twenty years before action brought, of the slip of land in question. There was no proof that, since the change of the towing-path, they had done any act on the west bank. When the main part of the land was inclosed by the plaintiff, this, which is a portion of the same property, must be deemed to have followed the possession of the former. Then, no title was shewn in the canal company, by mere proof of payment of the purchase-money, and production of the receipts. The 31st section of the act manifestly requires a transfer in writing of the purchased lands to the company; for it speaks of its being enrolled with the clerk of the peace, and of copies of it being evidence: and the 47th section only vests the land in the company, on payment of such sums as shall be contracted for in the manner thereinbefore mentioned, i.e., by writing according to sect. 31. This was the construction put upon the clauses of another act framed in precisely the same words, in *Doe d. Robins v. Warwick Canal Company* (2 Bing. N. C. 483; 2 Scott, 7). If there be any ambiguity in the act, it must be construed strictly against the company, it being their own language, and their duty, as against the public, to make it explicit; especially when a contrary construction would be a repeal pro tanto of the Statute of Frauds. The statute may not render all the formal conveyances necessary which would be required in an ordinary case, but there must be a contract in writing. In all the three cases referred to in the 47th section, viz. 1st, the case of a direct contract with the landowner; 2nd, the adjustment of differences by the commissioners or five of them; and, 3rd, the assessment of the purchase-money [91] by a jury, the legislature has carefully provided that there should be a writing, such as should be capable of being made evidence.

PARKE, B. I think this rule must be made absolute. The only question is, whether the case was correctly left by the Lord Chief Justice to the jury. The question left to them was, whether the payments proved by the defendant were payments made in respect of the land in question, contracted for by the company with Lord Harborough,

conveyances, and assurances so to be made as aforesaid, shall be made at the expense of the said company of proprietors, and inrolled with the clerk of the peace of the county in which such lands, &c., shall respectively lie, and copies thereof, signed by such clerk of the peace, purporting the same to be true copies, shall be allowed to be good evidence in all courts whatsoever; for which inrolment, as a copy thereof, the clerk of the peace shall receive the sum of 4d., and no more, for every one hundred words, and so in proportion for any less number of words."

Sect. 41 enables the commissioners, or any five or more of them, by writing under their hands and seals, with consent of the parties, to determine and adjust what sum or sums of money shall be paid by the company, either by an annual rent or in gross, for the purchase of the lands or grounds which shall be set out and ascertained for making the canal, &c.: and upon their refusal to treat accordingly, &c., empowers the commissioners to issue a warrant to the sheriff of the county to summon a jury to assess the sums or rent to be paid, &c., &c. [in the usual terms].

Sect. 47 enacts, "That upon payment of such sum or sums of money or annual rent, as shall be contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or any five or more of them, or assessed by such juries, in manner hereinbefore respectively mentioned, for the purchase of any such lands, &c., to the owner or owners thereof, or other person or persons entitled to receive such monies or rent respectively, or legal tender thereof made to such owner or owners, &c., at any time after the same shall have been so agreed for, determined, or assessed, &c., such lands &c. and the fee simple and inheritance thereof respectively, shall from thenceforth be vested in and become the sole property of the said company of proprietors, their successors or assigns, to and for the use of the said navigation for ever; and immediately thereupon, but not before, it shall be lawful for them, their agents, workmen, and servants, to enter upon the same, and to dig, cut, trench," &c., &c.

for the purposes of the act of Parliament; and his Lordship expressed his opinion, that if they were, that was sufficient to vest the land in the company. The question whether there had been possession by them for 20 or for 40 years, was not left to the jury; if it had, and the jury had found that there had been an occupation for twenty years before the commencement of the action, the verdict might have been supported. I think the direction was not correct: and that it was not sufficient proof of title in the company, to shew payment in respect of the land in question, supposing it identified: but that, in order to convey a title under the 47th section of the act, there must be either payment for land contracted for in writing, or payment of the sums determined and adjusted by the commissioners or five of them, or of the value assessed by a jury, in the manner thereinbefore mentioned. [His Lordship read sect. 47.] We are then to look to the prior sections of the act, to see what description of contract it is to which the provisions of the 47th section apply. That is provided for by sect. 31. [His Lordship read that section.]

The words of this section clearly shew that the contract referred to is a contract in writing, which would define the precise lands included in it, and leave no doubt, when produced in evidence, what the payment would refer to. It was not, however, left to the jury whether there had been such a contract, but it was assumed by the learned [92] Judge, that if the payment was made for this land among others, the case was within sect. 47. If there were a contract in writing, the identity of the lands would appear from the writing, as it would also from the adjudication of the commissioners in writing, or from the inquisition of the sheriff. I think, therefore, that to vest a title in the company, otherwise than by actual conveyance, there must have been payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value of which was found by a jury in writing. This construction entirely agrees with the view taken by the Court of Common Pleas on a similar act, *Doe d. Robins v. Warwick Canal Company*, which appears to me to be perfectly correct. The Court in that case thought that there was evidence to shew, from the acts of the parties, that payment was so made, and therefore sent the case down to a new trial. There may perhaps be such evidence in this case also; but that question has not been left to the jury. The rule must therefore be absolute for a new trial.

ALDERSON, B. I am of the same opinion. The clause on which the Court decided in *Doe d. Robins v. Warwick Canal Co.*, was exactly the same as in this case. No doubt a compliance with the provisions of the 47th section will have the effect of giving the company a title; but the question is, what is a complianee with them? It is this—payment under a contract, which by sect. 31 must be in writing, or of the sum adjusted by the commissioners in writing, or of the sum assessed by the jury. The first writing therein mentioned is the contract, which is to be enrolled; the second, the adjustment by the commissioners, is to be under their hands and seals; then there is a third case, of persons who refuse or are unable from various circumstances to contract: in which case, a jury are to be summoned, and are to assess the value, and, by necessary implication, to [93] state the lands in respect of which the payment is to be made, which also must be done in writing. It is not necessary that there should be an actual conveyance, in order to vest the lands in the company; but there must be payment under one or other of these matters so required to be in writing.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

BEILBY v. SCOTT. Exch. of Pleas. 1840.—Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel, within the meaning of the 6 Geo. 4, c. 125, s. 70. The master of a ship is not, however, precluded by that section from employing any moving power, as, for instance, steam or other power *bonâ fide* used as a moving power, if upon the party applying such power necessarily devolves the selection of the ship's course, and the charge or conduct of her in that course.—The penalty imposed by the 70th section of the Pilot Act may be sued for by a common informer, and is within the second head of the 76th section. The consent of the Trinity House or Lord Warden is necessary only in

the case of pilots licensed by them ; but their consent is not required with reference to pilots not within their jurisdiction.

[S. C. 10 L. J. Ex. 149.]

This was an action of debt, tried before Coleridge, J., at the York Spring Assizes, 1840, when a verdict was found for the plaintiff—debt £21, damages 1s., subject to the opinion of the Court on the following case :—

The declaration was founded on the 70th section of the General Pilot Act, stat. 6, Geo. 4, c. 125, and stated, that a vessel, called the “Good Intent,” navigating in a public navigable river, the Humber, and within the limits of the jurisdiction of the corporation of the guild or brotherhood, masters, and pilots, and seamen of the Trinity House, in Kingston-upon-Hull, one George Shetliffe, a pilot under the jurisdiction of that corporation, and duly licensed and qualified, being, as well as the vessel, within the limits of his license and the extent of his qualification, duly offered to take charge of the said vessel, whereof the defendant had notice, but that the defendant continued in the charge of the said vessel, he neither being a licensed pilot, nor licensed to act as a pilot within the limits in which the vessel then was, contrary to the form of the statute, whereby an action [94] had accrued to the plaintiff, to demand a sum not exceeding £50, nor less than £20 ; one-third thereof to go to the plaintiff, and the remainder to be applied to the purposes mentioned in the statute

The defendant pleaded *nil debet*.

At the trial, it appeared that a coasting vessel, called the “Good Intent,” then employed in the coasting trade of Great Britain, was, on the 7th of December, 1839, navigating in the river Humber, a public navigable river, and within the limits of the jurisdiction of the corporation of the Trinity House of Hull—the corporation mentioned in the declaration and in the General Pilot Act—for the purpose of proceeding up that river to Goole ; and that whilst there, George Shetliffe, the pilot duly qualified and licensed by that corporation to pilot vessels to Goole, within the limits of his license and the extent of his qualification therein expressed, boarded the “Good Intent,” and duly tendered his services to pilot the vessel up the river, which were rejected by the master of the vessel : that during the time that Shetliffe was on board, a steam-tug, commanded by the defendant, came up, when Shetliffe exhibited his license to him, the defendant, and, in the hearing of both the defendant and the master of the “Good Intent,” said, “I am a pilot ; I have tendered my services, which have been rejected, and if you (Mr. Scott) take the vessel up, I shall enter an action against you :” on which the defendant said that he did not care, and got a tow-rope fastened from his steam-tug to the “Good Intent,” and proceeded to tow her up the river, and did so, to Goole ; that the defendant selected the course by which the “Good Intent” and the steam-tug went up the river to Goole, acting on his own judgment, and receiving no orders from the master of the “Good Intent” : that on the next preceding and the next subsequent voyage up the Humber to Goole aforesaid, the same master of the same vessel, the “Good Intent,” took a licensed pilot of the same [95] class with Shetliffe. The ordinary employment of the steam-tug was towing vessels up and down the river, and she had been *bonâ fide* hired by the master of the “Good Intent” for the purpose of towing the latter vessel up the river, before the pilot came on board.

Thereupon it was agreed that the jury should find for the plaintiff, subject to the opinion of this Court ; the Court to draw any inference which, in their judgment, the jury ought to draw from the above facts, and to have every power of amendment that the Judge had on the trial, and in other respects the defendant to have the advantage of anything arising on the pleadings. Under these circumstances, the questions for the opinion of the Court are—

First—Whether the defendant had the charge or conduct of the “Good Intent,” within the meaning of the Pilot Act, 6 Geo. 4, c. 125, s. 70.

Secondly—Whether, the “Good Intent” being a coasting vessel, employed at the time in the coasting trade, any penalty was incurred.

Thirdly—Whether the plaintiff, who sues *qui tam*, has a right to maintain the present action under the above-mentioned statutes.

Fourthly—Whether the judgment ought to be arrested.

The points for argument were as follow :—

The plaintiff contends, that he has a right to recover under the general Pilot Act,

6 Geo. 4, c. 125, s. 70, and that the defendant has rendered himself liable to the penalty therein mentioned, and that the objections taken to the declaration are not valid.

It will be argued on behalf of the defendant, first, that the *bonâ fide* towing of a vessel in the ordinary course of the employment of a steam-tug, is not the having of the charge or conduct of a vessel, within the meaning of the 70th section of the Pilot Act.

2ndly. That the "Good Intent" being a coasting vessel, no [96] penalty could be incurred by virtue of the statute 2 & 3 Will. 4, c. 105.

3rdly. That there is no authority given by the statute to a common informer to sue in the Courts of Westminster, or, at all events, without the written consent of the corporation of the Trinity House, or Lord Warden, &c. See sections 76 and 77.

4thly. That the declaration is bad upon the face of it, it not being alleged that the proceeding is taken with the consent of the corporation of the Trinity House, or Lord Warden, &c.

Cowling, for the plaintiff. The first question is, whether the defendant had the charge or conduct of the ship called the "Good Intent," within the meaning of the 70th section of the Pilot Act, 6 Geo. 4, c. 125; and it is submitted that he had. The words are, "That it shall be lawful for any licensed pilot, within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel any person not licensed to act as a pilot, or not licensed to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing to act in the charge or conduct of any ship or vessel, without being a duly licensed pilot, or without being duly licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification, as expressed in his license, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding £50, nor less than £20." What is the meaning of the words "acting in the charge or conduct of any ship or vessel?" They clearly must mean to apply to the guiding or directing of the course of the vessel. And the other sections of the act shew this to be the meaning. The 1st section recites, that the [97] corporation of the Trinity House have, as well by usage for centuries as by grants from the Crown, "pilots, loadsmen, or guides" to conduct vessels within certain limits; and the 2nd section enacts, that the Trinity House shall appoint fit and competent persons duly skilled to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing on the river Thames. The terms, "loadsmen and guides," are there used as synonymous with pilots. From the language of these sections, it appears that the legislature, using the term "pilot," means the person having the guidance and direction of the vessel. A pilot might be employed to direct the course of the vessel, although a steam-tug is employed as a moving power. Here the case expressly states, that the defendant selected the course of both vessels of his own judgment. In the case of a boat on a canal, the horse moves the boat, but the person at the helm guides it. It does not appear whether the steam-tug was before or by the side of the vessel; but in either case, if the defendant assumed the guidance and direction of the tug, he is in charge of the ship within the meaning of the 70th section, and liable to the penalty.

The vessel is stated to be a coasting vessel, and the next question is, whether she is not exempt by the 59th section, which provides, that the master of any ship or vessel employed in the regular coasting trade of the kingdom, may lawfully pilot the same, without being subject to any of the penalties by that act imposed, so long as he shall conduct or pilot the same without the assistance of any unlicensed pilot, or any other person than the ordinary crew of the vessel. [Alderson, B. That is the same question as the first. Parke, B. The master of a coasting vessel is not bound to employ any one to conduct the vessel; but he may do so, and if he does, it must be a person duly licensed to act as a pilot.]

Then the third question is, whether the penalty can be [98] sued for by a common informer, and it seems clear that he is the proper party to sue. The 76th section enacts, that "all fines, penalties, or forfeitures hereinbefore or hereinafter imposed by this act, or by any of the by-laws, rules, orders, regulations, or ordinances hereby directed to remain in force, or hereafter to be made under the authority of this act, which shall exceed the sum of £20, (the manner of levying whereof shall not by this

act be otherwise expressly provided for,) and likewise all fines, penalties, or forfeitures imposed as aforesaid, (the manner of levying which shall not be otherwise expressly provided for), in cases where, the lowest penalty not being greater than £20, and the largest penalty recoverable being greater than £20, the party prosecuting shall proceed in respect thereof for a sum greater than £20, with the written consent of the corporation of Trinity House of Deptford Strond, or of the said lord warden, or his lieutenant for the time being, respectively, (as the case may be,) shall and may be recovered with full costs of suit, by action of debt, plaint, bill, or information in any of his Majesty's courts of Record at Westminster, to be commenced within twelve months after such offence or offences shall be committed, or within such other time as is hereinafter in that behalf directed." The part of this section which speaks of suing with consent, refers to the 58th section, which provides that the master of a vessel shall forfeit double the sum demandable for pilotage, and an additional penalty of £5 for every fifty tons burthen, if the corporation of the Trinity House, as to cases in which pilots licensed by them are concerned, or the lord warden for the time being, or his lieutenant, as to cases in which the Cinque Port pilots are concerned, shall think it proper that the party suing shall be at liberty to proceed. The 83rd section shows that the informer is the person to sue; if not, who is? for the penalty is not to go to the Crown. The 76th section is applicable to two classes of cases; but assuming [99] that the present is within the second branch of it, still that part relates only to cases in which the pilot is licensed either by the Trinity House of Deptford Strond, or the Lord Warden; and therefore this case is not within it, as this took place within the jurisdiction of the Corporation of the Trinity House of Hull, who have a distinct power to appoint pilots, as appears from the sixth section.

Martin, *contra*. With respect to the last objection, the case is within the second branch of the 76th section, and a common informer cannot sue without the written consent of the Corporation of the Trinity House, or lord warden. The right to bring any action at all is conferred by that section only; and if it be a *casus omissus*, the plaintiff cannot sue. If that should be so, the case is not without a remedy, as the Attorney-General may sue: *Re v. Malland* (2 Str. 828). The words of the section, however, are clear, and the object of it was to prevent suits being brought in the courts at Westminster, without the written consent of the Trinity House, or lord warden. The observation on the 83rd section as to the penalty not going to the Crown, is met by this—that actions may be brought by a common informer, with the consent of the Trinity House or lord warden.

The other point is a very important one. This is the first time it has ever been attempted to prevent the owner of a ship from employing a steam-tug for the purpose of towing her through the water. Whatever may be the position of the steam-tug with respect to the vessel she is towing, (though it is generally at the side of the ship) the entire moving power is in the steamer, and the vessel to which it is attached is dragged through the water like a log of wood. Piloting a vessel means directing her by means of the helm. The 18th section shews what duties a pilot has to perform—they are to ply without intermission [100] at all seasonable times by day and night, and take charge of vessels. The 19th, 31st, and 34th sections relate to the particular things they are to perform; but there is nothing here to shew that the defendant has done any of the things there enumerated. If the master of the steam-tug has incurred a penalty, so has the master of the "Good Intent" also. The case states that there was no fraud, but that the employment was *bonâ fide* for the purpose of towing the vessel. The true meaning of the act was to impose a penalty on persons going on board and conducting vessels as pilots, without being duly licensed, and it does not apply to cases where a steam-tug has been used *bonâ fide* as a moving power.

Cowling, in reply. The words of the act are general, and are not confined to cases where the party goes on board the vessel: they apply to all persons who select the course of the vessel. The 34th section gives a right to pilotage where the boat runs before the vessel, which would not otherwise be due: that shews that the ship may be conducted, within the meaning of the act, by a person in a boat ahead of the vessel, and is not confined to the care of a person on board. *Re v. Mallan* proceeded on the ground that the penalty was not appropriated, which is not the case here. The case of *Madden v. Bartlett* (Parker, 105) shews that the Attorney-General has no right to sue.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The first question arising on this case is, "whether the defendant had the charge or conduct of the Ship 'Good Intent'" within the meaning of the Pilot Act, 6 Geo. 4, c. 125, s. 70. We are of opinion that he had neither.

These words are to be understood in the sense ascribed to them in other parts of the act; that is, they mean the [101] taking the charge and direction, as a pilot, whose appropriate, and indeed sole duty it is to select the course, and take the management and conduct of the vessel, for the purpose of directing her in that course. The master of a coasting vessel may, if he pleases, perform that duty himself; but if he chooses to employ another for that purpose, he must employ a licensed pilot; and an unlicensed person taking that duty on himself by command of the master, when a licensed pilot offers his services, would be liable to the penalty in the 70th section.

But the master is not precluded from employing any moving power which he may please; he may make use of another vessel, or boats, or a steam-tug for that purpose; and if that cannot be done without necessarily devolving upon those who apply the power, the selection of the course, and a certain portion, or indeed all the charge and conduct of the vessel in that course, still if the *bonâ fide* object of the employment be the moving power, the person so employed is not a pilot, and has not the conduct and charge of the vessel as such, within the meaning of the act.

If indeed the real object in any case should appear to be to obtain the assistance of the skill of a pilot, and to give him the charge and conduct of the vessel, and some other colourable duty were assigned to him, the case would be within the act; but in the present instance it is expressly found that the steam-tug was *bonâ fide* hired for the purpose of towing the vessel up the river. We are therefore of opinion that no penalty was incurred in this case.

The answer to the first question makes it unnecessary to discuss the others raised by the special case. As the matter is, however, of general importance, we wish to state, that, in our opinion, the action is properly brought by a common informer; and that it is within the 2nd branch of the 76th section: the meaning of that enactment appears to us to be, that penalties, when the lowest is not greater than £20, and the highest is greater, are to be sued for with the consent of the Trinity House, in cases in which pilots [102] licensed by them are concerned; and with that of the lord warden with respect to pilots licensed by him; but that their consent is not required with reference to pilots not within the jurisdiction of either. The words "as the case may be" are explained by the 58th section. The judgment of the Court must be for the defendant.

Judgment for the defendant.

DOE D. GILBERT AND OTHERS v. ROSS. Exch. of Pleas. 1840.—Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a subpoena duces tecum, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.—There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power.—Where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in Court by the defendant's counsel:—Held, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff, in a second ejectment against another party.—Quære, whether such evidence would have been receivable, if the parties to the action had been the same.—Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion of the Court above, by the consent of both parties:—Held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted shewed the title to be in the lessors of the plaintiff; as, upon such a reservation, the Court are called upon to decide whether the lessors of the plaintiff are entitled to recover or not.—An examined

copy of the record of a fine, levied with proclamations, is as good evidence of the fine as the chirograph itself certified by the officer.—A fine was proved to have been levied of the estate in question, in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802, by the conusor of the fine to a purchaser, which stated that the fine was levied to the use of himself in fee. This deed was received without objection on the part of the defendant:—Held, that it was good evidence as a declaration of the uses of the fine, although it was not proved that the defendant derived title under the conusor.—By a will, in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue:—Held, in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remaindermen only capable of being enforced by real action.—In such a case the statute 3 & 4 Will. 4, c. 47, s. 38, preserves the right of the remaindermen to bring a formedon.

[S. C. 10 L. J. Ex. 201 ; 4 Jur. 321.]

Ejectment by the lessors of the plaintiff, who claimed as co-heiresses at law of Arthur Gramer Miller. At the [103] trial before Lord Denman, C. J., at the Warwickshire Spring Assizes, 1840, it appeared that, in 1779, the father of A. G. Miller had devised the property to A. G. Miller for life, with remainder as he should by deed or will appoint, with remainder, in default of and until appointment, to the heirs of his body with remainders over. A. G. Miller died in 1832 without issue, and it therefore became necessary for the lessors of the plaintiff, who claimed as his collateral heirs, to prove that he had acquired the fee-simple of the property before the time of his death. For this purpose they sought to give evidence of the marriage settlement of A. G. Miller, executed by him in 1789, after his father's death, in order to shew that he had acquired the fee by exercising the power of appointment. This settlement was in the possession of Mr. Baxter, the defendant's attorney, who had been subpoenaed to produce it: and upon his examination, he stated that he had received it from a Mr. Weetman, who was in possession of another part of the property, and against whom the lessors of the plaintiff had previously brought an ejectment, which was tried at the Summer Assizes of 1838, before Lord Abinger, C. B., and in which the lessors of the plaintiff were nonsuited. Mr. Baxter stated that he claimed a lien on the deeds for professional business done for Mr. Weetman, and he declined to produce it on this ground. Mr. Weetman himself was in Court, but was not examined, or called on to produce the deed.

Upon Mr. Baxter's refusal to produce the deed, the lessors of the plaintiff proposed to give secondary evidence of its contents. This was objected to on the part of the defendants, but Lord Denman ruled that such evidence was admissible. The lessors of the plaintiff then tendered in evidence a copy of the deed; but upon examination it appeared that this had been made an attested copy, and was unstamped, and it was consequently rejected. It was then proposed to read, as secondary evidence of the contents of [104] the deed, a short-hand writer's notes of the proceedings of the trial in the former action, when the settlement had been produced and proved by the then defendant Weetman. This evidence was objected to, but Lord Denman allowed it to be admitted, and the short-hand writer's notes were read; but it appeared from them that the deed had not been actually read by the officer of the Court, but that its contents were stated by the defendant's junior counsel. It was objected that this statement could not be received, but Lord Denman considered that it was substantially the same as if the deed had been read by the officer, and accordingly the note of this statement was read, and it thereby appeared that A. G. Miller had exercised the appointment in favour of himself and his heirs in fee, subject to a life interest in part of the estate to his wife, who died before him. The lessors of the plaintiff then tendered, as further evidence that A. G. Miller was seised in fee, an examined copy of the record of a fine, with proclamations, levied by A. G. Miller in 1790. This was objected to by the defendant's counsel, who contended that the chirograph should

have been produced, but the learned Judge overruled the objection, and the examined copy was received. The lessors of the plaintiff also proved a deed of conveyance, subsequent to the fine, from A. G. Miller to a purchaser of part of the estate in question, which recited the fine and settlement, and stated that by the latter the uses of the fine had been declared to A. G. Miller in fee. This deed was received without objection, and the case then went to the jury upon the evidence of pedigree, and a verdict was found for the lessors of the plaintiff.

Adams, Serjt., in Easter Term last, moved for a nonsuit or a new trial, on several grounds.—1st, that secondary evidence of the settlement was altogether inadmissible. 2ndly, that even if secondary evidence was receivable, the short-hand writer's notes were not admissible evidence. [105] 3rdly, that at all events they were not receivable, when it appeared that a copy of the settlement was in existence. 4thly, that the estate acquired by the fine terminated with the estate tail of A. G. Miller: and 5thly, that the verdict was against evidence. The Court granted a rule on all the points except the third, which was disposed of on the application. Adams, Serjt., urged in support of this point, that, assuming that the short-hand writer's notes might have been evidence if no better evidence had been in existence, it appeared here that better evidence did exist, viz. the attested copy, which the lessors of the plaintiff might have produced if they had procured it to be stamped. The short-hand writer's notes, at best, amount to nothing more than mere parol evidence. In *Villiers v. Villiers* (2 Atk. 71), Lord Hardwicke says:—"The rule of evidence is, that the best evidence that the circumstances allow must be given. If an original deed be lost, the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted; and if there should be no copy, there may be parol evidence of the deed, and of the manner of its being lost." This is an authority that parol evidence is not receivable where a copy exists; and the doctrine of this case appears to be admitted in *Munn v. Godbold* (3 Bing. 292; 11 B. Moore, 49). In *Doe d. Rowlandson v. Wainwright* (5 Ad. & Ell. 520; 1 Nev. & P. 8), the question arose, whether an abstract of a deed of feoffment, which deed was in the hands of the opposite party, who refused to produce it on notice, was admissible in the absence of an examined copy, which might have been produced. The Court decided the case upon another ground, but seemed to think that if a copy had been proved to exist, it should have been produced. [Parke, B. You must contend then, that there is to be primary, secondary, and tertiary evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not [106] attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know where to stop. Alderson, B. In *Doe v. Wainwright*, the Court refused to decide the question, because there was another point that made it quite immaterial.] In Buller's N. P. p. 256, the same rule is laid down as in *Villiers v. Villiers*.

LORD ABINGER, C. B. There can be no rule upon this point. Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is, that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another. In cases where the contents of public records and documents are to be proved, examined copies are allowed as primary evidence; but this is upon public grounds; for in these cases, the law, for public convenience, gives credit to the sworn testimony of any witness who examines the entry, and produces the copy.

PARKE, B. I concur entirely in refusing the rule on this ground. There can be no doubt that an attested copy is more satisfactory, and therefore, in that sense, better evidence than mere parol testimony; but whether it excludes parol testimony, is a very different thing. The law does not permit a man to give evidence which from its very nature shews that there is better evidence within his reach, which he does not produce. And therefore, parol evidence of the contents of a deed, or other written instrument, cannot be given, without producing or accounting for the [107] instrument itself. But as soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or

better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shewn from other sources, that a more satisfactory species of secondary evidence exists. I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. There is a case of *Brown v. Woodman* (6 Car. & P. 206), in which I am reported to have decided this point, and my ruling was not afterwards questioned.

ALDERSON, B. I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If you produce a copy, which shews that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—the existence of an original does not shew the existence of any copy; nor does parol evidence of the contents of a deed shew the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by shewing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all.

GURNEY, B., concurred.

[108] In Trinity Term, Goulburn, Serjt., Humfrey, and G. Hayes, shewed cause against the rule. First: Parol evidence of the settlement was receivable. The only difficulty arises from Weetman's not having been subpoenaed or called; but this was unnecessary, because Mr. Baxter refused to produce the deed, not on account of his client's title, but on account of a lien which he himself claimed upon the deed. Another answer to this objection is, that it was not taken at the trial. It appeared from Baxter's own evidence, that Weetman was in Court; and if any objection had been made on his account, it would have been immediately answered by calling Weetman. Secondly:—The short-hand writer's notes were good secondary evidence of the settlement. It appeared from these notes, that the deed was produced and given in evidence at the former trial, and it then became the duty of the officer of the Court to read it; but instead of this being done, the material parts were read by one of the counsel of the party producing it. This course was adopted for the more convenient conduct of the trial; and it must be taken that it was substituted for the reading of the deed by the officer of the Court, by the consent of all parties: it was, therefore, the same thing in substance as if the deed had been read in the regular manner by the officer. The deed itself was identified by a witness who formerly had it in his possession, and who saw it in Court and heard it read; and it must be presumed that it was read correctly. The material parts, shewing that the power was exercised by appointing to A. G. Miller in fee, appear from the short-hand writer's notes, and the notes of Lord Denman; and this was good secondary evidence of its contents. In addition to the short-hand writer's notes, the fine which was proved, and the deed of conveyance to Johnson in 1802, furnish good secondary evidence of the contents of the settlement; for the deed of 1802 recites both the fine and the settlement, and connects them together, and shews that by the settlement the uses of the fine were declared to be to A. G. Miller in fee; and by this conveyance of 1802, he actually disposes of part of the fee which he had so acquired. Now, as A. G. Miller was enabled, by his father's will, to acquire the fee by exercising the power of appointment, and as the conveyance of 1802 shews that he had acquired the fee, this conveyance is good secondary evidence that he had acquired it by exercising the power of appointment in the settlement, although it did not in terms distinctly shew that the power was exercised.

But assuming that there was no sufficient secondary evidence of the settlement, the fine alone was good evidence that A. G. Miller was seised in fee.

By the will of his father, the estate was devised to A. G. Miller for life, with a power of appointment over the fee, and a limitation, in default of and until any appointment, to the heirs of his body. Under these limitations it is clear that A. G. Miller was tenant in tail; but a question may perhaps be raised, whether he was tenant in tail in possession or in remainder; for if he was only tenant in tail in remainder, the fine would not operate as a discontinuance: Com. Dig. Discontinuance (C. 5). In *Doe d. Jones v. Jones* (1 B. & C. 238; 2 D. & R. 373), there was a devise

to a party for life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of the life tenant, with remainders over. A fine had been levied by the devisee, and the question arose, whether this worked a discontinuance. The Court held, on the authority of *Coulson v. Coulson* (2 Atk. 250), that, in consequence of the interposition of the vested remainder in the trustees, the first devisee was only tenant in tail in remainder, and consequently that no discontinuance took place. Here there is no intermediate estate, but [110] a mere power, which may or may not be exercised, accompanied by an express limitation to the heirs of the body, not only in default of but until the execution of the power. The effect of this is, that, until the execution of the power, the two estates unite, and the devisee becomes tenant in tail in possession, subject to the estates being disunited or defeated by the execution of the power. A. G. Miller being, then, tenant in tail in possession, the question arises, what was the effect of the fine? It is clear it created a discontinuance: *Doe d. Cooper v. Finch* (4 B. & Ad. 283). In that case the question was, whether the limitation of a term of 500 years, prior to the limitation of the first estate tail, prevented the party to whom such estate tail was given from being tenant in tail in possession; and the Court held that it did not, and that his fine worked a discontinuance. There the tenant in tail had died without issue and devised the property; and the Court held, that the effect of the fine was to give him an estate in fee, which was devisable, and passed by the will, and that the remainderman had no estate, but a mere right of action. Then, upon the same principle, the fee acquired by the fine is descendable to A. G. Miller's heirs. In *Doe v. Finch*, the fee acquired by the fine was called a base fee, which is a term commonly used to designate fees determinable on the failure of issue inheritable under an entail; but whether called a base fee, or a wrongful fee, it is clear, from the judgment of the Court, that it did not terminate on the failure of issue, but continued to exist as a fee descendable and devisable after the failure of issue.

It was contended here, that the fine only passed a base fee, which terminated ipso facto on the failure of issue, and that the remaindermen were entitled. [Parke, B. The remaindermen can have no right of entry: all their rights are turned into mere rights of action; and as [111] some one must have a right of entry, it must be the heir of the person who had the wrongful fee.] In this case, therefore, the right of entry must be in the heirs of A. G. Miller, who levied the fine; the remainders being discontinued and divested by the fine, cannot be revested except by formedon. *Doe d. Odierne v. Whitehead* (2 Burr. 704) is another authority on the subject of a discontinuance arising from the fine of a tenant in tail in possession.

With regard to the effect of a discontinuance, Littleton, sect. 597, shews that the rights of entry of the remaindermen are taken away and turned into mere rights of action: and sect. 620 clearly shews that a fee is acquired by the party creating the discontinuance. In these passages, a discontinuance by feoffment is treated of, but a fine includes a feoffment. By some writers it is called a feoffment of record, by others an acknowledgment of a feoffment. All agree that it has the same effect as a feoffment in creating a discontinuance, and this is shewn by *Doe v. Finch* and *Doe v. Whitehead*.

If it be considered that there is no sufficient evidence of any declaration of use of the fine levied by A. G. Miller, the consequence will be that the use will result to the conusor of the fine: *Armstrong v. Wolsey* (2 Wils. 19). In that case no declaration of use was shewn, and the Court held that the use resulted to the conusor. In the present case, therefore, the fine is evidence of a fee in A. G. Miller, to whom the use resulted if none was declared.

But a point may be raised on the other side, as to the nature and extent of the use that results. There was some little confusion formerly on that subject in the books, in many of which it is laid down that the old use results, and a doubt has arisen as to the meaning of this term. In two cases, viz., *Argol v. Chiney* (Latch, 82) and *Waker v. Snowe* (Palm. 359), it was de-[112]-cided that where a recovery was suffered, and no use declared, the use that resulted was an estate tail only, that being said to be the old use. The effect of these decisions was to render the recovery entirely inoperative, and the party suffering it was left just where he was before the recovery was suffered. In 1 Cruis. Dig. 378 (4th edit.), the inconvenient effects that would have followed from these decisions, if adhered to, are pointed out, and it is clear that they must now be considered as overruled (see *Saunders on Uses*, 102 (4th

edit.). In *Nightingale v. Earl Ferrers* (3 P. Wms. 207), it was admitted on all hands that on a recovery by tenant in tail, without any declaration of use, the use resulted in fee and not in tail, and that was so laid down several times afterwards by Lord Hardwicke (1 Atk. 9; 3 Atk. 313). In a very recent case, *Tanner v. Radface* (6 Sim. 21), this question was again raised; and the Vice-Chancellor held it to be clear, that the effect of a recovery suffered by tenant in tail, without any declaration of use, is to enlarge the estate tail into a fee. There appears to be no express authority with respect to a fine, but the same principle must apply to both. The effect of the fine is to create a discontinuance, and to change an estate tail into a wrongful fee; and if the use of the fee does not result to the conusor of the fine, in whom can it be? The use cannot result in tail, because the estate tail is discontinued; nor can any use result to the remaindermen, for their estates are divested, and turned into mere rights. If the use had been declared by the conusor of the fine, it would clearly have passed according to such declaration; this is shewn by *Doe v. Finch*, and *Doe v. Whitehead*: but it cannot be argued that the legal effect of the fine will vary, according as there is or is not a declaration of the use by the tenant in tail. A party may declare the uses of a fine after the fine has been levied; but what becomes [113] of the use in the interval between the fine and the declaration? In ordinary cases it results, during the interval, to the conusor; but if, in the case of a tenant in tail, nothing result but an estate tail, how can he afterwards declare the use of the fee? A party cannot declare a use which he has not got to declare. No distinction can therefore exist, whether the use results or is declared. The whole fee passes by the fine, and must belong either to the conusor or the conusee. And as, in the absence of a declaration, nothing goes to the conusee, the whole must result to the conusor. In the present case, therefore, secondary evidence of the settlement may be entirely dispensed with, as the fine alone is sufficient proof that A. G. Miller was seised in fee. [Parke, B. How is this question affected by the late stat. 3 & 4 Will. 4, c. 27, which abolishes real actions, and substitutes an ejectment? If a remainderman, whose estate has been discontinued, be entitled to bring ejectment instead of formedon, can the right to bring ejectment be in two parties at the same time?] The question is not affected by that statute. By section 39, rights of entry are not to be defeated by discontinuances made after December 31st, 1833; but by section 38, the right to bring real actions, in respect of previous discontinuances, is preserved; and formedon would therefore be the only remedy to revest the estate.

Adams, Serjt., M. D. Hill, Sir W. W. Follett, and W. T. S. Daniel, contra, were first heard on the evidence, as to the facts of the case, on which the Court intimated an opinion that there ought to be a new trial on payment of costs. They then addressed themselves to the objections in point of law. The defendant is entitled to a nonsuit, or at all events to a new trial without payment of costs, on several grounds. First, there was not sufficient evidence given at the trial of the settlement of 1789, inasmuch as parol evidence of its contents was not admissible under the circum-[114]-stances of the case. No doubt, if a deed be lost or mislaid, and it cannot be produced, secondary evidence may be given of its contents. [Parke, B. If a party does all in his power to produce the deed, but is not able to procure its production, is not that enough? Then is it not enough to subpoena the attorney, duces tecum, to produce it? *Marston v. Downes* (1 Ad. & Ell. 31; 4 Nev. & Man. 861) appears to have settled that it is.] At all events, no secondary evidence was given of that deed, which was receivable for the purpose of shewing the limitations contained in it, or that the power of appointment was executed by it. The limitations in the deed were not read at this trial, but the lessors of the plaintiff sought to give in evidence a copy of the short-hand writer's notes of the reading of the limitations in the deed by Mr. Daniel, the junior counsel for the defendant, on a former trial respecting the right to other property held under the same title; and the learned Judge held it to be admissible. But that was a trial of a cause between different parties, entirely unconnected with the parties to this action. If the lessors of the plaintiff desired to prove that these notes were a correct copy of the limitations in the deed, they should have called the officer of the Court to prove that fact. But taking it that Mr. Daniel read the deed as and for the officer of the Court, it would not be binding upon third parties. [Parke, B. The statement of the officer of the Court would not be evidence, unless it was a cause between the same parties.] The present defendant was not a party to the former action.

Next, with respect to the fine. The first objection is, that there was not proper evidence of it. The evidence produced was a copy of the chirograph, and an examined copy of the proclamations. It is admitted that an examined copy of the proclamations would be evidence of the proclam-[115]-ations; but it is not evidence of the fine. To prove the fine, the chirograph should be produced. The usual mode is, to produce the chirograph, and prove an examined copy of the proclamations. The former is the only proper evidence of the fine; and this evidence was therefore improperly received.

Then as to the effect of the fine. The parties to it were John Mitchell and James Chartres plaintiffs, and Arthur Gramer Miller deforciant; and there being nothing to shew that A. G. Miller had executed the power of appointment, and acquired the fee by that means, it was sought to prove, that, as this fine worked a discontinuance, there had been an express declaration of the use to A. G. Miller in fee. For which purpose the deed of 1802 from A. G. Miller to Johnson, conveying property held under the same title, reciting both the fine and the settlement, was put in evidence, and it was said that this was good secondary evidence of the contents of the settlement, and connected the fine and settlement together, and shewed that by the settlement the uses of the fine were declared to A. G. Miller in fee. But there was no evidence of the custody from which this deed was produced, and it was therefore not receivable in evidence; and further, the defendant was no party to it, nor claimed under it, but was a perfect stranger. Again, even though the evidence of the fine should be held sufficient, there was no legal evidence of any declaration of uses at all; nor anything to shew that A. G. Miller had acquired the fee by an exercise of the power of appointment. But then it is said that there would be a resulting use in favour of A. G. Miller, and a fee created by wrong, liable only to be defeated by the remainderman bringing a real action. But there is no authority to shew, that where there is an estate tail, with remainders over, and a fine levied, but no deed to declare the uses, the tenant in tail takes back any larger estate than he had before. The distinction is be-[116]-tween the effect of a fine and that of a recovery—a fine does not destroy the remainders, though it may displace them. The effect of a recovery is to give to the recoveror a rightful fee-simple—not a wrongful fee, subject to be defeated, as in the case of a fine. Then, as by the recovery the remainders over are wholly destroyed, it is held, that as there is no deed to lead the uses, the use results to the recoveror in fee. But in the case of a fine, no rightful estate in fee is created, and therefore the use results according to the old estate. [Parke, B. In whom would the use be?] In the parties entitled under the old uses. The doctrine of resulting uses is fully stated in Cruise's Digest, where it is said (vol. 1, p. 370, s. 19):—"Before the Statute of Uses, if a person had conveyed his lands to another, without any consideration, or declaration of the uses of such conveyance, he became entitled to the use or pernancy of the profits of the land thus conveyed. This doctrine was not altered by that statute; and therefore it became an established principle, that where the legal seisin and possession of lands is transferred by any common law conveyance or assurance, and no use is expressly declared, nor any consideration or evidence of intent, to direct the use, such use shall result back to the owner of the estate." In the case of a recovery suffered, the rightful fee-simple is vested in the recoveror—not a mere right liable to be defeated by action, as in the case of a fine. It is also said in the same work (vol. 1, 373, s. 31):—"It was determined in a modern case," (alluding to *Roe v. Popham* (Douglas, 25)) "where a fine was levied by a tenant for life, together with the remainderman in tail and the reversioner in fee, and a declaration of uses was executed by the tenant for life and the remainderman in tail only, that the use of the reversion in fee resulted to the reversioner." It was formerly held, that in the case even of a [117] recovery, the assurance enured to the old uses. "When a tenant in tail suffered a common recovery of his estate, by which it was converted into a fee-simple, without declaring any uses thereof, it has been doubted whether the use which resulted to him be in fee tail or fee-simple. The language of the old books is, that where there is feoffment, fine, or recovery, without consideration or declaration of uses, these assurances shall enure to the old uses" (Cruis. Dig., vol. 1, 378, s. 55). The contrary was indeed admitted and established in the case of *Nightingale v. Earl Ferrers* (3 P. Wms. 207), with respect to a recovery, and has since been confirmed by the modern authorities, as stated in Cruise's Digest (vol. 1, p. 379, s. 60). The author there quotes the words

of Lord Hardwicke—"a common recovery will bar the entail, though there is no deed to lead the uses; because it is in respect of the satisfaction of estate in value, which creates the bar:" and also of Lee, C. J., who said, "It is the use of the fee-simple that passes to the recoveror from tenant in tail, and which results to him and his heirs if no use is declared." That is with respect to a recovery. Then, with respect to a fine, Mr. Cruise goes on to observe:—"It follows from the above principles, that where a tenant in tail levied a fine without any declaration of uses, he acquired a base fee descendible to his heirs, as long as he had heirs of his body; and in the case of *Roe v. Popham*, it must be presumed that the Court reasoned in that manner; for, upon the death of the tenant in tail without issue, the person who had the reversion in fee was held entitled to the possession of the estate." [Parke, B. The question is, whether that is a base fee, in the strict sense of the word. It is not determinable on failure of issue simply, but on failure of issue and of the remaindermen bringing their action of formedon. The resulting use must go where the legal estate [118] goes.] The only effect of a fine is to create a discontinuance of the remainders over, leaving the remaindermen to their action. With respect to the authorities which have been cited, the case of *Armstrong v. Wolsey* (2 Wils. 19) is the only one which relates to a fine, and it was there held, that a fine levied without any consideration or uses declared, shall enure to the old use, in whomsoever it was. That is no authority for the plaintiff, but the contrary. All the other cases cited were cases of recoveries, which are distinguishable on the grounds already stated. [Parke, B. The conveyance gives no consideration, and takes no use. The question is, whether the use does not result to the conusor, until a real action is brought by the remainderman. The estate tail becomes a fee by the levying of the fine, and a new estate results to the conusor. Is not that analogous to the case of a recovery; the conusor is in, not according to the old estate, but of an estate as altered sub modo by the fine?] In the one case there is a rightful modification of the estate; in the other there is a fee created by a wrong. Where it is a rightful fee, it is easy to understand that the Courts should say the use resulted; but not where there is a wrongful fee—no rightful estate at all. [Rolfe, B. Has the party not the same rightful estate, until a real action is brought, in the one case as the other?] The effect of the fine is merely to bar the estate tail. In *Sanders on Uses* (p. 102), there is the following passage, which follows the one already quoted on the other side:—"Where A. is tenant for life, with remainder to B. in tail, with remainder to A. in fee, and A. and B. levy a fine without declaring the uses of it; it should seem that the use would result to A. for life, with remainder to B. and his heirs so long as he shall have issue, and in default of his issue to A. and his heirs. But I am not aware that the point has been determined." Undoubtedly, it must be [119] admitted that there both A. and B. were parties to the fine. In *Martin v. Strachan* (5 T. R. 107, n.), Lee, C. J., says, "A fine operates as an extinguishment of the estate tail, and passes a base or a qualified fee; but a common recovery does not operate in that manner; for a common recovery passes not a base fee, but a full, absolute, unlimited, and rightful fee, and is to be considered as the proper conveyance of a tenant in tail, and passes the fee in the same manner as the fee is passed by a feoffment of tenant in fee." There is no direct decision in point; but it will be for the Court to determine whether, there being no declaration of uses, the fine gives the conusor, not an estate according to the old uses, but a new estate in fee. If the fine did not operate to vest an estate in fee in A. G. Miller, then the lessors of the plaintiff are not entitled to recover. There is no evidence to shew who the defendants are. Suppose they were the parties in remainder; the heirs of Arthur Gramer Miller could not bring an action, and turn them out of possession. [Parke, B. Yes:—the old doctrine of remitter does not apply.] It was so held in *Doe v. Cooper v. Finch* (4 B. & Adol. 483; 1 Nev. & M. 130); but there is another objection to this fine having the effect contended for, which is this: a use can result only from some conveyance from which it appears that no consideration was paid; but the copy of the chirograph of this fine states on the face of it, that a sum of £1100 was paid by the conusees to the conusor, and whether this sum was actually paid or not, or was merely nominal, this copy being the only evidence of the fine before the Court, the plaintiffs are estopped from asserting, and the Court are unable to infer, that this fine was without consideration. The whole doctrine of resulting uses is founded upon this, that the document from which it arises expresses no consideration. As this fine expresses a consideration to have been paid, the legal estate, in the absence [120] of

an express declaration of uses, remains in Mitchell and Chartres, the conusees. In Sheppard's Touchstone (p. 222), speaking of the effect of a bargain and sale, it is said, "There must be some valuable consideration in money or money's worth given, or at least expressed to be given, for the land." "If the deed make mention of money paid, as in consideration of £100 or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this, which is expressly affirmed by the deed." In *Armstrong v. Wolsey*, which is relied upon by the other side, the fine is expressly stated to have been levied without consideration. [Parke, B. The objection at the trial was, that the trustees under the settlement had the legal estate. We ought not to allow this objection now, as it might have been removed if it had been taken at the trial.] This objection could not have been made at the trial, because the resulting use upon the fine was not then relied upon. That point is first made in shewing cause against this rule; and the objection, that no use results, is only an answer to the argument which the plaintiffs now raise as to the effect of the fine.

Then as to the effect of the statute 3 & 4 Will. 4, c. 27, with respect to the remedies which the remaindermen now have. That act having, by the 36th section, abolished all writs of right, and by the 2nd section limited the trial of titles to land to actions of ejectment, has virtually abolished the distinction which existed under the law as it formerly stood, between the right to the property and the right to the possession. And as the rights of the remaindermen to the property are clearly not barred by the fine, and they can only bring ejectment, it is submitted that if they can now maintain ejectment, the present lessors cannot; for two persons cannot be entitled at the same time to the possession of the same estate by different titles, as that [121] would be to make the defendant liable more than once for the same trespass.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. In this case the Court have already intimated their opinion, that there should be, at all events, a new trial on payment of costs, in order that the question, whether the Millers of London, the silkmen, were descended from Thomas, a younger son of the common ancestor, may be more fully considered; it having been too hastily taken for granted by the jury on the former trial.

But it was contended by the counsel for the defendant that he was entitled to a nonsuit or new trial, on the objections in point of law.

These objections were several.

First, that parol evidence of the contents of the deed of settlement was inadmissible.

Secondly, that evidence of the speech of counsel on a former trial of the same title was inadmissible.

Thirdly, that the evidence of the fine was insufficient.

Fourthly, that if the fine was proved, the heir at law of Arthur Gramer Miller had no title.

It will be necessary to dispose of each of these objections.

As to the first, it appeared that the original settlement was in the hands of Mr. Stafford Baxter, attorney for a Mr. Weetman, but he did not hold it merely as attorney, but as a security for money advanced by him to his client. Mr. Baxter, when called upon on a subpoena duces tecum, refused to produce the deed; and Lord Denman was of opinion that secondary evidence of its contents was then admissible, and in that opinion we entirely concur.

The rule on that subject is, that the law excludes such evidence of facts, as from the nature of the thing supposes [122] still better evidence in the party's possession or power (Phill. on Evid. 437); which rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party producing it. But if such evidence is shewn to be unattainable, the presumption ceases, and the inferior evidence is admissible. If therefore a deed be in the possession of the adverse party, and not produced, or lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the same, for the original is then unattainable by the party offering the secondary evidence. And this is one of the points ruled in the case of *Marston v. Downes* (1 Ad. & Ell. 31; 4 Nev. & Man. 861). But it was

suggested, I believe by the Court, on the motion for a rule nisi in this case, that though the attorney might refuse to disclose a title deed or instrument which was confided to him by his client, the client might not; and, until he was subpoenaed to produce the instrument and refused to do so, all was not done which might be done to shew the original evidence unattainable. It becomes, however, unnecessary to consider that point, for two reasons: first, because here the attorney had a title of his own to the deed, and lawfully refused to produce it, and the party is not bound to buy up that title, and pay the amount for which the attorney holds the title deed: and secondly, because, if the objection had been taken at the trial, it might have been cured by calling Mr. Weetmen himself, who was in Court.

The next question is, whether the species of secondary evidence admitted was by law admissible. It was this. In an argument of the junior counsel for the defendant, on a former trial of the same title, the contents of the deed of settlement had been stated; and that statement [123] had been received by Lord Denman as proof of those contents. It appears, however, from his lordship's report, that the deed was produced on the former trial, and that the counsel stated its contents instead of its being read by the officer; and the statement of the junior counsel, as copied by the short-hand writer, was admitted as secondary evidence. If then, the reading by the officer of the document would have been secondary evidence, the statement of counsel was so. But we are of opinion, that such evidence was not receivable: for supposing what was read by the officer would have been admissible, if the parties to the suit had been the same, (a proposition which is very questionable), here the parties were not the same; for the defendant, against whom this evidence was received, was no party to the former suit.

It was then contended on the argument before us, that as inadmissible evidence had been received, the defendant was entitled to a new trial without the payment of costs. But we are of opinion, that under the circumstances of this case, he was not. If this part of the case had been submitted as a question of fact for the jury, and improper evidence had been left to their consideration, the defendant would certainly have been entitled to a new trial: but this was not the case, for this question was withdrawn from them; and Lord Denman reports, that "all the objections and exceptions were reserved for the consideration of the Court of Exchequer." As no such reservation could have taken place without the implied assent of both sides, we consider ourselves as called upon, by mutual consent, to decide upon all the technical points, whether the lessors of the plaintiffs are entitled to recover or not; and if the legal evidence shews the title to be in the heir at law of Arthur Gramer Miller, we ought so to decide, disregarding the immaterial evidence which has been improperly received. And we think that, upon the other evidence, the title was shewn to be in A. G. Miller in fee. By the [124] will of his father, the Rev. A. Miller, in 1779, the estate was left to A. G. Miller for life, remainder as he should by deed or will appoint; and in default of appointment, remainder to the heirs of his body, with remainders over. The evidence of the execution of the power of appointment having been given, the lessors of the plaintiff proceeded to make out a title in another way, by virtue of a fine levied by A. G. Miller, with proclamations, in 1790. The evidence given was not the chirograph, but an examined copy of the record of the fine, and of the record of proclamations. The former was objected to, but the objection was overruled, and we think properly overruled; because the chirograph is but itself, in contemplation of law, a copy of the original record delivered out by the chirographer, who is authorized to make and deliver out to the parties such a copy; but an examined copy of the original record is as good as one certified by the officer. This point, indeed, was not raised on the motion for a new trial.

It was then proposed by the lessors of the plaintiff to prove a declaration of the uses of the fine, by proving a deed of conveyance in 1802, from A. G. Miller to a purchaser of a part of his estate, reciting the fine, and stating that it had been levied to the use of A. G. Miller in fee. This document was received in evidence, and no objection taken to its admissibility, either on the trial or motion for the rule nisi. The argument, therefore, of Sir William Follett, that it was not admissible at all, comes too late. Assuming the deed to be admitted, it is proof of a declaration of the uses of the fine to A. G. Miller in fee; and the question is, what estate A. G. Miller took by that fine and declaration of uses.

It is contended by Mr. Daniel, that on the face of the fine itself, there was a

statement of a consideration, namely, £1100 and upwards, given by the conusees; and that this was evidence against the lessors of the plaintiff, to [125] prove that a valuable consideration was given, and if so, that no use would result to the conusor. But assuming this to be true, the deed of 1802 is evidence to shew that the use was declared to A. G. Miller in fee; and consequently the case is to be considered as if the use had been so declared.

What then was the effect of the fine, with such a declaration? As Arthur G. Miller was tenant for life, with a power of appointment, remainder in default of appointment to the heirs of his body, and as we assume no appointment to have been made, he was tenant in tail in possession, and consequently, without doubt, his fine operated as a discontinuance, and turned the remainders over into mere rights of action. And the estate taken by the conusor, by virtue of the fine and declaration of uses, was not a base fee, or determinable fee on failure of issue inheritable under the original estate tail, but strictly and properly a fee-simple, defeasible by the remaindermen in tail, by bringing a real action (*Seymour's case*, 10 Rep. 96 a.). It follows that, until defeated by that mode, the fee-simple continues in and descends from the conusor, and therefore, if in this case the lessors of the plaintiff were the heirs at law, they were entitled to recover.

The late Real Property Act, 3 & 4 Will. 4, c. 47, does not appear to raise any question in this case. The rights of the remaindermen to a formedon are preserved by the 38th section.

The result is, that there must be a new trial on payment of costs; and as this is not a matter *ex debito justitiæ*, we impose the terms on the defendant of admitting, on the new trial, that A. G. Miller was seised in fee at the time of his death; and in case of the death of any witnesses, their evidence is to be read from the Judge's notes, if the party offering the evidence shall think fit.

Rule absolute accordingly.

[126] IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

VYSE v. WAKEFIELD. Exch. Chamber. 1840.

[S. C. 8 Dowl. P. C. 912; 4 Jur. 611.]

A writ of error having been brought on the judgment of the Court of Exchequer in this case (6 M. & W. 442), it now came on for argument. The Court, however, on reading the record, were unanimously of opinion, that an averment of notice to the defendant that the policy had been effected was necessary to make the declaration good, and that the judgment must be affirmed.

Judgment affirmed.

MEMORANDUM.

In this Vacation William Glover, Esq., of the Middle Temple, and Stephen Gaselee, Esq., of the Inner Temple, were called to the degree of the coif, and gave rings,—the former with the motto—"Regina et lege gaudet serviens:" the latter with the motto—"Nec temere nec timide."

End of Trinity Vacation.

[127] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, MICHAELMAS TERM, 4 VICTORIÆ.

CHRISTY v. TANCRED, FINLAY, AND TWO OTHERS. 1840.—A. let premises to four persons, B., C., D., & E., for a year certain, ending at Midsummer, 1839, with a proviso that if, a month at least before the termination of the year, a request were made to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director

in January, and C. in March, 1839. On the 31st of May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff, on the 23rd, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following the premises were delivered up to A.:—Held, that the four original lessees were liable to A., in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas.

[S. C. 10 L. J. Ex 228. See further, 9 M. & W. 438. See *Henderson v. Squire*, 1869, L. R. 4 Q. B. 170.]

Assumpsit for use and occupation. The defendants Tancred and Finlay pleaded non assumpsit; the other defendants suffered judgment to go by default. At the trial before Lord Abinger, C. B., at the London Sittings after Trinity Term, it appeared that the defendants, who were directors of the "Trades' Union Bank," personally agreed with the plaintiff, on the 12th of July, 1838, to take from him certain premises in Gracechurch-street, from the Midsummer preceding, for one year certain, with a proviso that if, a month at least before the termination of the [128] year, a request were made to the plaintiff to that effect, the plaintiff would grant the defendants a lease for seven, fourteen, or twenty-one years. The defendant Tancred ceased to be a director in January, and the defendant Finlay in March, 1839. The premises continued to be occupied by the directors for the time being, for the purposes of the business of the Bank, until the 31st of May, 1839, on which day they made an application to the plaintiff through their solicitor, to renew the tenancy for another year, on the same terms as before, and said "the names would be different." On the 13th of June the plaintiff's solicitor replied, that no objection would be made, and required to have the names of the proposed lessees furnished to him. This was done, and the plaintiff's solicitor, a few days afterwards, sent a draft agreement for a lease for perusal by the solicitor of the directors, with the names of the then directors inserted as the lessees. This agreement, however, was not executed, and on the 20th of June, the solicitor of the directors applied to the plaintiff to know if he would renew the agreement with them for a quarter of a year longer, (the directors being then in negotiation for another house). On the 23rd an answer was returned by the plaintiff, that "he should consider of it." Nothing further occurred between the parties until the following Michaelmas, when the possession of the premises was delivered up to the plaintiff. This action was brought to recover the quarter's rent due at Michaelmas, 1839. It was contended for the defendants, that they were not liable in this action, which was brought for rent accruing due after the period for which they had contracted with the plaintiff, and after they had ceased jointly to occupy. The Lord Chief Baron overruled the objection, and a verdict was found for the plaintiff, damages £105.

Crowder now moved for a new trial, on the ground of misdirection. This was an action, not against the parties [129] who actually occupied; but against the parties to the original agreement for one year, as having held over, after the expiration of that period, on the terms of the agreement. Under the circumstances, there was no legal presumption against these defendants, so as to render them liable. It was a question for the jury, whether the plaintiff had not accepted the new directors as tenants for the quarter. He had the fullest intimation that the tenancy of the defendants was to terminate on the 24th of June, and that the other parties were in fact in possession. It cannot be said that they were trespassers. [Parke, B. Suppose there had been no negotiation between the parties, and some of the defendants had continued to occupy, they would all have remained liable. It is their duty, at the end of the term, to give up the tenancy: if by themselves, or by sub-tenants, or joint-tenants, they remain in, they are liable as holding over. The question then is as to the effect of the negotiation. Now there was nothing amounting to a contract: nothing was decided on. If the plaintiff had absolutely accepted the names of the new directors as tenants, only reserving the terms, it would have been different.] What defence would the parties who actually occupied have had to an action for use and occupation? [Parke, B. It does not at all follow that the landlord might not recover against the parties actually occupying; he may waive the trespass, and go

against them for the actual enjoyment of the land.] Surely not, when he has a remedy against other parties.

LORD ABINGER, C. B. I think there is no weight in the objection. These parties were in the relation of landlord and tenants, until the expiration of the lease; and the only question is, whether the negotiation for a fresh lease, pending that demise, is sufficient to preclude the landlord from proceeding against those who held over. This was a [130] mere proposal for the plaintiff's acceptance; there was nothing amounting to an agreement.

PARKE, B. It is clear that the original parties to this agreement continued liable for the rent as tenants holding over, unless there was a new agreement by the landlord to accept other persons as his tenants in their stead. The duty of a tenant in this respect is clearly laid down by Lord Kenyon, in *Harding v. Crethorne* (1 Esp. 57): "When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in the possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved that the lessor had accepted the under-tenant as his tenant." The only question therefore is, whether there was in this case any evidence of an agreement by the plaintiff to accept the new parties as his tenants in place of the old. If the negotiation had been so far final as that he agreed to accept the names at all events, although the rent and other terms of the tenancy were to be afterwards settled, that might be sufficient to put an end to the liability of the original lessees. But there is no evidence of any agreement to accept any particular persons on any defined terms, or of any complete bargain at all, but only of a proposal for a tenancy on certain terms, which never came to anything more. It is therefore the simple case of the lessees holding over by their under-tenants, and consequently they continue liable.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[131] DOE D. ELIZABETH DAVY v. OXENHAM. Exch. of Pleas. 1840.—Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred, by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of the 3rd section, which, in the case of an estate or interest in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease.

[S. C. 10 L. J. Ex. 6; 4 Jur. 1016.]

Ejectment for a house and garden. At the trial before Coleridge, J., at the last Devon assizes, it appeared that one Richard Bowden, being seised in fee of the premises in question, in the year 1795 demised them to Thomas Duxham and Ann Duxham for ninety-nine years, if three persons named in the lease, or the survivors or survivor of them, should so long live, reserving an annual rent of £38. In 1815, John Davy acquired the fee in the premises, and on his death they descended to his heir at law, George Davy, who, in 1825, devised them to Elizabeth Davy, the lessor of the plaintiff, in fee. In the year 1802, Ann Duxham, the surviving lessee under the lease of 1795, assigned the premises to the defendant, who paid the rent until 1815, when he entered into an agreement with John Davy, that on Davy's being allowed to make certain alterations in the premises, he should not call on the defendant for payment of any further rent during his life. The defendant accordingly occupied the premises without payment of any rent, until the determination of the lease by the death of the last cestui que vie, in 1837. The present action was thereupon commenced, the defendant having refused to give up the possession. It was contended for the defendant, that the right of the lessor of the plaintiff was barred by the stat. 3 and 4 Will. 4, c. 27, more than twenty years having elapsed since 1815, at which time the right of action, by reason of the non-payment of the rent, first accrued. The learned Judge overruled the objection, and a verdict was found for

the plaintiff, leave being reserved to the defendant to move to enter a verdict, if the Court should be of opinion that the statute was a bar.

Montague Smith now moved accordingly. The second [132] section of the stat. 3 and 4 Will. 4, c. 27, enacts, "that no person shall bring an action to recover any land or rent, but within twenty years next after the time at which the right to bring such action shall have first accrued," &c. The third defines the period when the right shall be deemed to have first accrued in various cases; which, in the case of an estate in possession, is as follows:—"When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Since this statute, therefore, if a landlord choose to suffer his tenant to remain in possession of the land for twenty years without payment of rent, and without having commenced any proceedings against him, he loses his right to the land. The lessor of the plaintiff was entitled to the rent reserved under the lease, and therefore must be considered as a party who "while entitled thereto, has discontinued the receipt" thereof. [Rolfé, B. Suppose no rent at all were reserved on the lease, what then?] In that case, as there could not have been any receipt of the rent or profits of the land, the landlord would not be barred by the tenant's continuing in possession for twenty years; but where the landlord, by his own laches, allows the tenant to remain in possession without paying any rent, a right to the land will in time accrue to the tenant. The 35th section also provides, that the receipt of the rent payable by any tenant or lessee, shall, as against such lessee or any person claiming under him, be deemed to be the receipt of the profits of the land, for the purposes of the act.

[133] PARKE, B. I think there is no ground whatever for granting a rule in this case. The point appears to me to be perfectly clear, and I cannot see how any doubt could have been entertained on the subject. The lessor of the plaintiff claims an estate in remainder, expectant on the determination of a lease granted for ninety-nine years, if these persons named in the lease should so long live. She has but the right of possession until the end of that period, or the expiration of the last of the three lives. Her case, therefore, falls within the latter part of the 3rd section of the act, which provides, that "when the estate or interest claimed shall have been an estate or interest in remainder or reversion, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession." And the 9th section throws light on this subject. It enacts, that "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled." Here [134] there has been no adverse claim, and no payment of rent to any other person; it is the mere case of a landlord omitting to compel his tenant to pay the rent reserved by his lease. The right of the plaintiff manifestly accrued on the determination of the lease, and he is entitled to bring his action at any time within twenty years from that period.

ALDERSON, B. This cannot properly be called a discontinuance of the possession or receipt of the profits. If we were to construe the statute according to the defendant's view of it, we should in fact determine, that a landlord who gets no rent from an insolvent tenant for twenty years, thereby loses the estate.

GURNEY, B., and ROLFÉ, B., concurred.

Rule refused.

WILLIAMS v. MOULSDALE. Exch. of Pleas. 1840.—In debt for use and occupation, goods sold, &c. to which the defendant pleaded *nunquam indebitatus* and a set-off, the verdict was entered *ad nisi prius* for the plaintiff, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict should stand, and for what amount, or whether it should be vacated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues :—Held, that he had a right to do so, and that the certificate was not inconsistent.

[S. C. 10 L. J. Ex. 2 ; 4 Jur. 1038.]

This was an action of debt for use and occupation, with counts for goods sold, money paid, and on an account stated ; to which the defendant pleaded, first, *nunquam indebitatus* ; and, secondly, a set-off to the whole declaration. The cause came on for trial at the last Denbighshire Assizes, when it was agreed that a verdict should be taken for the plaintiff for the damages in the declaration, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict so entered for the plaintiff should stand, and if so, for what amount, or whether it should be vacated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues.

Townsend, for the plaintiff, now moved for a rule to shew cause why the certificate of the arbitrator should not be set aside, or why a verdict should not be entered for the plaintiff on the first issue. This certificate, finding for the defendant both on the issue of set-off and on that of *nunquam indebitatus*, is inconsistent. *Fenton v. Dimes* (Q. B., Trin. T. 1840 ; not yet reported) is an authority for the plaintiff. That was an action of assumpsit, to which there were pleas of non-assumpsit, payment, and set-off. The cause and all matters in difference were referred to an arbitrator, who directed a general verdict to be entered for the defendant. The Court set aside the award, on the ground that the arbitrator, having found that nothing was due from the defendant to the plaintiff, but that the plaintiff was under an obligation to him in respect of the set-off claimed, ought to have found the amount due from the plaintiff to the defendant ; and that as he had not done so, his award was inconsistent. [Parke, B. There the arbitrator was to decide all matters in difference between the parties, therefore he should have found the balance : here the only matter left to him to decide is, how the issues in the cause are to be found.] But the finding is inconsistent ; since, if there be nothing owing from the defendant to the plaintiff, the case is not within the statutes of set-off. [Parke, B. Supposing nothing be due from the defendant to the plaintiff, and £100 be due from the plaintiff to the defendant, there is no inconsistency. Suppose there were no plea but that of set-off, and the plaintiff could not prove that the defendant owed him anything, and the defendant proved that the plaintiff owed him £100, the verdict ought to be entered [136] for the defendant. There each issue is to be considered as if it were the only one.] Secondly, the certificate ought to be amended, by entering the first issue for the plaintiff. There was no evidence to support the finding for the defendant on that issue : and *Woof v. Hooper* (4 Bing. N. C. 449) shews that an arbitrator, having power to certify, may enter a verdict on the several issues, according to the evidence. [Alderson, B. There the arbitrator directed a general verdict, under the supposition that he was bound to do so ; but the Court held that he was not, but that he might enter it otherwise.]

PARKE, B. In the case cited, it was put in argument that the arbitrator had no power to enter the verdict on each issue ; and the Court only decide that he has power to do so : there was no contest that if he had the power, he ought to have done so. Having done so here, his finding is conclusive, and we cannot enter into his reasons. As to the other point, there is no inconsistency whatever on the record. The arbitrator seems to me to have done quite right.

ALDERSON, B. The case of *Fenton v. Dimes* is distinguishable from the present ; because there the reference being of all matters in difference, and it appearing on the face of the award that something was due from the plaintiff to the defendant, and nothing due from the defendant to the plaintiff, the arbitrator ought to have gone on to find the balance due to the defendant ; but here the reference is of the cause only. As to the other point, the case of *Woof v. Hooper* does not apply. There the arbitrator

supposed himself bound to order a general verdict, whereas the Court decided that he had the same power as a jury, of directing a verdict to be entered on the several [137] issues: but here the application is to set aside the finding as against evidence; the answer is, that the certificate of the arbitrator is conclusive on the parties.

Rule refused.

JEFFERSON v. WARRINGTON. Exch. of Pleas. 1840.—After the death of the plaintiff in an action, his executrix obtained an order for referring the bill of the plaintiff's attorney to taxation. Less than a sixth having been taxed off:—Held, that the executrix was liable to the costs of the taxation.

[S. C. 10 L. J. Ex. 79; 4 Jur. 993.]

This was a rule calling upon Elizabeth Antrobus, executrix of the plaintiff Jefferson, and upon her husband in right of her, to shew cause why they should not pay the costs of the taxation of the bill of Mr. Morton, the attorney of the plaintiff in this cause. After the plaintiff's death, Mrs. Antrobus, as his executrix, had obtained an order in the usual form for the delivery by Morton of his bill of costs, in order that it might be referred to taxation; and on the taxation less than one sixth having been taken off, this application was made under the statute 2 Geo. 2, c. 23, s. 23, to compel payment of the costs of the taxation.

Petersdorff shewed cause. This application cannot be sustained against the executrix. No one but the client of the attorney is compellable, under the 2 Geo. 2, c. 23, s. 23, to pay the costs of taxation. The words of the statute are:—"If the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be less, the Court in their discretion shall charge the attorney or client," &c. If, at the time of the application to tax the bill in this case, an express condition of payment had been imposed on the executrix, the case would be different. [Alderson, B. She applies as client to tax; she is not entitled to tax the bill unless she be the client; can she afterwards say she is not the client, and is not bound [138] by the order of the Court?] It does not follow, because she has obtained the reference to taxation, that she is to be subject to the costs of it, unless the words of the statute are sufficient to comprehend the case. She is not the client, but only his representative. It has been decided that the executor of an attorney is not liable, under the same clause, to pay the costs of the taxation where more than a sixth is taken off: *Weston v. Pool* (2 Stra. 1056).

Crompton, contra, was not called upon.

PARKE, B. The statute gives the Court power to refer the bill for taxation on the application of "the party or parties chargeable by such bill;" and when it afterwards speaks of the costs being paid, according to the event of the taxation, by the attorney or the client, the word "client" is evidently synonymous with the words "party chargeable." Here the executrix applied as the party chargeable by the bill, to have it referred to taxation.

ALDERSON, B. The case of the executor of an attorney differs; he is not the person who makes out the bill, and ought not to be held responsible for the act of another person. So here, if it had been the testator who had made the application to tax, the executrix ought not to have been held liable. But the "client" clearly means the "party chargeable" with the bill, which in this case was the executrix.

Rule absolute.

[139] DOE D. KINDERSLEY AND OTHERS v. JOHN HUGHES AND ELIZABETH HUGHES. Exch. of Pleas. 1840.—A tenant held a house and land from year to year, the land from the 2nd of February, the house, &c., from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his present year's holding:—Held, that this was a good notice to determine the tenancy in the spring of 1839; it not being shewn on the part of the tenant that the land was not the principal

subject of the holding.—A notice to quit, given by a person authorized by one of several lessors, joint-tenants, determines the tenancy as to all.

[S. C. 10 L. J. Ex. 185.]

Ejectment to recover a house and lands in the county of Denbigh. The declaration contained three demises, all dated 3rd of May, 1839; the first by R. T. Kindersley and A. Chambers; the second by A. Chambers alone; the third by H. W. Seton and A. Chambers. At the trial before Lord Denman, C. J., at the last Denbighshire Assizes, it appeared that the premises in question were a farm (the extent of it did not appear) part of a considerable estate vested in trustees for the benefit of a Miss Shipley, which had been occupied by the defendants for many years as tenants from year to year. The actual period of the commencement of their tenancy was not shewn; but it was proved to be the usage of the estate, that the tenants should enter upon the lands on the 2nd of February, and upon the house and outbuildings on the 1st of May. On the 16th of February, 1838, the following notice to quit was given to the defendants:—

“As agent for and on behalf of your landlords, Henry Wilmot Seton and Alexander Chambers, trustees of Miss A. L. Shipley, I hereby give you notice to quit and deliver up the farm, lands, and premises which you hold under them, at the end of your present year’s holding thereof. Dated this 16th day of February, 1838.

“J. V. HORNE,
“Agent to the trustees.”

This notice was served by the clerk of Mr. Horne, who at the time explained the nature of it to the defendant, John Hughes (he being an illiterate man), and told him that his time for quitting would be in the spring of the following year. The clerk stated that Mr. Horne had authority to receive the rents and manage the estates, and that he (the witness) had on one occasion, four years ago, [140] let a small farm. Mr. Horne was also called, and stated, that about the end of 1836 or the beginning of 1837, he was in London to settle his accounts with the trustees, (the then trustees being Messrs. Seton and Chambers) and there saw Mr. Seton, and informed him that some of the farms were kept in bad repair, and that the defendants’ was one: upon which Mr. Seton directed him to give notices to quit in all such cases. In June, 1838, Mr. Seton ceased to be a trustee, and he and Mr. Chambers conveyed their estate to Messrs. Kindersley and Chambers.

It was contended for the defendants, first, that the notice to quit was insufficient on the face of it, inasmuch as it was to quit at the end of the defendant’s present year’s holding, i.e., in May, 1838, for which it was too late, and that it could not operate to determine the tenancy at the end of a subsequent year; secondly, that there was no evidence of authority from the trustees to Mr. Horne to determine the tenancy. The Lord Chief Justice reserved both points, and a verdict passed for the plaintiff, leave being given to the defendant to move to enter a nonsuit.

Welsby now moved accordingly. First, the written notice to quit was insufficient. None of the cases have gone so far as to say that a notice in these terms can be applied to a subsequent year. In *Doe d. Williams v. Smith* (5 Ad. & Ell. 350), where the tenancy commenced on the same days as in the present case, a notice given on the 28th of October, 1833, to quit both land and house “at the expiration of half a year from this notice, or at such other time or times as your present year’s holding of the premises, or of any part thereof respectively shall expire after the expiration of half a year from this notice,” was held sufficient to determine the tenancy in the spring of 1835; but that was by reason of the latter words, which rendered it impossible that the te-[141]-nant should be misled, and the Court therefore rejected the word “present” as surplusage. But here the only words are “at the end of your present year’s holding.” Now, at the time of the service of this notice, the current year was that which would expire on the 1st May, in the same year; and the insufficiency of the written notice cannot be helped by the parol contemporaneous statement of the party serving it. [Lord Abinger, C. B. The year then running was that which had commenced on the 2nd of February preceeding.] That is on the assumption that the land was the principal subject of the demise, and the house, &c., only the accessory; but there was no evidence from which to infer that. [Parke, B. Did you

ask that that question should be left to the jury?] No—it was for the plaintiff to have given evidence on the subject. [Parke, B. In that case, *Doe d. Heapy v. Howard* (11 East, 498) is an express authority against you: it was there held, that it is a question for the jury, which is the principal and which the accessorial subject of demise, in order for the Judge to decide whether the notice for the whole was given in time; and that, if the party against whom he decides does not desire him to leave that question to the jury, it must be taken that he acquiesces in the fact assumed by him as the ground of his decision.]

Secondly, that there was no proof that Horne had a sufficient authority from the trustees to determine the tenancy. A notice to quit, given by a third party, professing to be an agent for joint-tenants, is not good, unless his act be ratified before the service of the notice: *Doe d. Mann v. Walters* (10 B. & C. 626). [Parke, B. Here the party was previously authorized by one of the trustees: that is the same as if that trustee had given the notice: and *Doe d. Aslin v. Summersett* (1 B. & Adol. 135), is an express authority that a notice to quit by [142] one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they all shall agree.]

Per Curiam. Rule refused.

GOREN v. TUTE. Exch. of Pleas. 1840.—Where application is made to set aside proceedings for irregularity after eight days, but within the eight days a similar application had been unsuccessfully made to a Judge at chambers, the Court cannot take notice of such application at chambers, unless it be shewn on affidavit, even though the Judge, being in Court, certifies the fact.

[S. C. 8 Dowl. P. C. 868; 10 L. J. Ex. 61; 4 Jur. 1017.]

Humfrey had obtained a rule for setting aside the copy and service of the writ of summons in this cause, on the ground that the defendant's place of abode was not set forth in the writ according to the form prescribed by the Uniformity of Process Act, 2 Will. 4, c. 39. The writ was served on the 24th of October. The learned counsel stated, that on the 31st, an application was made to Gurney, B., at chambers, to set aside the service; but the learned Judge declined to interfere. On the 2nd of November, the present rule was moved for; but there was no affidavit to shew what had taken place at chambers.

Corrie shewed cause, and objected that as the Court could know nothing of the application at chambers, unless it was regularly brought before them by affidavit, the present application appeared as the only one that had been made on the subject, and was therefore too late, being after the expiration of eight days from the service of the writ.

GURNEY, B., being present in Court, stated that the application had been made to him as above mentioned; and

Humfrey, in support of the rule, contended that the presence of the learned Judge in Court, certifying the fact, was sufficient, and likened it to the case of a Judge's order, which it never was necessary to verify by affidavit.

[143] PARKE, B. This is certainly an objection *strictissimi juris*, but it must prevail. The cause of the delay in making the application ought to have been explained by affidavit. The rule must be discharged, but without costs.

ALDERSON, B. The Court can know nothing of what has passed at chambers, but by affidavit. The case of a Judge's order is different; there the order, when produced, speaks for itself; but parties have no right to tax the memory of the Judge as to every case brought before him at chambers.

Rule discharged without costs.

DENNE v. KNOTT. Exch. of Pleas. 1840.—Where an insolvent, being arrested after his discharge for a new debt, agreed, on A.'s becoming his bail, to give him a bond for £300, in which amount was included a debt of £80, which had been inserted in the insolvent's schedule:—Held, that the insolvent was not entitled to be

discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default.

[S. C. 9 Dowl. P. C. 224; 10 L. J. Ex. 80.]

The defendant being indebted to the plaintiff in the sum of £80, in February, 1831, petitioned the Insolvent Debtors' Court for his discharge, and was discharged accordingly in April in the same year, the plaintiff's debt having been inserted in the same schedule. He was afterwards arrested for a new debt, when the plaintiff agreed to become his bail, on the defendant's giving him a bond for £300, in which sum was included the old debt of £80. The plaintiff, in 1839, sued the defendant on this bond; and judgment having been signed for want of a plea, a ca. sa. issued thereon against the defendant, under which he was arrested. Rolfe, B., having made an order for his discharge out of custody, a rule nisi was obtained to set aside this order: against which

Miller shewed cause. The defendant was entitled to his discharge, the bond in respect of which the judgment was signed, and execution issued, having been given to secure, not only a new debt, but also the old debt of £80, in respect of which the defendant had been discharged under [144] the Insolvent Debtors' Act. The bond was a fraud on the other creditors of the defendant, and was in violation of the policy of the statute, that the debtor shall be released in the first instance from the pressure of his debts, in order that he may be able to employ his future exertions in obtaining the means of satisfying, in just proportions, the claims of all his creditors. Here the effect of this bond was to enable the plaintiff to obtain a disproportionate payment out of the future effects of the insolvent; it was therefore altogether void: *Jackson v. Davison* (4 B. & Ald. 691), *Tabram v. Freeman* (2 C. & M. 451; 4 Tyr. 180).

Ogle, contra. *Philpot v. Aslett* (1 C. M. & R. 85; 4 Tyr. 721), is an authority to shew that this defendant was not entitled to his discharge. There a debtor, after having been discharged under the Insolvent Debtors' Act, contracted a new debt; and for that debt, as well as for an old debt inserted in his schedule, gave a bill of exchange. Being sued on the bill, he gave a warrant of attorney for the amount, and the Court refused to set it aside. [He was then stopped by the Court.]

PARKE, B. I am clearly of opinion, that the defendant is not entitled to be discharged out of custody. If he wished to avail himself of the protection given him by the Insolvent Debtors' Act, he should have pleaded his discharge from the sum of £80, and might to that extent have reduced the amount of the plaintiff's demand. This bond was given to secure the sum of £300, of which £220 are a new debt. The security is not illegal as to that sum: indeed, my impression is, that it is not illegal at all. If a party who has been discharged under the Insolvent Debtors' Act, be subsequently arrested on mesne process [145] for a debt in respect of which he was discharged, the law enables him to apply for his discharge; but if an action be brought against him, and instead of pleading his discharge, he allows the plaintiff to obtain final judgment, it is his own default, and the law must take its course. The rule for setting aside the order of my Brother Rolfe must therefore be absolute.

The rest of the Court concurred.

Rule absolute.

MANN v. WILLIAMSON. Exch. of Pleas. 1840.—The affidavit, in answer to a rule for judgment as in case of a nonsuit, stated that the plaintiff, after filing the declaration, was given to understand that the defendant was insolvent, and therefore instructed his attorney not to proceed to trial:—Held, that this affidavit was not sufficient to compel the defendant to accede to a *stet* processus, but that he was entitled to a peremptory undertaking.

[S. C. 10 L. J. Ex. 16; 4 Jur. 1063.]

Cowling shewed cause against a rule nisi for judgment as in case of a nonsuit, on an affidavit of the plaintiff, which stated that after filing the declaration in this cause, he had been given to understand that the defendant was in insolvent circumstances, and unable to pay the debt and costs, and had therefore instructed his attorney not to proceed to trial. Under these circumstances, the defendant ought to be compelled to accept a *stet* processus.

Gray, *contra*, contended that the affidavit was not sufficient to entitle the plaintiff to a *stet* process, but that the rule ought to be discharged on a peremptory undertaking. The plaintiff did not say that he had not proceeded in the action after he discovered the insolvency, nor that it was after issue joined; neither did he even speak to his belief of the fact. He cited *Symes v. Amor* (6 M. & W. 814; 8 Dowl. P. C. 773).

Per Curiam. The plaintiff must give a peremptory undertaking. It only appears that the discovery of the insolvency was made after filing the declaration, and the plaintiff does not even speak to his belief of it.

Rule discharged on a peremptory undertaking.

[146] *BENTLEY v. BERREY*. Exch. of Pleas. 1840.—An application for an order under 1 & 2 Vict. c. 110, s. 3, for a *capias* to issue against a defendant, cannot be made to the Court at Westminster, but may be made to a single Judge sitting there.

In this case Jervis applied to the Court to grant a special order for a *capias* to issue against the defendant under the 1 & 2 Vict. c. 110, s. 3, stating that it was essential that the order should be obtained before three o'clock, until which hour a Judge would not be at chambers: and he submitted, that the language of the statute, "shall shew to the satisfaction of a Judge of the superior Courts," &c., would include any one of the learned Judges sitting here, who would now look at the affidavits.

The Court, however, thought that the application could only be made to a Judge out of Court, or sitting alone; and shortly afterwards, all the Barons having retired for a short time except Gurney, B., that learned Judge read the affidavits, and granted the order.

BLACKWELL v. ALLEN. Exch. of Pleas. 1840.—A rule obtained on an affidavit the jurat of which is without date, will hereafter be discharged with costs.

[S. C. 10 L. J. Ex. 65.]

Humfrey had obtained a rule in this case to set aside the taxation of costs (on a rule to compute), and the judgment and execution thereon, for irregularity, with costs, on the ground that a copy of the bill of costs had not been delivered together with the notice of taxation, pursuant to the rule of this Court, M. T. 1 Will. 4, s. 10.

Corrie shewed cause, and objected that the jurat of the affidavit on which the rule was obtained had no date, and contended that for this defect the rule ought to be discharged with costs; citing *Cooper v. Archer* (12 Price, 149), and *Houlden v. Fusson* (6 Bing. 236).

[147] Humfrey, *contra*, urged that these cases were not of recent date, and that the practice had since, notwithstanding the threat held out in them, been otherwise.

The Court discharged the rule without costs; but intimated that in future the authorities referred to would be strictly acted upon, and the rule would in such cases be discharged with costs.

COTTON v. GODWIN. Exch. of Pleas. 1840.—Assumpsit by payee against maker of a promissory note for 15l. 9s. 4d., payable on demand; averring a demand on a particular day. Plea, as to £3, parcel, a set-off due at the time when the note was demanded, and ever since; concluding with a verification and prayer of judgment: and as to 12l. 9s. 4d., residue, that at the time of the demand the defendant tendered the plaintiff 12l. 9s. 4d., and hath always, from the time of making his said promise, as to 12l. 9s. 4d., been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that, before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12l. 9s. 4d., to wit, 15l. 9s. 4d., including the said sum of 12l. 9s. 4d., was due upon the note; and that before the said tender the plaintiff demanded pay-

ment of the said sum of 15l. 9s. 4d., which so included the 12l. 9s. 4d., but the defendant refused to pay the 15l. 9s. 4d.; and that at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed:—Held, on special demurrer, that the replication was good.

[S. C. 9 Dowl. P. C. 763; 10 L. J. Ex. 243.]

Assumpsit by the payee against the maker of a promissory note for 15l. 9s. 4d., dated 23rd of September, 1829, payable on demand, averring a demand made, to wit, on the 3rd of April, 1838.

The defendant pleaded, as to £3, parcel &c., a set-off for money paid, and due when payment of the note was demanded and ever since, concluding with a verification and prayer of judgment; and as to 12l. 9s. 4d., residue &c., that at the time of the said demand, to wit, on the 3rd of April, 1838, the defendant tendered to the plaintiff the sum of 12l. 9s. 4d.; and that he hath always, from the time of the making of his promise as to 12l. 9s. 4d., residue &c., been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the time of the commencement of this suit, on which issue was joined: and to the second plea, that [148] before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12l. 9s. 4d., to wit, 15l. 9s. 4d., including the said sum of 12l. 9s. 4d., was due upon and by virtue of the said promissory note: and that before the said tender, to wit, on the 1st of January, 1835, the plaintiff demanded payment of the said sum of 15l. 9s. 4d., which so then included the said sum of 12l. 9s. 4d.; yet the defendant did not then pay the said sum of 15l. 9s. 4d., or any part thereof, but then wholly neglected and refused to pay the said sum of 15l. 9s. 4d., and every part thereof; and that no set-off or other just cause then existed for non-payment of the said 15l. 9s. 4d., or any part thereof. Special demurrer, and joinder in demurrer.

The case was argued in Trinity Term, by

Wightman, in support of the demurrer. The replication of a prior demand of a larger sum is bad. The plaintiff should have replied a prior demand of the precise sum tendered, and no more: *Rivers v. Griffiths* (5 B. & Ald. 630; 2 D. & R. 215); or he should have traversed the tender, if he meant to dispute its sufficiency or validity. The replication is also bad for duplicity; for the first and second pleas together constitute but one answer to the note; and the plaintiff, therefore, should not have traversed the set-off, and also endeavoured to avoid the tender: either would have been sufficient.

Cole, contra. *Rivers v. Griffiths* merely decides that if, in answer to a plea of tender, the plaintiff does reply a prior demand of the sum tendered, and issue be taken thereon, he must prove a prior demand of the precise sum, and no more; but it is no authority for the proposition that the plaintiff must reply a prior demand of the precise sum. [149] This action being upon a note for 15l. 9s. 4d., payable on demand, the cause of action thereon accrued immediately, or at all events when payment of the note was first demanded. There may have been several demands; but the plaintiff could not properly, in his declaration, anticipate the defendant's case by alleging that he demanded payment before any tender was made: *Hollis v. Palmer* (2 Bing. N. C. 713; 3 Scott, 265). The replication admits that a tender of 12l. 9s. 4d. was in fact made; but at the same time shews also, that it was not made until after the cause of action had accrued. The prior demand of the whole amount due on the note was undoubtedly good. If there had been no such prior demand as alleged, the defendant might have traversed it. If there was such prior demand, a subsequent tender of the whole amount of the note, with lawful interest thereon, would have been bad: *Hume v. Peploe* (8 East, 168), *Poole v. Tumbridge* (2 M. & W. 223). Therefore a subsequent tender of part, without interest, must necessarily be bad as to that part, for damages thereon had then accrued. As to the second point, there is no duplicity, for the first and second pleas are quite distinct; the replications to them are also quite distinct; and the defendant has joined issue on the first, and demurred to the second. The first and second pleas ought to have been comprised in one, and for that reason are substantially bad in their present form, the cause of action on the note being entire.

Wightman, in reply. The plaintiff in his replication alleges, that, at the time of

making his prior demand, no set-off was due. That could not be traversed, or if traversed, would raise the same question as under the first plea.

The Court suggested, that each party should amend [150] without payment of costs, and the case stood over accordingly. This, however, not being assented to on the part of the plaintiff,

PARKE, B., now delivered the judgment of the Court. This case, which was argued last term, stood over for the counsel on both sides to consider whether the pleadings should be amended. It has been intimated to us that the counsel for the plaintiff declines the proposal, and requires the opinion of the Court upon the pleadings as they stand. We think the plaintiff is entitled to our judgment. [His lordship stated the pleadings, and continued.] The replication to the first plea, that of set-off, is correct, though it takes no notice of the averment that the sum claimed by the defendant was due at the time of the demand mentioned in the declaration; that circumstance was wholly immaterial on a simple plea of set-off, where the defence is merely the existence of a cross demand, as this is, which is a plea as to the sum of £3 only. Indeed, upon looking more carefully at the pleadings, the replication to the first plea is not demurred to.

It is unnecessary to decide whether the second plea, which is a plea to part of an entire sum due on a promissory note, of a tender of that part only, is bad, without shewing in the same plea, in some way, that it was all that was due at the time; as we are clearly of opinion that the replication to that plea is good. The principle of the plea of tender is, that the defendant has performed, so far as he could perform, his part of the contract, by being always ready to pay the debt, and actually offering to do it; but this replication shews that there was a time when the defendant was not ready to perform his part, viz. when the demand was made of the whole amount of the note, at which time he ought to have been ready to pay the whole, as the whole was then due, according to the averments in [151] the replication, which must be taken to be true on this demurrer. That being so, a subsequent tender of part was unavailing. Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

ACEY AND ANOTHER, Executors of Simpson v. FERNIE, Secretary to the British Commercial Insurance Co. Exch. of Pleas. 1840.—Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the Insurance Company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the Company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the Company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount:—Held, first, that the mere debiting the agent with the premium could not be considered as a payment to the Company by the assured; secondly, that as the agent had no authority to contract for the Company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the Company's books, debiting him with the amount, were no evidence of a new agreement between the Company and the assured.

[S. C. 10 L. J. Ex. 9. Distinguished, *In re Economic Fire Office*, 1896, 12 T. L. R. 142. Followed, *London and Lancashire Life Assurance Company v. Fleming*, [1897] A. C. 499.]

This was an action brought, under the direction of the Court of Chancery, to recover the sum of £400, the amount of an insurance with the British Insurance Company on the life of Charles Harper Simpson, on the 16th of March, 1831, for a period of seven years, at an annual premium of 5l. 19s. 8d. The first count set out the policy, and then averred the payment of the premiums on the 15th day of March (the day on which it was due) in every subsequent year during the life of the assured,

to wit, on the 15th day of March, 1832, and on the 15th day of March, 1833; and that the assured died on the 14th of April, 1833. The second count was similar to the first, except that it alleged the assured to have failed in the payment of the premium on the 15th of March, 1833, and averred that he had afterwards paid the sum of 5l. 19s. 8d., the amount of such premium, on the 12th day of April in the same year, when the Company accepted it, and agreed that the policy should be of like force and effect as if the premium had [152] been paid at the proper time. The defendant pleaded to the first count, that the premium was not paid in every subsequent year on or before the 15th day of March, to wit, on the 15th day of March, 1833. To the second count he pleaded, 1st, non assumpsit; 2ndly, that the 5l. 19s. 8d. were not paid on the 12th of April, as and for the premium for the year commencing on the 16th day of March, 1833; 3rdly, that the promise alleged to have been made on the 12th of April, 1833, was obtained by fraud and covin. Issue was joined on these pleas; and at the trial before Lord Abinger, C. B., at the London Sittings after last term, it appeared that the insurance had been effected through the Company's agent at Hull; and that the premium payable on the 15th of March, 1833, was not in fact paid until the 12th of April, on which day the money was paid to the agent, who then gave the following receipt:—

“British Commercial Life Assurance Company, London.

“Receipt, 3258.—Sum assured, £400.—Policy, 3298.

“Received the 12th day of April, 1833, of Mr. Charles Harper Simpson, the sum of 5l. 19s. 8d., being the premium of insurance on four hundred pounds for one year from the 15th day of March, 1833, on the life of himself.

“5l. 19s. 8d.

“(Signed) GEO. GREENWOOD.”

At the bottom of the receipt was the following:—

“If this receipt be not taken up within fifteen days from the day the premium becomes due, it must be returned to the office; as, after that period, the insurance being cancelled, the several receipts will be of no avail. (See conditions of insurance in the printed proposal of the Company.)”

The instructions given by the Company to their agent, Greenwood, were, *inter alia*, “That the premium on every life policy must be renewed within fifteen days at the latest from the time of its becoming due; and if not paid within that time, you are to give immediate notice to the office of [153] such fact; and in the event of your omitting to do so, your account will be debited for the amount after the fifteen days are expired, and you will be held responsible to the Directors for the same.” No notice was given to the Company by Greenwood of the non-payment of the premium within the fifteen days after it became due; and, in accordance with the usual practice of the office, the premium was entered in the Company's books as paid on the 15th of March, and the agent was debited for the amount. The Lord Chief Baron directed a verdict for the defendant, giving the plaintiffs leave to move to enter the verdict for them, on such of the issues as the Court should think fit.

Sir F. Pollock now moved accordingly. The evidence shewed that there was payment of the premiums according to the regulations established by this Company; and it was not necessary that the premium should be paid on the day it became due, without reference to the practice of the office. It is sufficient if it were paid according to the ordinary rules of the office. Here the Company, having received no notice from their agent that the premium had not been paid, entered it as paid in their books on the day it became due; they are bound by that entry, and cannot be allowed afterwards to say that it was not so paid. [Parke, B. The question is, whether that would not be evidence of a new contract.] It goes further than that. The fact of the Company having debited the agent with the premium, was evidence that they had taken his responsibility for the amount, and accepted it as paid on that day. [Parke, B. The agent was not debited with the money until after the expiration of the fifteen days, when the contract was at an end.] The money was paid to the agent, and a receipt given, without any objection being made, or anything to shew a repudiation of that mode of dealing, [154] and this was evidence to go to the jury

that the money was to be considered as actually paid, according to the practice of the office. There was nothing to prevent Greenwood from paying for the assured; and if the Company adopted that payment, it must be considered as a payment on the proper day. The arrangement was, that if the agent did not give notice, he should be debited with the amount; he was debited with it, and some days afterwards the money was paid to him. That was in effect a payment to the Company, who must take the consequences of having entered into such an arrangement. [Lord Abinger, C. B. It was not an arrangement entered into with the assured, but between the company and their agent; how can the assured take advantage of that?] Suppose the agent had told the assured that he would pay the premium for him, and he should repay him when convenient to him, and he relied upon his doing so: surely the assured ought not to suffer.

Then as to the second count. Although an agent may be liable to his principal where he exceeds his authority, the principal is bound by his act. Where there is a general agent, who has in fact a limited authority only, but that is unknown to the person with whom he enters into a contract, the principal must look to his agent for any breach of his instructions, but the principal is bound if the agent exceeds his authority. [Lord Abinger, C. B. What an agent does within the scope of his general authority binds his principal; but where there is a limited authority only, then what he does must be shewn to be within the scope of that authority. There was here no evidence to go to the jury of a new contract.]

LORD ABINGER, C. B. The Court concurs with me in thinking the verdict must be supported, and this rule therefore cannot be granted. Sir Frederick Pollock says very [155] truly, that on the trial I entertained an impression somewhat favourable to his view of the case; but that was at the time when we were considering whether the agent of the Company might not be made the agent of the assured; and in that view of the case, if it were understood that payment was to be made by the agent, and there was an agreement on his part to advance the money, then it might be considered as a payment on the day when it became due: but there was no evidence to shew that Greenwood was the agent of the assured, and I was of opinion that he could not be so considered. It seems to me that the provision, that he should be debited as if the premium was paid, was to operate as a penalty on him; but does not authorize third persons to take advantage of that which was a mere private arrangement between the Company and the agent, for the purpose of insuring the due payment of all monies which were to be received by him. The first count states that the premium was paid at Hull when due, whereas it was not so. Then as to the second count, there was no evidence of any new contract having been made, nor was there in any sense any authority in the agent to make a new contract under these circumstances with the persons assured. I think there cannot be a rule.

PARKE, B. I entirely agree in the view taken of the case by my Lord Chief Baron. With regard to the latter point, that appears to me to be altogether out of the question; because the very receipt itself shews that Greenwood had no authority, as agent, to make a bargain binding the Company to a new contract on the terms of the old contract, but varying the time of payment. Greenwood is not the general agent of the Company; he is merely an agent with limited powers, to receive premiums; he had authority to bind the Company in respect of that money, as if it was paid to the Company itself; but he had no other power, [156] and therefore it seems to me that the payment made to Greenwood, and for which he gave a receipt, dated the 12th of April, is no proof of an agreement on the part of the Company to enter into and make a new policy of assurance on the terms of the old one, varied only as to the time at which the premiums were to be paid. The memorandum on the back of the receipt, is a memorandum made by the Company, and shews that, unless the money was paid in fifteen days, the policy was at an end altogether. It is impossible to consider the debiting of the agent with the amount of the premium as a payment on the original day, according to the allegation in the first count: the only question is, did the Company mean to make themselves liable as on a new contract? It seems to me that they did not, and that the meaning of the transaction was merely to keep their agents right, and in case of neglect to be able to come upon them for the amount of the premium by way of penalty; but they did not mean thereby to make themselves liable for the amount of the policy. It is only on the ground that they became liable upon a new contract, that anything can be made of the case on the part of the plaintiff.

It appears to me that this was purely a mode of keeping their own agents in order, by holding over them in *terrorem* that they should be responsible for the amount of money not received. I think, therefore, that the verdict is right, and ought not to be disturbed.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[157] BECKETT AND OTHERS v. DUTTON. Exch. of Pleas. 1840.—Declaration on a promissory note for £250, made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs or their order on demand. Plea, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for £250, made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date. There was no proof of any other note between the parties.—Held, that this was a variance properly amended at *Nisi Prius*, under the 3 & 4 Will. 4, c. 42, s. 23.

[S. C. 8 Dowl. P. C. 865 ; 10 L. J. Ex. 1 ; 4 Jur. 993.]

The declaration was on a promissory note for £250, made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs, or their order, on demand, for value received. The defendant pleaded that he did not make the note. At the trial before Rolfe, B., at the last York Assizes, the note, on being produced in evidence, turned out to be a joint and several promissory note for £250, made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date, with interest. It appeared that it was given in consideration of an advance of the sum of 237l. 10s. to the defendant's wife, and there was no proof of the existence of any other note between the parties. The learned Judge, on the application of the plaintiffs' counsel, allowed the record to be amended, so as to correspond with the note, and then directed a verdict for the plaintiffs, giving the defendant leave to move to enter a nonsuit, if the Court should think the amendment ought not to have been made.

W. H. Watson now moved accordingly, and contended that the learned Judge, in permitting this amendment, had exceeded the powers intended to be given by the stat. 3 & 4 Will. 4, c. 42, s. 23, in cases of variance. This was a material variance in substantial parts of the note, and the defendant has been prejudiced by the amendment. The note produced differs in its date, in the parties to it, and in the period of its duration, from that declared upon. Suppose the defendant had suffered judgment by default to the declaration, that judgment would not be available to him in a subsequent action by a third party upon this note. Besides, the note was for £250, when it appears [158] that the actual sum due was 237l. 10s. only, and the defence might have been that the transaction was usurious, which could not have been pleaded without averring that the note was different from that declared on. [Alderson, B. How could there be any defence of that kind? the difference between the two sums is not greater than the lawful interest on the 237l. 10s.] At all events, this is a mistake which could have arisen only from great negligence, and an amendment in such a case tends only to encourage it.

PARKE, B. I do not see that any real hardship or prejudice has been done to the defendant by this amendment. It is not pretended that there is more than one promissory note in existence between these parties, and the sum, as well in the note declared on as in that proved in evidence, is substantially the same, and became due at the same time. It is clearly a mere misdescription. As to the usury, no such thing appears ; and if it really existed, it might have been pleaded to the note as set out in the declaration, without prejudice to the defence. It seems to me that the amendment was a very proper one.

ALDERSON, B. It appears to me that this is just the case in which the legislature intended that the discretionary power of amendment should be exercised.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[159] THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND v. JAMES REID AND JOHN REID. Exch. of Pleas. 1840.—Under a *capias utlagatum*, issued in February 1838 (in an action on foreign bills of exchange for upwards of 7000l.), goods of the defendants, who were merchants carrying on business in the United States, were seized and sold; out of the proceeds of which the plaintiffs received upwards of £4000. On application to reverse the outlawry, the Court directed that it should be reversed on payment of all costs, and on entering a common appearance, and that the money received under the levy should be invested in Exchequer bills, and deposited with the officer of the Court, to abide the event of the suit.—Where, on an application to reverse an outlawry, the Court see sufficient grounds for believing that the defendant does not intend to remain in this country, and that the circumstances are such as that a Judge would order a *capias* to issue under the 1 & 2 Vict. c. 110, s. 3, it seems that they will still impose on the defendant the condition of putting in special bail.

[S. C. 8 Dowl. P. C. 848; 10 L. J. Ex. 62; 4 Jur. 1204.]

This was an action to recover from the defendants a balance of 2871l. 14s., due in respect of several foreign bills of exchange for upwards of £7000, drawn by the defendants, payable sixty days after sight, and indorsed to the plaintiffs. The action was commenced by *capias*, before the stat. 1 & 2 Vict. c. 110, came into operation. The affidavit to hold to bail stated the amounts and particulars of the bills, and, as to some of them, that they had been refused acceptance and payment by the drawees; as to others, that they had been refused payment by the acceptors. A writ of *exigi facias* was issued on the 12th February, 1838, and the plaintiffs proceeded to outlawry against both the defendants, and a special *capias utlagatum* was issued on the 10th of May, 1838, under which goods of the defendants were seized and sold, out of the proceeds of which the rest of the plaintiffs' claim was satisfied. In this term, Crompton obtained a rule to shew cause why, upon entering a common appearance, the proceedings to outlawry should not be reversed. The affidavit of the defendant, James Reid, in support of the rule, sworn 20th of October, 1840, stated that the defendants had continually resided in the United States for five years last past (except as after mentioned), where they had carried on business as commission and general merchants in copartnership; that in June 1837, the defendant, John Reid, came to England to lay the state of his affairs before their creditors, and on the 27th of September, 1837, left England and returned to the United States; that in August 1839, he again proceeded to England, and remained there about a month, when he returned to the [160] United States to attend to his business, where he had ever since remained; that the defendant James Reid came to England for the purpose of his general business in August, 1836, and in the September following returned to the United States, and remained there until August, 1840, when he left the United States for this country, and arrived in England on the 9th of September: and that both the defendants were abroad when the writ of *exigent* was issued against them. The affidavit in opposition to the rule stated, that on the 20th of July, 1839, a summons was taken out by the defendants' attorney, calling on the plaintiffs to shew cause at chambers why the outlawry should not be set aside; but that on the 25th of July, the plaintiffs' attorneys received a letter from the defendants' attorneys, stating that they had that morning received instructions from their clients not to proceed with the application.

Sir F. Pollock (with whom was Bayley), shewed cause against the rule, and contended that, as all the proceedings were regular, the Court ought not to set aside the outlawry on the defendants' merely entering a common appearance, but would impose upon them such further terms as they should deem equitable; and that the defendants ought to be called upon to pay the costs and put in bail, and the plaintiffs be permitted to retain the money received under the execution, in part satisfaction of their debt. He urged that the stat. 1 & 2 Vict. c. 110, did not apply to this case; because here the defendants avowed that their permanent residence was abroad, and therefore, if they were now within the jurisdiction, an affidavit might well be made that they were about to leave England: and he cited *Matthews v. Erbo* (1 Ld. Raym. 349; Carth. 459), in which, under similar circumstances, the Court refused to interfere at all on motion, but left the defendant to his writ of error. The Court then called on

[161] Cresswell and Crompton, contra. If the affidavit to hold to bail appears to be so substantially defective that the defendants, if they had been arrested on it, would have been entitled to their discharge on entering a common appearance, it cannot be made the foundation of proceedings to outlawry, and they are entitled to reverse the outlawry on entering a common appearance. Here the affidavit does not shew, as to all the bills, that they are overdue: it merely states that they have been accepted, and that payment of them has been refused by the acceptor; but it does not state when they were accepted, and therefore discloses no means of computing the sixty days' sight, so as to shew that they were overdue. And where an affidavit to hold to bail is bad as to part of the sum for which the arrest is made, it is bad altogether, and the defendant is entitled to his discharge: *Kirk v. Almond* (2 C. & J. 354). [Parke, B. That case has been disapproved of, and is acted on only where the part which is good cannot be separated from that which is bad (see *Cunee v. Rigby*, 3 M. & W. 67). Here this affidavit is undoubtedly good as to some of the bills.] At all events, it is clear that these proceedings would be bad on error, as the defendants were abroad when the exigent was awarded. The plaintiffs, therefore, are not in strictness entitled to the costs of outlawry; *Ibbotson v. Fenton* (6 Ad. & Ell. 772); and as to the condition of putting in bail, since the stat. 1 & 2 Vict. c. 110, it is not in the ordinary course to require special bail to be put in, on the reversal of an outlawry. *Harvey v. O'Meara* (7 Dowl. P. C. 725) is expressly in point. There the action was commenced, and an *exigi facias* was awarded, and the proceedings in outlawry were completed, during the defendant's absence abroad, and before the passing of the statute; and on an application, after its passing, to set aside the outlawry, and discharge the defendant from custody on entering a com-[162]-mon appearance and on payment of costs, the Court made the rule absolute. It is said that, under the circumstances, this case is such as that an affidavit might be made, on which a Judge would issue a *capias* under the statute. Even if this were so, that ought to be the subject of a distinct application: if the condition of putting in bail is imposed now, the defendants are precluded from answering, and shewing that they do not intend to leave the country.

Nor are the plaintiffs entitled to retain the money levied under the *capias* utlagatum. The proceedings being merely for the purpose of compelling an appearance, the case is similar to that of money paid into Court in lien of bail; when the party enters the appearance, he takes it out again. All that the plaintiffs can demand is to be put in the same condition as when the proceedings in outlawry were commenced.

LORD ABINGER, C. B. It appears to me that this rule cannot be absolute except upon payment of costs; and further, that under the special circumstances of the case, we should be doing great injustice if we insisted on the plaintiffs' returning the money which has been levied: more especially as the majority of the Court think that we ought not also to impose the terms of putting in special bail. The Court all think that the money should remain to be subject to the final decision of the cause; because, if the outlawry be reversed and the money returned, the defendants may go abroad again, and so prevent the plaintiffs from obtaining execution. The only remaining question therefore is, whether the defendants ought to be compelled to put in bail. I should myself have thought the particular circumstances of the case were sufficient to justify the Court in requiring them to do so. The proceedings in outlawry were commenced in 1837; the seizure took place in May 1838; in July 1839, an application is [163] made to set aside the outlawry, which is abandoned a few days afterwards, it being clear that the defendants, or one of them, were then in this country. Then it is not until this present month of November, 1840, that this application is made to the Court. All the facts speak plainly to my mind, that the application was delayed until the defendants should have gone away to America, so that the Bank would have no opportunity to apply for a *capias* under the statute. I admit the general principle, that, since the 1 & 2 Vict. c. 110, a defendant is entitled to set aside his outlawry without putting in special bail; but here I think the circumstances afford sufficient ground for concluding that the defendants, having been in England, have gone abroad in order to make this motion more conveniently, and that their delay has given them the means of getting away, and has deprived the plaintiffs of the opportunity of obtaining special bail. I think it must be inferred that they intended to go abroad; and that it is a case in which a Judge would have made an

order for a *capias* to issue. This, is, however, a matter of no great importance, as we are all agreed that the money must remain until the action is determined.

PARKE, B. There is no doubt whatever that it is the constant practice of the Court, on motion to set aside an outlawry, to impose such terms as they think reasonable, this being an application to the equitable jurisdiction of the Court. If the defendant chooses to resort to a writ of error, he is at liberty to do so; but if he applies to the Court, the invariable practice is to impose on him the terms of paying costs, unless he satisfactorily makes it out that the plaintiff vexatiously proceeded to outlawry, by an abuse of the process of the Court, knowing that the defendant was not subject to outlawry. That is not the present case; so that, at all events, the defendants must pay all the costs. The next question is as to the money levied under the [164] outlawry; and under the circumstances, it appears to me that we ought not to require the plaintiffs to refund it, but that the equitable course is, that it should remain in *medio*, to abide the decision of the cause. With respect to the question of bail, I think the defendants ought not to be required to put in special bail. Nothing turns upon the validity of the affidavit of debt, which appears to me to be perfectly correct. But since the stat. 1 & 2 Viet. c. 110, and the decision of my brother Coleridge in *Harvey v. O'Meara*, the general rule of the Courts ought to be, to discharge a defendant from outlawry on entering a common appearance, and on payment of costs. If the plaintiff says that he has lost an opportunity of arresting the defendant he should make that clearly appear by affidavit. I think that it is not so here: non constat but that both these defendants are now within the jurisdiction, and if so, the plaintiffs may have an opportunity of applying to a Judge for a *capias* against them, provided they are about to leave England. Inasmuch, therefore, as it does not appear but that the plaintiffs have still an opportunity of holding the defendants to bail, I think we ought to abide by the general rule.

GURNEY, B. I am of the same opinion. I think the costs must be paid, and that the money should be retained to abide the event; but I agree with my Brother Parke, that a sufficient case is not made out to require special bail.

ROLFE, B. I am of the same opinion. The only doubt I had was as to the last point: I thought at first that sufficient matter was disclosed to hold the defendants to bail, but I have now come to a different conclusion. All that appears upon the affidavit is, that the defendants are persons residing abroad, and now in England; at least it is not shewn that they have left England.

[165] The rule was made absolute for reversing the outlawry, on entering a common appearance, and on payment of the costs of outlawry and of this application; the defendants to invest the money received by them in Exchequer Bills, and deposit the same with the officer of the Court, to abide the event of the suit. The defendants to have a week to draw up the rule; and if not drawn up within that time, the rule to be discharged with costs.

SWEETING v. ASPLIN. Exch. of Pleas. 1840.—R. having undertaken, by a written contract, to build for the Corporation of Henley a house on a farm occupied by A., engaged S. to do the carpenters' work; and the following agreement was made and signed by R. and S., and witnessed by A.:—"It having been arranged that R. shall build a new house on the farm occupied by Mr. A., it is hereby agreed and understood between the said R. and S., that S. shall do all the carpenter's work, &c. under the inspection and control of the said A., and that the amount of the said work shall be paid by Mr. A. to S. only, and that this agreement shall be his guarantee for so doing." On the same day, A. wrote to S. as follows:—"It having been agreed that R. shall build a new house on the farm occupied by me, and that, by an agreement this day shewn me between you and S. you are to do the carpenter's work, &c., and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge:—"Held, that S., having done the work, could not maintain an action of *indebitatus assumpsit* for work and labour against A. for the value of it.

[S. C. 10 L. J. Ex. 3.]

Indebitatus assumpsit for work and labour and materials, goods sold and delivered, and on an account stated. The defendant pleaded, except as to 63l. 13s., (which was

paid into Court), non assumpsit, and also other pleas which it is not necessary to state. At the trial before Gurney, B., at the last assizes for the county of Essex, the following appeared to be the facts of the case:—

The corporation of Henley-on-Thames being about to build a house for the defendant, on a farm which he occupied as their tenant at West Tilbury, requested the defendant to take the necessary steps for that purpose. He accordingly applied to one Rowland, a bricklayer, to build the house. Rowland undertook it, and engaged the plaintiff to do the carpenter's and other work. A written contract was entered into between Rowland and the corpor-[166]-ation, to which the plaintiff was no party, but was aware of its contents. After it had been signed by Rowland, the following memorandum of agreement was made between Rowland and the plaintiff, and witnessed by the defendant:—

“Memorandum made this day between Samuel Sweeting, of South Ockendon, in the county of Essex, carpenter, and Isaac Rowland, of the same place, bricklayer. It having been arranged that the said Isaac Rowland shall build a new house at the farm occupied by Peter Asplin, Esq., called Gun-Hill Farm, in the parish of West Tilbury, it is hereby agreed and understood between the said Samuel Sweeting and Isaac Rowland, that Samuel Sweeting is to do and perform all the carpenter's, joiner's, painting, glazing, ironmonger's work, and all the chimney pieces wanting, in a proper manner, and also the stonemason's and slater's work, and find materials for the above works, under the inspection and control of the said Peter Asplin, and the person that shall be appointed to inspect and survey the work, and by no other person. And it is further agreed and understood between the said Samuel Sweeting and Isaac Rowland, that the amount of the said work of the said Samuel Sweeting shall be paid by Mr. Asplin to Samuel Sweeting only, and that this agreement shall be his guarantee for so doing. Witness our hands this 23rd day of February, 1839.

“Witness, Peter Asplin.

“ISAAC ROWLAND.

“SAMUEL SWEETING.”

On the same day, the defendant wrote and sent the following letter to the plaintiff:—

“West Tilbury, February 23, 1839.

“Sir,—It having been agreed that Mr. Isaac Rowland, of South Ockendon, bricklayer, shall erect and build a new house on the farm occupied by me, called Gun-Hill Farm, [167] in this parish, and that, by an agreement this day shewn me, between you and the said Isaac Rowland, dated this day, you are to do and perform the carpenter's, joiner's, glazing, ironmonger's, stonemason's, and slater's work, and all the chimney pieces wanting for such work; and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge.—I am, Sir, &c.

“To Mr. S. Sweeting, carpenter,

“PETER ASPLIN.

“South Ockendon.”

The work mentioned in the above agreement was proved to have been done by the plaintiff.

It was contended for the defendant, that upon these facts, Rowland, and not the defendant, was the original debtor to the plaintiff, and that this action of indebitatus assumpsit could not be maintained. The learned Judge, however, thought that, taking the two documents together, the defendant had entered into an original undertaking, and had made himself the principal debtor to the plaintiff: and under his direction a verdict was found for the plaintiff, damages 157l. 10s. 10d.

Platt having obtained a rule nisi for a new trial, on the ground of misdirection,

Thesiger and Gurney shewed cause. The only question is, whether the undertaking of the defendant amounted only to an agreement to pay the plaintiff in default of Rowland's paying him, or whether it was not an absolute agreement by the defendant to pay. And taking the two papers together, which are to be considered as forming one contract, although they are not drawn up with technical accuracy, they are sufficient to shew that the defendant, who was to derive benefit from the work, entered, not [168] into a mere guarantee, but into an original undertaking. There is

nothing in the agreement between the plaintiff and Rowland which creates an original liability in Rowland, and on which he could be sued: it appears to amount to this, that as to the work therein mentioned, the plaintiff shall be put in the place of Rowland, and be paid for it by the defendant instead of by Rowland. The case resembles that of *Simpson v. Penton* (2 C. & M. 430). There the plaintiff introduced the defendant to an upholsterer, and in his presence asked the upholsterer if he had any objection to supply the defendant with some furniture; and that if he would, the plaintiff would see him paid at the end of six months. The upholsterer agreed to give this credit, and the plaintiff gave him the order, and the goods were supplied accordingly. It was held that this was an original and not a collateral undertaking by the plaintiff, and that the plaintiff, having paid for the goods at the end of the six months, might recover the money so paid from the defendant. So here, it appears that, before the plaintiff would undertake the work—as there, before the party would supply the goods—he obtained the undertaking of the defendant to pay. *Dixon v. Hatfield* (2 Bing. 439; 10 Moore, 42) still more resembles the present case. There one West had undertaken to complete the carpenter's work in the defendant Hatfield's house, and to find all materials. West being delayed for want of funds or credit to procure timber, it was supplied by Moore, on the defendant's signing an undertaking in these terms:—"I agree to pay M. for timber to house in Annett's Crescent, out of the money I have to pay William West, if West's work is completed." This was held to be a direct undertaking by the defendant to pay on the completion of the work, and not a guarantee to pay if West should fail. *Andrews v. Smith* (2 C. M. & R. 627) is an [169] authority to shew that the undertaking here was not the less an original one, because it was to pay out of the funds that should come to the defendant's hands for Rowland. [Parke, B. This is in truth nothing more than an agreement between Rowland and the plaintiff, that if money should become due to Rowland from the corporation of Henley, he, the defendant, should pay out of the funds in his hands to the plaintiff instead of to Rowland, and that that paper should be his warrant or authority for so doing. The defendant merely attorns to that agreement, and undertakes to pay, out of the monies due from the corporation to Rowland, directly to the plaintiff. Alderson, B. Why should Rowland and the plaintiff agree that the defendant should be guaranteed in making the payment, if he is to be personally liable?] The whole work was done for the defendant's benefit, though nominally for the corporation. [Parke, B. According to your argument, even if Rowland had wholly neglected to perform his work, so that, instead of £500, £250 only was payable, which was swallowed up by the carpenter's work, that must be paid by the defendant. Alderson, B. In *Andrews v. Smith*, the plaintiff declared on a special contract, and alleged that funds had come to the defendant's hands; here the plaintiff sues generally for work, and labour.] If the plaintiff refused to undertake the work, except on an undertaking by the defendant to pay, how is the case distinguishable from *Simpson v. Penton*? [Alderson, B. No doubt it is an original undertaking; but the question is, whether it can be the foundation of an action for work and labour.] There is nothing on the face of the agreement to shew that the defendant was to be liable only conditionally on having funds of Rowland's in his hands. If so, the plaintiff is entitled to recover on the general count.

Ogle, (with whom was Platt) contra. First, this was a collateral promise on the defendant's part to pay the debt [170] of Rowland; but secondly, if it was not, the plaintiff cannot recover in this form of action, but should have declared specially. Here the contract with the corporation was signed by Rowland as the only contracting party; then Rowland and the plaintiff enter into their sub-contract. The argument on the other side is founded altogether on the hypothesis that Rowland did not thereby become liable to the plaintiff; but it is clear that he did, and that if the defendant had failed to pay the plaintiff, he might have sued Rowland. Again, supposing the plaintiff had done the work improperly, who but Rowland could have sued him? If this be so, then the subsequent agreement between the plaintiff and the defendant merely amounts to a guarantee for Rowland's debt. If the plaintiff gave credit to Rowland, the defendant's undertaking must be a collateral one; and if so, the plaintiff clearly should have declared specially: *Milnes v. Southorpe* (1 Saund. 211). The cases cited on the other side do not apply. In *Dixon v. Hatfield*, and *Andrews v. Smith*, the plaintiff declared on the special contract, averring the facts necessary to shew that the defendant had become liable. The words of the agreement

in the present case clearly shew that another party than the defendant was primarily liable; and that the defendant was only to pay on having funds payable to Rowland, and on having a proper discharge from him.

PARKE, B. It seems to me that this rule ought to be made absolute. I do not think it is necessary to dispose of the point, whether this is or is not a collateral engagement on the part of the defendant, so as to require a note in writing; if it were, I should be disposed to doubt, on one construction of these documents, whether it was not a collateral engagement. If it was an undertaking by the defendant to pay so much as should be due from the [171] corporation to Sweeting by Rowland's assignment, then it would be a collateral undertaking for the corporation; but if it meant that, if the defendant had money in his hands, he was to pay on the assignment of Rowland, then it would not be collateral, and he would be responsible on his simple parol promise. It is unnecessary, however, to decide that point; here there is a note in writing; but the question is, whether the plaintiff can recover on a simple *indebitatus assumpsit*, or whether he ought not to declare upon the special contract: whichever it is, I think, on the true view of the contract in this case, that no such relation is shewn between the plaintiff and the defendant, as that the plaintiff could sue the defendant for work and labour; that there is no such privity between them as to enable him to do so; but that he could only sue on the special agreement. The question depends on the construction of the agreement proved at the trial. It appears that the corporation had agreed with Rowland that he should build the house for them for a specified sum. Then comes the first memorandum of agreement between Rowland and Sweeting. If the former part of that agreement had stood alone, it would clearly have been nothing more than a sub-contract between Rowland and Sweeting, Sweeting looking to Rowland for payment, and the corporation to Rowland for performance of the work. The memorandum refers to the original agreement which had been entered into between Rowland and the corporation, and which was under seal. The argument for the plaintiff is, in effect, that the parties meant to vary that original agreement under seal, and to constitute a new one, whereby the defendant was to make payment to Sweeting, leaving the original agreement to stand as to the rest; but the recital shews clearly that they had no such intention, but that they meant it to remain in full force. The agreement is in effect this,—“When the contract is fulfilled between me, Rowland, and the corporation, I agree that you, Sweeting, shall receive [172] from me so much as is ascribable to your work, which is to be performed under the inspection and control of Asplin and the surveyor, and of no other person; and it shall be paid by him to you only, instead of to me, and this agreement shall be his guarantee for so doing, i.e. shall be his warrant, as agent of the corporation, for making that payment.” The defendant is the subscribing witness to this agreement; that, however, does not necessarily import that he knew the contents of the instrument. But his own subsequent agreement of the same date shews his knowledge of the former; and he thereby undertakes, that so much of the money which shall be due from the corporation to Rowland, as is properly ascribable to the carpenter's work, shall, on his receiving a proper discharge from Rowland, be paid by him directly to the plaintiff. Therefore, whichever this be, whether a collateral or an original contract, it is a special contract, and does not render the defendant liable as for work and labour; the plaintiff must sue upon the contract itself, i.e. according to the terms of the deed, which it is plain none of the parties meant to vary: it must therefore be the subject of a special action, as in *Andrews v. Smith and Dixon v. Harrison*.

ALDERSON, B. I am of the same opinion. I think that, looking at both the documents together, it is clear that this was a special agreement, and not an agreement whereby one party was to do work for the other, and to be paid by him for that work when done. The original contract was by the corporation with Rowland, and there is nothing to shew that the parties intended it should be altered. If the argument for the plaintiff be right, the corporation would not have to pay for the carpenter's work at all. The case depends on the effect of two documents, one signed by the defendant alone, the other by the plaintiff and Rowland, witnessed by the defendant. If there was a direct agreement between the plaintiff and the defendant, why should the [173] plaintiff and Rowland come to any arrangement at all? Here is an agreement between Rowland and the plaintiff, that the plaintiff shall do the carpenter's work, and shall be paid for it in a particular way, that is, by the defendant to him

only; why to him only, unless the defendant had to pay for it to some one else? It must mean to him and not to Rowland. Why, again, should there be an agreement between Rowland and the plaintiff, which should be a warrant to the defendant to pay to the plaintiff? If the money was due from the defendant to Sweeting, Rowland had nothing to do with the matter; but if it were payable first to Rowland, it would require his signature and warrant to authorize payment to the plaintiff, according to his sub-contract. That construction gives effect to all the words of the instrument; but the other construction gives none to the words I have quoted: as Lord Ellenborough once said, it is a complete jettison of words. Then the defendant, having that agreement between Rowland and the plaintiff shewn to him, undertakes to pay the plaintiff by having a proper discharge, i.e. he undertakes to fulfil that sub-agreement, on having such a discharge as to shew that, as between Rowland and the plaintiff, a debt is due to the plaintiff for the carpenter's work. If the money were due directly to the plaintiff, the payment would of itself be a discharge. The plaintiff, therefore, should have sued on the special contract, and shewn that Rowland had not paid him, and that the defendant had money of Rowland's in his hands.

GURNEY, B. The objection at the trial was, that this was not a collateral but an original undertaking. I retain the opinion I then expressed, that it is an original one. The other question is one of some difficulty, and on which I entertain considerable doubt. I yield, therefore, to the opinions of the rest of the Court.

ROLFE, B. The question which it is necessary to decide [174] in the affirmative, in order to sustain this action, is, whether work and labour has been done by the plaintiff for the defendant, to be paid for by the defendant to the plaintiff. I think that that is not the situation of the parties; but that, whether the undertaking of the defendant be an original or a collateral one, it is a special agreement, on which the defendant should have sued specially. The latter words of the second agreement appear to me to be conclusive. When a man enters into a direct agreement with another, he does not say, "I will pay you on having a receipt;" but when it is collateral, on non-payment by a third party, it is natural to express that there is to be a voucher from him.

Rule absolute.

MORLEY v. CULVERWELL. Exch. of Pleas. 1840.—The drawer of a bill of exchange, before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncanceled:—Held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value, before it became due.—A plea, in such action, that the bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and the acceptor, whereby the bill was treated as being satisfied.

[S. C. 10 L. J. Ex. 35; 4 Jur. 1163.]

Assumpsit by indorsee against drawer of a bill of exchange for £100, dated 7th of March, 1840, drawn by the defendant on and accepted by Thomas G. C. Riley, payable to the order of the defendant three months after date; indorsed by the defendant to John Short, and by Short to the plaintiff. The defendant pleaded nine pleas, of which, however, the 7th and 9th only are material to this report.

The 7th plea stated, that after the drawing and accepting of the bill of exchange in the declaration mentioned, and before the delivery of the same to the said T. G. C. Riley, before the same became due and payable, and before the commencement of this suit, and while the defendant, as such drawer as aforesaid, was the holder thereof, and entitled to sue upon the same, to wit, on the 20th of April, 1840, [175] it was agreed between the defendant and Riley, that he, Riley, should execute a certain indenture, and thereby assign by way of mortgage certain leasehold premises to the defendant, to secure the payment of a large sum of money, to wit, £853, part of which, to wit, the sum of £703, was theretofore lent and advanced by the defendant to Riley, and for part of which Riley, before the said 20th of April, 1840, gave to the

defendant certain bills of exchange, drawn by the defendant on Riley, and accepted by him, [stating four bills of exchange, one of which was the bill mentioned in the declaration]; and that the defendant should deliver up to Riley the said four bills of exchange, that is to say, the three bills of exchange in this plea mentioned, and the said bill of exchange in the declaration mentioned, as discharged and fully satisfied by the said T. G. C. Riley. Averment, that in pursuance of the said agreement, the said mortgage was executed by Riley, and accepted and received by the defendant in discharge and satisfaction of the said four bills of exchange, and thereupon the said bills respectively were given up and delivered to Riley, as paid and fully satisfied by him, Riley, the acceptor thereof, and not for the purpose of being transferred, indorsed, or otherwise negotiated; that the said bill in the declaration mentioned was indorsed and delivered by Riley to Short, without any consideration or value for the same, and without any authority or sanction from the defendant, as drawer thereof, and that Short indorsed and delivered it to the plaintiff without any consideration or value for the same, and the plaintiff now holds the same without having given any consideration or value for the same. Verification.

The 9th plea stated, that the said bill of exchange was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided, and that the said bill afterwards, and after the drawing and accepting thereof, and before the same became due, to wit, [176] on &c., was fully paid and satisfied by the said T. G. C. Riley, and was then, to wit, on &c., and after the said bill had been so fully paid and satisfied by Riley, according to the statutes in such case made and provided, without any new stamp, or the payment of any rate or duty chargeable thereon, re-issued by the said T. G. C. Riley. Verification. To each of these pleas the plaintiff replied *de injuriâ*, on which issue was joined.

At the trial before Lord Abinger, C. B., at the last assizes for the county of Surrey, the delivery up of the bills by the defendant to Riley, the acceptor, on his executing a mortgage, was proved as stated in the 7th plea: it appeared also that Riley, before the bill in question became due, indorsed it to Short for a valuable consideration, who also, before it became due, indorsed it for a valuable consideration to the plaintiff. It was not proved that the plaintiff had any knowledge of the circumstances under which the bill had been negotiated by Riley. The learned Chief Baron thought that the 7th and 9th pleas were proved in substance, and directed a verdict on those issues for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, with £102 damages. Platt having obtained a rule nisi accordingly.

Thesiger and Petersdorff shewed cause. The question upon this rule is, not whether the pleas are or are not good in point of law, but whether they were proved in fact. The whole agreement stated in the 7th plea was proved, and that was sufficient to prevent the plaintiff from recovering. Here the acceptor, during the running of the bill, discharged and satisfied it by agreement with the drawer; and it could not afterwards be negotiated by the acceptor, so as to give a valid title to an indorsee. There is a distinction between the payment of a bill of exchange by a party primarily liable upon it, and payment of it by any other party. If it be paid by the acceptor, it cannot afterwards be negotiated at all: if by another party to it, and if by negotiating it, he would make subsequent parties liable upon it, he cannot negotiate it; otherwise he may. The agreement of the indorsers of a bill is, that the acceptor shall pay it, or that they in his default shall do so. By his payment of it, that contract is fulfilled. There is no rule of law which says that it is to be paid by the acceptor, at the precise moment when it becomes due. It is in that respect like a bond. Most of the cases on this subject were decided before or without reference being made to the Stamp Act, 55 Geo. 3, c. 184, s. 19, which enacts, that "all promissory notes, bills of exchange, drafts, or orders for money, not hereby allowed to be re-issued, shall, upon the payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available for any purpose whatever." In *Burbridge v. Manners* (3 Campb. 194), it was held that a note, which, before it became due, was paid and taken away from the banker's where it lay, and was indorsed, also before it became due, for valuable consideration to the plaintiff, might be recovered upon against the payee. The facts of that case, however, do not appear to be very intelligibly stated; and it was before the stat. 55 Geo. 3, c. 184. [Rolfe, B. The Stamp Act of the 48 Geo. 3, c. 149, was then in operation, and the 55 Geo. 3, c. 184, s. 19, is in terms a re-enactment of the 14th section of that statute.] The true

rule is laid down in *Beck v. Robley* (2 H. Bl. 89, n.), and *Callow v. Lawrence* (3 M. & Selw. 95), that a bill cannot be indorsed or negotiated after it has been paid, if such indorsement or negotiation would throw a liability on any of the parties who would otherwise be discharged. [Lord Abinger, C. B. Those were cases where the bill was negotiated after it was due. Parke, B. A bill may be negotiated even after [178] it is due, if no other person be made liable than before.] Here, however, it is clear that the transaction amounted to payment by the acceptor. He is not bound to wait until the bill becomes due before he pays it. Can he then afterwards negotiate it, so as to make the drawer liable? [Parke, B. The condition of an indorser of a bill payable after date is this, that he is a surety for the payment of it by the acceptor at a particular time and place, on presentment for payment. If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected (*Da Silva v. Fuller*, Bayl. on Bills, 326 (5th edit.)).] There he is doing an act inconsistent with his duty as banker; but there is no such violation of duty in the acceptor paying the bill before it is due, and to the party entitled to receive it. [Parke, B. But it shews that the obligation of the drawee or acceptor is to pay at a particular time. You will find the legal liability of the drawer and indorser of a bill of exchange very clearly expressed by Mr. Justice Bayley in his work on Bills (pp. 43, 156 (5th edit.)).] In *Bartrum v. Caddy* (1 P. & D. 207), where a note payable on demand was indorsed for the maker's accommodation, and having been deposited in the hands of a creditor of his, was afterwards paid by the maker and re-issued, it was held that it was no longer negotiable, by reason of the stat. 55 Geo. 3, c. 184, s. 19. [Lord Abinger, C. B. There the note was payable on demand, so that it was over due.] In *Freakly v. Fox* (9 B. & Cr. 130; 4 Man. & R. 18), it was held that a promissory note was discharged by the payee and holder of it having made the maker his executor, and that no action could be maintained on it, even by a party claiming by indorsement from the executor.

[179] But at all events, the defendant is entitled to the verdict on the 9th plea. The stat. 55 Geo. 3, c. 184, does not distinguish between payment made at and before the maturity of the bill; but the intention of the legislature was, that after a bill had been in any manner satisfied, it should not be re-issued without a new stamp.

Platt and Peacock, *contrâ*. First, the plaintiff was entitled to recover on the seventh plea. It can never be said that the rights of a *bonâ fide* indorsee for value before the bill became due, can be affected by a private arrangement between the drawer and acceptor. This bill was never paid, in a legal sense, at all. The undertaking of an acceptor is to pay the bill at a particular time; and that of the drawer and the indorsers, that he shall pay it at that time, or they will be responsible. In pleading, therefore, the obligation of the acceptor is said to be, to pay according to the tenor and effect of the bill. Has he satisfied that obligation here? Mere satisfaction of a bill before it is due is not payment of it. And the stat. 55 Geo. 3, c. 184, s. 19, when it speaks of "the payment thereof," means not the mere act of payment, but payment according to the tenor of the bill. In the cases cited on the other side, the instrument had been paid according to its tenor and effect, and therefore could not afterwards be negotiated to the prejudice of innocent parties. In *Freakly v. Fox*, the plaintiff must have known that the defendant had no right to indorse the note except as executor, and therefore that it was discharged by making him executor: he thus had notice, that the note was satisfied. It was essential, therefore, to the defendant's case, in support of the issue on this plea, to prove not only the agreement between himself and the acceptor, but also that the bill was transferred to the plaintiff with notice of it, and without consideration.

Secondly, the 9th plea was not proved. The facts [180] proved on the trial did not amount to payment of the bill, so as to satisfy the allegation in the plea, that it "was fully paid and satisfied" by Riley. That must mean a payment in money: but this was a mere arrangement whereby the bills were considered as satisfied, on the execution of a mortgage. It is clear that such evidence would not have supported a plea of payment; if it would, it might equally be proved by a release, or by the delivery of a chattel in accord and satisfaction. Neither can there be any re-issuing of a bill until it is over due; until then, it is in course of negotiation.

LORD ABINGER, C. B. I am of opinion that this rule ought to be made absolute. On the trial, it struck me that the pleas were substantially proved; but upon con-

sideration I am satisfied that I was wrong. I think, under the circumstances, the 7th plea could not be supported, unless the allegation, that the plaintiff took the bill without any consideration or value, was proved. It seems to me that was an essential part of the plea, in order to make out the defence. As to the last plea, I think it is bad in point of law; but the question now is, whether it was proved or not. It is bad, on the ground that it does not allege a payment in satisfaction of the bill, after it became due. But even supposing that payment by the acceptor in satisfaction of the bill, before it became due, were a good answer in point of law to an action by an indorsee, the plea was not proved; because upon this issue the plaintiff had a right to expect proof of actual payment in money, not of a mere accord and satisfaction. If the bill were satisfied otherwise than by payment in money, the plaintiff had a right to expect that the particular kind of satisfaction should be set forth in the plea. Proof of payment, therefore, was essential to support this plea; and that not having been given, the defendant cannot maintain his verdict upon it.

[181] With respect to the more general question which arises in this case, I am now satisfied, after some doubt, that the plaintiff is entitled to recover. The defendant, the drawer of the bill, agrees with the acceptor, while it is running, to deliver it up to him, in consideration of his having the security of a mortgage of property of the acceptor; and gives up the bill accordingly, without striking out his name as drawer. Before the bill becomes due, a party who is ignorant of this transaction discounts it for the acceptor; and, before it becomes due, transfers it for value to the plaintiff, who is also ignorant of the transaction. The question then is, whether the discharge of a bill by the acceptor, by an arrangement with the drawer before it is due, can affect the bill in the hands of an innocent holder for valuable consideration. I think it cannot. The contract of the drawer and of each indorser is, that the bill shall be paid by the acceptor at its maturity—not before it is due; that it shall be paid, as Mr. Peacock has observed, according to its tenor and effect—that is, when it becomes due. If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it, against his intention. It is in the hands of an innocent holder, who has no notice that it has been discharged. Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them; the parties may circulate them so as to give a title to a bona fide holder, before they become due; and wherein does this case differ from that? Therefore, a bill is not properly paid and satisfied according to its tenor, unless it be paid when due; and consequently, if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovering upon it. The rule must therefore be absolute.

[182] PARKE, B. I entirely concur with the Lord Chief Baron, and think that in this case neither of the pleas was proved. [His Lordship stated the 7th plea.] Undoubtedly, if all the facts alleged in this plea had been proved, they would have amounted to a good defence; because the plaintiff would then have been in the same situation as Short, and Short as Riley; and as to Riley the bill was satisfied. But in order to establish the plea, it was necessary to prove the two allegations which put the plaintiff in the same situation with Riley; viz. that Riley indorsed to Short, and Short to the plaintiff, without value or consideration; whereas it was proved that there was a valuable consideration for both indorsements. The question therefore is, whether the fact of the acceptor having satisfied the bill before it became due, is any defence against a bona fide indorsee. I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law merchant—that is, payment of the bill at maturity: if a party pays it before, he purchases it, and is in the same situation as if he had discounted it. The rule is laid down correctly by Lord Ellenborough, in *Burbridge v. Manners*, that a payment before a bill becomes due “does not extinguish it, any more than if it were merely discounted;” and that “payment means payment in due course, and not by anticipation.” The party who takes a bill before it becomes due has no means of knowing whether payment has been anticipated or not. The 7th plea, therefore, was not proved. As to the cases that have been cited, they are all cases of bills paid at maturity, because they were payable on demand.

With respect to the 9th plea, the question now is, whether it was proved in fact.

It is bad in point of law ; because the payment mentioned in the Stamp Act must be taken to mean payment by the party liable, at the maturity of the bill, and according to the tenor of it : otherwise there have been many cases wrongly decided. But I [183] agree that, even assuming the plea to be good, it was not proved in fact. It would be essential, in order to support it, to prove payment of the bill in money, and not merely a satisfaction of it by an agreement such as was proved in this case, which was no payment in the proper sense of the word. On a demurrer to this plea, for stating only that the bill had been "paid and satisfied," without stating the mode of payment, the plea would, I think, have been held sufficient, on the ground that those words would be construed to mean payment in money. It follows that, in order to support that averment in evidence, the proof should have been of a payment in money. Neither of these pleas, therefore, being proved, the rule must be absolute to enter a verdict on those issues for the plaintiff.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

CARNE v. BRICE AND ANOTHER. Exch. of Pleas. 1840.—The property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts.

[S. C. 8 Dowl. P. C. 884 ; 10 L. J. Ex. 28 ; 4 Jur. 1115. Distinguished, *Fleet v. Perrins*, 1869, L. R. 4 Q. B. 509. Discussed, *Richards v. Jenkins*, 1886, 17 Q. B. D. 546 : affirmed, 18 Q. B. D. 451.]

This was an issue under the Interpleader Act, directed by Gurney, B., to try whether certain wearing apparel taken in execution under a writ of fieri facias, issued by the plaintiff against the effects of one Richard Morgan, was the property of Richard Morgan or not. The issue was drawn up in this form with the assent of both parties. The plaintiff averred in the declaration, that the said goods and chattels, at the time of the seizure thereof, were the property of Richard Morgan : that averment was traversed by the plea, and issue was joined thereon.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after last Easter Term, it appeared that the plaintiff, having recovered judgment in an action against Morgan for the piece of butcher's meat supplied to him, [184] issued a fieri facias thereon, under which the sheriff was proceeding to take in execution certain property then in Morgan's house at Hampstead, where he resided with his wife, when the defendants interfered, and claimed the property as trustees of the wife, on the ground that it had been purchased with money vested in them for her sole and separate use, under the settlement executed previously to her marriage with Morgan. It was ultimately arranged among the parties, that the plaintiff should seize part of the property, in order to raise the question between them, and he accordingly took in execution Mrs. Morgan's wearing apparel, which had been bought by her with part of the money so settled to her sole and separate use. The defendants offered evidence of Morgan's bankruptcy, with a view of shewing that, at all events, the property in the goods was not vested in him, but in his assignees. The Lord Chief Baron rejected the evidence, considering that the only question intended to be raised on the issue was as to the right of the defendants as trustees ; and being of opinion that the property in the goods, under the circumstances, vested by law in the husband, directed a verdict for the plaintiff.

In Trinity Term, Platt obtained a rule nisi for a new trial, on the ground that, under the issue as framed, the evidence of Morgan's bankruptcy had been improperly rejected ; and also on the ground of misdirection,—citing *Jarman v. Woollaton* (3 T. R. 618), *Heselinton v. Gill* (id. 620, n. ; 3 Dougl. 415), and *Dean v. Brown* (5 B. & Cr. 336 ; 8 D. & R. 95). In this term,

Erle and Moody shewed cause. First, the defendants were not at liberty, under this issue, to set up the *jus tertii*, and defeat the plaintiff by shewing that Morgan had become bankrupt, and therefore that the wearing apparel in question [185] belonged to his assignees, and not to him. The real question intended to be raised between the parties was, whether the property belonged to the trustees, or had vested

in the husband. [Parke, B. The form of the issue ought properly to have been, whether the goods were the property of the trustees or not; but, in truth, that is in effect the question upon this issue.] The issue in fact is, whether the goods were liable to be taken in execution as against the defendants, the claimants. Neither the assignees, nor any other persons not parties to this suit, will be barred by the present verdict: *Carter v. Johnson* (2 M. & Rob. 263).

Secondly, the goods were the property of the husband, inasmuch as the money with which they were bought, immediately on its being handed over by the trustees to the wife, and in her hands as a chattel, vested by law in him: à fortiori, the produce of that money by a subsequent contract made by the wife, belonged in law to the husband. In *Rex v. French* (Russ. & Ry. C. C. 491), it was held that goods bought by a married woman, even when living apart from her husband, on an income arising from property vested in trustees for her separate use, were by law the property of the husband, and must be so described in an indictment for stealing them. The cases relied upon on the other side are distinguishable. In *Jarman v. Woolleton*, stock in trade and furniture were assigned by a wife before her marriage, to a trustee for her separate use, to the intent that she might carry on trade at her own risk and for her own benefit. There the Court held, that the furniture, though removed to the husband's house, was vested in the trustee. Neither is it disputed here, that the property included in the settlement vested in the trustees. So, in *Heselinton v. Gill*, where certain cows, and the produce and increase to arise therefrom, were vested before marriage in trustees, for the separate use of the wife, who carried on the business of a cowkeeper, it was held, that neither the iden-[186]-tical cows included in the settlement, nor others bought by the wife with the money produced by the sale of their milk, were liable to be taken in execution for a debt of the husband; upon the ground, as stated by Lord Mansfield, that there was no authority to shew that a man may not before marriage put his intended wife in a situation to carry on a separate trade. Here the parties are living in private life together, and no question as to a separate trade arises. In *Sir John St. John's case* (4 Vin. Abr. Baron and Feme (F. 2), p. 48), where a woman before her marriage conveyed certain leases to trustees, and after her marriage received the rents, and died, leaving part of them in money, it was agreed, that "if the trustees consent that the wife shall receive the money, as in the case above the contrary does not appear, there the husband might gain the property as husband." That is an authority directly in point for the plaintiff. In *Molony v. Kennedy* (3 Jurist, 793), after a separation between husband and wife, the wife invested money acquired from the savings of her separate estate in the names of her trustees, and appointed it by her will; upon her death she left an additional sum undisposed of; and the Vice-Chancellor held, that the husband could not be compelled to take out administration, but was entitled to the personalty undisposed of, jure mariti.

Platt, contrà. First, the learned Judge ought to have received the evidence of Morgan's bankruptcy. The only question raised by this issue is, whether the goods were the property of Morgan or not. The plaintiff chose to take the issue in that form; and no equitable construction ought to supersede the strict legal interpretation of it. [Lord Abinger, C. B. No question was ever suggested to the Court or the Judge, as to the goods being the property of the [187] assignees. The only question on the interpleader rule was, whether they were the property of the trustees; if they were not, they had no right to interfere.] Still the plaintiff takes upon himself to prove the affirmative of the issue, that they were the goods of Morgan; and as nothing could properly be taken under the execution but that which was his property, that was the legitimate issue to be tried.

But secondly, this wearing apparel was not the property of Morgan as against the trustees. It is said, that as soon as the wife receives the money for her separate use, it is her husband's. If that be so, it is utterly useless in any case to make a provision for the separate use of the wife; because not only would the husband be entitled to money, when delivered into her hands, but he might even take the food purchased with it from her table. The wife must reasonably have a control over the money, for the purposes of her food and clothing. The clothes are, if the expression may be allowed, part of the machinery by which the separate use is effected. The authorities cited for the plaintiff only go to shew that the husband may reduce the goods into possession, and so make them his: here he did not do so. *Dean v. Brown* is in point

for the defendants. All that is to conduce to the separate use and maintenance of the wife, is vested in the trustees. In the case cited from Viner's Abridgment, all that was agreed was, that the husband might gain the property as husband—i.e. by reducing it into possession.

LORD ABINGER, C. B. I entertain no doubt in this case, and think the rule ought to be discharged.

PARKE, B. I quite agree that the trustees had no right to set up the title of the assignees, and that the Lord Chief Baron, therefore, was quite right in excluding evidence of the bankruptcy. This issue is only a proceeding directed for the purpose of informing the conscience of the Court; [188] and the only question upon the rule was, whether the trustees had a right to intervene. We shall certainly not grant a new trial, because evidence was rejected which we did not intend should be admissible. My only doubt is, whether, for the purposes of this deed of settlement, the trustees must not be taken to have employed the wife as their agent for the purchase of this wearing apparel; otherwise the object of the settlement may be defeated.

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., said. The question in this case was, whether certain wearing apparel, bought by a married woman out of an income settled in the hands of trustees to her sole and separate use, and taken in execution for a debt of her husband, belonged to the trustees or to the husband. I was of opinion that they belonged to the husband and not to the trustees, and consequently that they might be taken in execution for his debt; and the Court are of the same opinion. My brother Parke had some doubt, on the ground that possibly the wife might have been the agent of the trustees for the purpose of buying these clothes. The evidence, however, did not shew any such agency: the clothes were bought by the wife with her own money. The rule for a new trial must therefore be discharged.

Rule discharged.

REG. v. THE BISHOP OF EXETER. Exch. of Pleas. 1840.—The Attorney-General, in the Queen's business, has pre-audience in the Court of Exchequer over the Postman and Tubman.

[S. C. 9 Dowl. P. C. 276; 10 L. J. Ex. 92; 4 Jur. 674.]

At the sitting of the Court (24th November), the Attorney-General moved in this case. The Postman and Tubman claimed pre-audience; but upon the Attorney-General's stating that it was the Queen's business in which he moved, the Court decided that he was entitled to be heard before the Postman and Tubman.

CASEY v. TOMLIN AND ANOTHER. Exch. of Pleas. 1840.—After a plea of payment of money into Court, in an action of assumpsit, the plaintiff obtained an order to sue in formâ pauperis. A judge thereupon made an order that the money should remain in Court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendants having obtained the verdict, the Court ordered that the money should be paid out to them in satisfaction of their costs antecedent to the order to sue in formâ pauperis.—Semble, a plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit.—The action of assumpsit is within the operation of the stat. 23 Hen. 8, c. 15, s. 2.

[S. C. 8 Dowl. P. C. 892.]

This was an action of assumpsit, to recover the sum of 44l. 2s. 6d., for wages alleged to be due to the plaintiff as gunner and mariner on board a ship of the defendants. The action was commenced on the 1st of January, 1840. On the 6th of January, the defendants took out a summons, calling on the plaintiff to shew cause why, upon payment of the sum of 31l. 16s. 6d. and costs, all further proceedings in the action should not be stayed. On the hearing of this summons, the plaintiff's attorney refused to accept the amount offered, and no order was made. The declaration having been delivered, on the 24th of January the defendants pleaded non assumpsit, except as to the sum of 31l. 16s. 4d., and payment into Court of that sum.

On the same day, after the money had been paid into Court, the defendants were served with an order of that date, for admitting the plaintiff to sue in formâ pauperis. The defendants thereupon immediately took out a peremptory summons, calling upon the plaintiff to shew cause why the sum of 31l. 16s. 4d. paid into Court, should not remain in Court to abide the event of the action, unless it should be taken out by the plaintiff in full satisfaction; and Rolfe, B., before whom the summons was attended by both parties, made an order accordingly. On the trial of the cause, a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for 12l. 6s. 2d.; and a rule nisi was obtained for that purpose, which was afterwards discharged.

Butt thereupon obtained a rule, calling upon the plaintiff [190] to shew cause why he should not be dispaupered, and why the Master should not tax the defendants their costs; and if taxed at so much or more than the sum paid into Court, why the same should not be paid out to the defendants, or if taxed at a less sum, why the amount taxed should not be deducted from the amount paid into Court, and paid out to the defendants.

Erle and Humfrey shewed cause. The real question in this case is, whether a plaintiff can be admitted to sue in formâ pauperis after the commencement of the suit. In *Foss v. Racine* (4 M. & W. 610), this Court intimated a doubt whether an admission after the commencement of the suit was regular; and in *Lovewell v. Curtis* (5 M. & W. 158), decided that it was not. That decision, however, appears to have proceeded upon a misconstruction of the statutes relating to this subject. The stat. 23 Hen. 8, c. 15, s. 2, enacts, "That all and every such poor person or persons, being plaintiff or plaintiffs in any of the said actions, bills, or plaints, (mentioned in s. 1), which at the commencement of their suits or actions be admitted by the discretion of the Judge or Judges where such suits or actions shall be pursued and taken, to have their process and counsel of charity, without any money or fee-paying for the same, shall not be compelled to pay any costs by virtue and force of this statute (i.e. on nonsuit or verdict for the defendant,—s. 1), but shall suffer other punishment, as by the discretion of the Justice or Judge afore whom such suits shall depend, shall seem reasonable." The whole effect of this enactment is to relieve the parties therein mentioned from costs, on a nonsuit or verdict for the defendant. It gives only an exemption to a particular class of persons, viz. those admitted paupers at the commencement of the suit, from the costs which were then first imposed on plaintiffs, in the case of a [191] nonsuit or a verdict for the defendant. The stat. 11 Hen. 7, c. 12, enacts, that "every poor person or persons which have or hereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the Chancellor of this realm for the time being, writ or writs original, and writs of subpoena, according to the nature of their causes, therefore nothing paying, &c., &c.; and after the said writ or writs be returned, if it be afore the King in his Bench, the Justices there shall assign to the same poor person or persons counsel learned, by their directions, which shall give their counsel, nothing taking for the same, and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons, &c., &c.: and the same law and order shall be observed and kept of all such suits to be made afore the King's Justices of his Common Pleas, and Barons of his Exchequer, and all other Justices in the Courts of Record, where any such suit shall be." There is nothing in that clause applying particularly to the commencement of the suit; it is an enactment applicable just as much to any subsequent stage of the cause. [Lord Abinger, C. B. That statute appears to refer to the commencement of the suit, when it speaks of the pauper having an original writ out of Chancery.] The Court would pause before they construed it according to its strict letter, which would require that an original writ should in every case have been sued out in Chancery. Such a construction could have no application to modern times. [Lord Abinger, C. B. The 23 Hen. 8, c. 15, extended the right to sue in formâ pauperis to proceedings by bill; but the original power of the Court to admit a plaintiff so to sue depends on the 11 Hen. 7, which by implication gives that power only at the commencement of the suit.] That statute has in practice been construed as authorizing the admission of the pauper at any period of the suit. But the stat. 23 Hen. 8 does not create or affect the power of making pauper plaintiffs; [192] all that it says is, that all plaintiffs shall pay costs on a nonsuit or verdict for the defendant, except a particular class of pauper plaintiffs, viz., those admitted at the commencement of the suit. In *Outs v. Holiday*,

cited by Wilmut, C. J., in *Blood v. Lee* (3 Wils. 24) from his manuscript notes, it is said to have been "at first doubted whether a plaintiff could be admitted in formâ pauperis after the commencement of the suit; but at length it was resolved that he might be so admitted at any time of the suit; and the Court resolved, that a person so admitted, pendente lite, shall not pay costs from the beginning of the action." [Parke, B. In *Blood v. Lee* the question was adjourned; so that the point appears to have been considered doubtful.] In *Jones v. Peers* (M'Clel. & Y. 282), the application was for costs incurred previously to the plaintiff's admission to sue in formâ pauperis.

But further, if the stat. 23 Hen. 8 be held to apply, so as to render the admission of a pauper after the commencement of the action irregular, it may be questioned whether that statute extends to actions of assumpsit. The actions, &c., mentioned in the first section are, any action, bill, or plaint of trespass on the 5 Ric. 2, or any action, bill, or plaint of debt or covenant upon any specialty, or of detainee or account "or any action, bill, or plaint upon the case, or upon any statute, for any offence or wrong personal, immediately supposed to be due to the plaintiff," &c. These words seem properly to apply to actions ex delicto only. Then the stat. 4 Jac. 1, c. 3, reciting that actions of trespass and ejectment, and many other actions, real and personal, are within the mischiefs intended to be provided against, "and yet were omitted out of the provisions of the said law," extends the operation of the 23 Hen. 8, c. 15, to actions of every kind. [Parke, B. I never before heard it doubted that the statute of Hen. 8 applied to actions of assumpsit.] Lastly, these are not costs [193] within the meaning of that statute; they are costs specially payable by virtue of the rule of H. T. 4 Will. 4, s. 19. That rule gives a mode of proceeding, by payment into Court after declaration, which did not exist before, and provides for the costs payable on that proceeding. [Parke, B. The rule gives the mode of proceeding; but the defendant gets his costs under the statute of Hen. 8. The plaintiff has gone down to trial on the issue whether more money was due to him than the sum paid into Court, and on that issue the defendant has had a verdict.]

Butt, contra. The stat. 23 Hen. 8 clearly applies to actions of assumpsit: the term "actions on the case" may include both actions of assumpsit and actions ex delicto. This is an action on the case on assumpsit. Then it is said the stat. of 11 Hen. 7 enables the Courts to admit a pauper during the pendency of the action. That statute in terms applies only to those cases in which an original writ was issued out of Chancery, and impliedly refers to the period of the commencement of the suit. But this plaintiff has been admitted, not under that act, but under the 23 Hen. 8, which expressly refers only to plaintiffs admitted paupers at the commencement of the suit. If the argument on the other side have any weight, it would go to shew that the party could not be admitted to sue in formâ pauperis at all; since, if the case be taken out of the first section of the statute, it is equally out of the second. [Parke, B. The case of *Langley v. Blackerley*, which is referred to in *Blood v. Lee*, and which is reported in Andrews, p. 306, would seem to be an authority that a plaintiff may be admitted a pauper after the commencement of the suit.] There does not appear to be any direct authority that such a practice is correct. In *Jones v. Peers*, the Court only refused to dispauper the plaintiff after a lapse of two years. The authority of the Court is derived from the statutes alone, which clearly do not admit of the construction contended for by the plaintiff. But even if [194] the Court have a discretion, they will surely exercise it in favour of the defendants in this case.

Erle referred to *Morgan v. Eastwick* (7 Dowl. P. C. 543).

LORD ABINGER, C. B. The real question here is, whether, while my Brother Rolfe's order is standing and acquiesced in, we are to refuse to put it in force. If it be irregular, that is not the question here; the plaintiff has never made any objection to it; and I am strongly inclined to think that the admission of a plaintiff as a pauper after the commencement of the suit is irregular: the statutes appear to be directly against it; but nevertheless, if there were any decisions the other way, or any inveterate practice to that effect, the Court would be anxious not to overturn it. In the case of *Blood v. Lee*, the Court, although an authority was produced to them in favour of the admission pendente lite, thought it did not conclude the matter, but adjourned the consideration of the question, and apparently did not think fit to make the rule absolute. Then there are the recent cases in which this Court has decided the contrary; and on this full investigation, I remain of the same opinion. The

statute of Hen. 7 applied only to original writs, and the 23 Hen. 8 by implication gave a power to admit a pauper at the commencement of a suit by bill, and clearly includes an action of assumpsit.

PARKE, B. If there be no case by which we are bound, the question as to the construction of the statutes seems to admit of no doubt. Though the statute of Hen. 7 applied principally to originals out of Chancery; yet the latter words of the clause appear to have given the Judges of the other Courts the power of adopting the same proceedings in ac-[195]tions commenced by latitat, bill, or quo minus. The practice has always been so to construe it, and we have no wish to throw any doubt on the property of that practice. Then the stat. of Hen. 8 makes all plaintiffs liable to costs—in assumpsit as well as in other actions—on a nonsuit or verdict for the defendant, unless they fall within the exempted class, i.e. of paupers admitted at the commencement of the suit. No doubt, at that time it was never thought that the party could be admitted at any other period, although it appears subsequently to have been the practice to do so, the pauper being held liable to pay the antecedent costs. There is no case which has put a construction on the statute except that referred to in *Wilson*, which, for the reasons given by my Lord Chief Baron, is not satisfactory. In *Morgan v. Eastwick*, the point was not raised. I think, therefore, we ought to abide by the late decisions in this Court.

The other Barons concurred, and it was ordered that the rule should be absolute. On the following day, however,

LORD ABINGER, C. B., said—We have looked into the case which was referred to yesterday, in *Andrews's Reports (Langley v. Blackerley, Andr. 306)*, and it appears that there the Court said, that by implication they had, under the 11 Hen. 7, c. 12, power to admit a party to sue in formâ pauperis at any stage of the cause. The present rule, therefore, will not be absolute in all its terms, but as to the latter part of it only, whereby the defendants will be enabled to obtain their costs out of the money paid into Court. It must be understood that we give no opinion on the question of dispaupering the party, but confine our judgment to the latter part of the rule. The result will be, that the money will be paid out of Court [196] to the defendants, in satisfaction of their costs up to the time of the plaintiff's admission to sue in formâ pauperis.

Rule accordingly.

BROWN v. M'MILLAN. Exch. of Pleas. 1840.—A capias may be issued under the stat. 1 & 2 Vict. c. 110, s. 3, into a county palatine, to be executed in that county, although it be indorsed for a less sum than £50.

[S. C. 8 Dowl. P. C. 852; 10 L. J. Ex. 147; 4 Jur. 1090, 1116.]

In this action, after the writ of summons had been sued out, a writ of capias, indorsed for bail in the sum of £22, was issued under a Judge's order, made in pursuance of the stat. 1 & 2 Vict. c. 110, s. 3, and in the form prescribed by that act. The writ described the defendant as "of Liverpool, in the county of Lancaster," and was directed "to the Chancellor of the county palatine of Lancaster, or his deputy there." Upon receipt of the writ, the usual warrant was made out from the Chancellor to the sheriff of Lancashire, who, however, refused to execute the writ, on the ground that, by the stat. 7 & 8 Geo. 4, c. 71, s. 7, a defendant was not arrestable within the county palatine for a sum under £50. Gurney, B., having thereupon made an order directing the sheriff to return the writ, Wightman obtained a rule to shew cause why that order should not be set aside.

Martin shewed cause. The question in this case is, whether the 7th section of the 7 & 8 Geo. 4, c. 71, is not virtually repealed by the 1 & 2 Vict. c. 110, s. 3. The preamble of the 7 & 8 Geo. 4, c. 71, s. 7, states, "that the holding to bail of persons inhabiting within the counties palatine, by process out of the Courts of Record at Westminster, in debts of a small amount, is oppressive and vexatious;" and it is then enacted, "That no sheriff or other officer within the counties palatine shall, upon any mesne process issuing out of any of the superior Courts, arrest or hold any person to special bail, unless [197] such process shall be duly marked and indorsed for bail in a sum not less than £50." It is clear that the object of this act was to prevent defendants from being arrested for small sums, within the counties palatine, by

mesne process out of the superior Courts, when the plaintiff might proceed by process out of the Court of the county palatine. But since the stat. 1 & 2 Vict. c. 110, all mesne process is at an end; and the writ of *capias* given by the 3rd section of the act is a mere ancillary proceeding for the plaintiff's security, in the nature of writ *ne exeat regno*, which may issue at any stage of the suit, and may go into a different county from that into which the writ of summons was issued. The writ mentioned in the 7 & 8 Geo. 4, c. 71, s. 7, on the contrary, was the commencement of the action; and when the object was to proceed by bailable process, the plaintiff must have known where the defendant was resident. That statute, therefore, must now be considered as virtually repealed. [Parke, B. The question is, what is the meaning of the words in the 1 & 2 Vict. c. 110, s. 3, "a plaintiff in any action in any of the superior Courts, in which the defendant is now liable to arrest?"] The true construction is, that it comprehends any action in the superior Courts, in which the defendant is indebted to an amount sufficient to render him liable by law to arrest. The words refer to that state of things in which the defendant is generally, by law, liable to arrest. The subsequent words, "one or more writ or writs of *capias* into one or more different counties," contain no exclusion of the counties palatine; and the proviso at the end of the section, makes express provision for the direction of the writs when issued into the counties palatine. If the construction contended for on the other side be correct, a defendant living in London, and against whom an action has been commenced there for a debt above £20, but under £50, might, by going into a county palatine, set at defiance a writ of *capias* obtained by the [198] plaintiff, and escape out of the kingdom from any seaport in that county. Again, if that construction be correct, the 21st section, which extends all the remedies and provisions of the act to the Courts of the counties palatine, within the limits of their jurisdiction, cannot have the general operation which the legislature intended to give it, as to all the subjects of the realm; but whenever the debt is between £20 and £50, the benefit of the provision will be lost.

But secondly, even supposing the 7 & 8 Geo. 4, c. 71, s. 7, to be still in force, it applies only, as appears from the preamble, to persons inhabiting within the counties palatine; and here it does not distinctly appear on the affidavits, whether the defendant is an inhabitant in Lancashire, or merely a temporary sojourner there. [Parke, B. That is not at all material. The preamble no doubt recites the mischief of holding to bail persons inhabiting within the counties palatine, for small sums; but the enacting words are, "That no sheriff, &c., within the counties palatine, shall arrest or hold any person to special bail," &c. It would be very inconvenient if the sheriff of a county palatine, before he could execute the *capias*, were to be compelled to determine at his peril whether the party were an inhabitant within the county or not, which might often be a question of great nicety.] At all events, the motion should have been to set aside the Judge's order on which the *capias* issued. [Parke, B. No; if their construction be the right one, that order was but waste paper, and the writ was a mere nullity, to which the sheriff was not bound to make any return.]

Wightman, *contra*. The stat. 7 & 8 Geo. 4, c. 71, s. 7, is still in force. The words of the 1 & 2 Vict. c. 110, s. 3, are:—"If a plaintiff in any action in any of the superior Courts, in which the defendant is now liable to arrest," &c., &c. The question, therefore, must be considered as at the time of the passing of the act. Now, before it came into [199] operation, the liability to arrest within a county palatine was regulated by the 7 & 8 Geo. 4, c. 71, s. 7; the effect of which was, that when the bailable writ was marked for bail in a sum amounting to £50, process might issue from the superior Courts at Westminster; but if for less than that sum, and not less than £20, the process must issue from the Court of the county palatine. The words of the present statute are not "in case of any debt for which the defendant is liable to arrest;" but "in any action" in which he is so liable. Now, in this action, the defendant was only liable to arrest elsewhere than within a county palatine; he was not liable to arrest in Lancashire. There are no words in the act applying in terms to the limitations contained in the 7 & 8 Geo. 4, c. 71, s. 7, as to arrests in counties palatine; and the proviso at the end of sect. 3 applies only to cases in which the process of the superior Courts could before have been executed in a county palatine, viz. where the sum amounted to £50 or upwards. Then the 21st section expressly gives to the Judges of the Courts of the counties palatine the same authorities as are given by the act to Judges of the superior Courts, within the limits of their jurisdiction.

Taking this defendant and his situation as a resident in Lancashire together, he was not a defendant liable to arrest in this action. Relation must be had as well to the defendant as to the action; because the words are—"any action, &c., in which the defendant is now liable to arrest."

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

PARKE, B. The question reserved for the consideration of the Court in this case was, whether a Judge of the superior Courts at Westminster is empowered by the stat. [200] 1 & 2 Vict. c. 110, s. 3, to issue a *capias* into a county palatine for a less sum than £50, to be executed in that county; and we think that he has such a power, and that the sheriff is bound to execute the *capias* so issued. By the stat. 7 & 8 Geo. 4, c. 71, s. 7, a restriction was imposed upon the operation of writs of *mesne* process, issuing from the superior courts at Westminster into counties palatine. That statute enacts, "That no sheriff or other officer, within the counties palatine of Lancaster and Durham, shall, upon any *mesne* process issuing out of any of his Majesty's Courts of Record at Westminster, arrest or hold any person to special bail, unless such process shall be duly marked and indorsed for bail, in a sum not less than £50." The 1 & 2 Vict. c. 110, s. 1, abolishes arrest on *mesne* process issuing from the superior courts, except in certain cases specially provided for. The effect of the first section, if it stood alone, would be to render the 7 & 8 Geo. 4 a dead letter, and to do away altogether with arrest on *mesne* process, in the counties palatine as well as elsewhere. But the third section gives a right of arrest in certain cases, and provides for the purpose a new writ of *mesne* process—not of *mesne* process in the sense in which the word is used in the former act, but *mesne* in this sense, that it is a proceeding to be taken between the commencement of the suit and final judgment; which is issued for the collateral purpose of obtaining security for the amount of the plaintiff's claim, if recovered in the suit, and not for the advancement of the suit itself: and the question therefore is, whether any restriction is now imposed by law on the execution of such a writ within the counties palatine. There is certainly no express restriction; the only question is, whether it is to be implied from the proviso at the end of the third section. That section enacts, that "if a plaintiff in any action at law in any of her Majesty's superior courts of law at Westminster, in which the defendant is now (that is to say, at the time of the [201] passing of the act) liable to arrest, whether upon the order of a Judge or without such order, shall by the affidavit of himself, or of some other person, shew to the satisfaction of a Judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of £20 or upwards, or has sustained damages to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they shall be forthwith apprehended; it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior Courts of Westminster, into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Durham, or his deputy there." Now the whole question turns on the construction to be put upon this part of the statute. This section does not say, that in those cases, or under those circumstances, in which the defendant was not previously liable to arrest, he shall be so under the new process; but that in every action, that is to say, in every species of action (of which this is one) in which the defendant was at the time of the passing of this act liable to arrest, the Judge shall have power to order process to issue under the act. This construction is in accordance [202] with the natural and ordinary meaning of the words used by the legislature: and acts of Parliament ought always to be construed as using the words in their common and ordinary sense, unless it appears from the other parts of the enactment, that some absurdity or incongruity would follow from so construing them. Now that certainly is not the

case here; for the express provision that the new writ of *capias* may run into the counties palatine, to be directed to the chancellor there, clearly shews a power in the Judge to issue such writ for £20 and upwards, as described in the former part of the section, and without distinction of the counties palatine in any respect. The necessary effect of the clause is, to authorize the Judge to issue this writ; and when once issued, no limit is placed to its operation. In order to support the opposite construction contended for by the sheriff in this case, qualifying words must be introduced into this part of the act; such as, that the writ of *capias* is not to issue into a county palatine at all, or that it is to have no effect there, unless when allowed by the Judges of the Court of the county palatine. The introduction of words in this manner may be proper, when an enactment is not sensible or rational without them; but that is by no means the case in the present instance; on the contrary, by the construction which we put on this section, the plaintiff has the full benefit which the legislature intended to give him, viz. the power of arresting the defendant by means of several concurrent writs issued into different counties; a benefit of which he would otherwise be to a certain extent deprived, if the defendant were resident in a county palatine. If, on the other hand, the plaintiff chooses to bring his action in a county palatine, he can, by the provisions of the 21st section, still resort to the same writ, by application to the Judge of the Court of the county palatine.

The point in question in this case does not appear to have been hitherto formally decided; we have been in-[203]-formed, however, by Lord Chief Justice Tindal, that he on one occasion discharged a person arrested in a county palatine for a sum under £50, but that he afterwards entertained doubts as to the propriety of that course.

We are of opinion, therefore, that the sheriff was bound to execute the writ in this case, and this rule must consequently be discharged, but, under the circumstances, without costs.

Rule discharged without costs.

HARWOOD v. LAW, Public Officer, &c. Exch. of Pleas. 1840.—Where a plaintiff obtains judgment against the public officer of a joint-stock banking copartnership, pursuant to stat. 7 Geo. 4, c. 46, s. 9, he may issue execution against the defendant without first suing out a *scire facias*.

[S. C. 8 Dowl. P. C. 899; 10 L. J. Ex. 30; 4 Jur. 1137.]

This was an action against the defendant, as the public registered officer of the Imperial Bank of England; and judgment having been signed for the plaintiff for 14l. 17s., the amount of the damages and costs, execution was issued thereon against the defendant, and he was detained in custody for that sum at the suit of the plaintiff. Cresswell had obtained a rule, calling upon the plaintiff to shew cause why the execution should not be set aside, and the defendant discharged out of custody, on the ground that the execution could not issue without a previous *scire facias*. The defendant did not, in his affidavit in support of the rule, deny that he was a member of the Company.

W. H. Watson shewed cause. No *scire facias* was necessary in this case, the defendant being not only the public registered officer, and as such a party to the record, but also, as it must be assumed, a member of the company. The question depends upon the construction to be put on several of the clauses of the Banking Copartnership Act, 7 Geo. 4, c. 46. The 4th section impliedly requires that the two public registered officers, who are by sect. 9 to sue and be sued on behalf of the Company, shall be members of the [204] copartnership. The 9th section enacts, that all actions and suits, &c., to be commenced on behalf of the copartnership shall and lawfully may be commenced and prosecuted in the name of one of the public officers for the time being, as nominal plaintiff; and all actions or suits, &c. to be commenced against the copartnership, shall and lawfully may be commenced and prosecuted against one of the public officers, "as the nominal defendant for and on behalf of such copartnership." Then sect. 12 provides, that all judgments recovered against any public officer of the copartnership "shall have the like effect and operation upon and against the property of the copartnership, and upon and against the property of any member thereof, as if such judgments had been recovered or obtained against such copartnership:" and sect. 13, that execution upon any judgment obtained against

the public officer may be issued against any member or members for the time being of the copartnership. There is nothing in these clauses to exempt the defendant from liability in his character of a member of the Company, or to prevent the judgment from operating in the ordinary way against the registered officer, as the party to the record, if, like the present defendant, he is also a member of the copartnership. The defendant might have pleaded to the action that he had ceased to be a member of the Company, if the fact were so. In a recent case of *Rawlinson v. Nuttall* (not reported), it appeared that the action was commenced against the defendant, as the public officer of a banking copartnership, on the 3rd of August, 1839. On the 22nd of August he became a bankrupt; in October following he ceased to be the public officer, but took no steps to have his name removed from the record; on the 10th of December judgment was entered up against him, and execution issued thereon, under which he was arrested; and having paid the debt and costs, under protest, in order [205] to procure his liberation, he applied to this Court to set aside the judgment and execution, and to have the money repaid to him; but the application was refused, on the ground that, by taking no step to remove his name from the record, he had admitted himself to be a member of the Company, and as such liable to the execution. That case is expressly in point. He also referred to *Harrison v. Timmins* (4 M. & W. 510), and *Wood v. Marston* (8 Dowl. P. C. 865).

Cresswell, *contra*. The plaintiff was not entitled to issue execution against this defendant, without first suing out a *scire facias*. Having elected to avail himself of the mode of proceeding given by the statute, instead of proceeding according to the course of the common law, as he might have done (for the words "shall and lawfully may," in the 9th section, cannot be considered as imperative on the plaintiff), he must proceed throughout according to the statute; he cannot engraft a common law execution upon a statutory judgment. A judgment against the public officer can have effect only against those who are members of the copartnership at the time of judgment signed. Then, by sect. 13, execution may issue thereon against members for the time being; or, if ineffectual in such case, then against those who were members at the time when the contract was entered into, or before it was executed, or at the time of the judgment obtained, by leave of the Court. Now, although the record would undoubtedly be strong evidence to shew that the defendant was a member of the copartnership at the time of judgment obtained, it would not necessarily prove that he continued such up to the time when execution issued. At all events, that is not a question to be tried upon affidavits, but ought to be determined by a jury upon a *scire facias*. It has already been decided that execution cannot issue against a member of the copartnership, who is not a party [206] to the record, without a *scire facias* (*Cross v. Law*, 6 M. & W. 217); and the practice ought to be the same with regard to the public officer, who is sued merely as a nominal defendant by virtue of the statute, and has no interest in the suit beyond that of the other members of the copartnership.

Cur. adv. vult.

On the following day, the Court delivered judgment.

LORD ABINGER, C. B. This was an application for the discharge of the defendant out of custody on the ground that, upon the proper construction of the act of Parliament for regulating joint-stock banking companies, the defendant, who is sued as the registered officer of the Imperial Bank of England, is not liable to be taken in execution, unless he was a member of the copartnership at the time when the execution issued. Mr. Cresswell contended that he must be shewn to be such by *scire facias*, in conformity with the decision of this Court, that that mode of proceeding is necessary in cases where the judgment is obtained against the registered officer as the nominal defendant, and it is sought to have execution against some other member of the Company, not a party to the record. It is to be observed, that the defendant in this case neither states that he is not a member of the company, nor alleges any other facts to shew to the Court that he is not the proper object of execution upon this judgment. As he has not done so, the necessity for a *scire facias* does not seem to arise. When the Courts direct a *scire facias* to issue, it is only with the view of rendering their own records consistent. The first case in which a question of this kind arose was that of *Bartlett v. Pentland* (1 B. & Ad. 704), where the plaintiff, having obtained judgment against the secretary of the St. Patrick's Assurance Company, took out execution against another [207] member of the company, (an alderman of Dublin, who happened

to be in London on some public business), without first obtaining the leave of the Court to enter a suggestion on the record. The Court on that occasion said, that some suggestion ought to be put upon the record, in order to make a party liable to the execution, who was not a party to the record at the time of the judgment. Since then, the proper mode of doing this has been taken more fully into consideration, and the Courts have decided, I think rightly, that it must be by writ of *scire facias*. A suggestion on the record would indeed have the same effect, a *scire facias* does nothing more, and they may both be traversed; but the latter is an original and well understood process for the purpose. A *scire facias*, however, is resorted to only for the specific purpose of making the judgment and execution consistent with each other; since otherwise there would be judgment against A. and an execution against B., which would render the record absurd and inconsistent: but the *scire facias* makes the record technically correct, and the party has the opportunity of contesting whether he is really liable to the execution or not. But it appears to the majority of the Court, that if we were to accede to the argument urged on the part of the defendant, and hold a *scire facias* necessary in this case, the greatest inconvenience would follow; for as the parties liable to the execution in the first instance are those only who are members of the copartnership at the time of the execution, and the *scire facias* would only establish that the defendant was such at the time of the judgment, no execution could issue against him until a fresh *scire facias* was issued, to shew that he was a member at the time execution issued: so that *scire facias* after *scire facias* would be necessary. It never could have been the intention of the legislature to introduce such an inconvenience as this, which would certainly be the consequence if the act of Parliament were to be interpreted as is contended for by Mr. Cresswell. [208] The defendant, therefore, ought to have shewn by affidavit that he had *bonâ fide* and without fraud ceased to be a member of the copartnership, in which case he would be no longer liable to be taken in execution. At present he appears to be a party to the record and a member of the company, and he has shewn no reason why the execution should not issue against him as such. I think, therefore, that this rule ought to be discharged, but, under the circumstances, without costs.

LARKE, B. The mode of obtaining execution upon a judgment obtained against a joint-stock banking copartnership, is distinctly pointed out by the stat. 7 Geo. 4, c. 46, s. 13. The execution is to issue, in the first instance, against those who are members of the copartnership for the time being, i.e. at the moment of suing out the execution: and the Courts have decided, that the party against whom it is intended thus to proceed, is entitled to have the question, whether he were such member or not, determined by a jury, and that the course of proceeding for that purpose ought to be by writ of *scire facias*, which will have the effect of shewing, on the face of the record, the grounds on which the execution issued against a person who was no party to the judgment. But a great difficulty arises when we attempt to put a construction on this part of the enactment; for the *scire facias* only shews that the party against whom it issues was a member of the copartnership at the time of the judgment, and not at the time of issuing execution. In order to reconcile this difficulty, it seems to me that the *scire facias* may be considered as a part of the execution contemplated by the legislature in framing this section; and then, the party being shewn to be a member at the time of the *scire facias*, he is liable. If this view be correct, I entertain considerable doubt whether the defendant in the present case is concluded by the judgment, or whether he has not a right to insist that the question, whe-[209]-ther he was a partner at the time when execution issued,—i.e. when the *scire facias* issued,—should be submitted to a jury; and consequently, whether he is not entitled now to be discharged out of custody: but as the rest of the Court agree in the view taken by the Lord Chief Baron, my doubts will of course be unavailing. The course to be afterwards pursued with respect to the several other classes of persons made liable to the execution, is very clearly pointed out by the act: first, it is to go against those who were members of the Company at the time when the contract was entered into; then, if the plaintiff fails by those means to obtain satisfaction, his next step must be by application to the Court, for leave to proceed against those who were members before the contract was executed; and lastly, he is entitled to proceed against those who were members at the time of the judgment obtained: and although no precedence is expressly marked out by the statute, as between these and the former classes,—the words of the clause comprising them all in the same sentence, that “it shall be lawful for the party so having obtained judgment, to issue execution against any person or

persons who was a member when the contract was entered into, or became a member before it was executed, or was a member at the time of the judgment obtained ;" still, by the construction put upon this section, execution is to issue, first against one of these classes, and then against the other, and the defendant is only to be concluded by the record that he was a member at the time of the judgment obtained. The present inclination of my opinion, therefore, certainly is, that the execution issued against this defendant, without giving him an opportunity of trying the question whether he was a partner in the Company, not at the time of the judgment, but at the time of the execution, is irregular. That is a question which, in my opinion, is not to be determined on affidavits, but to be tried in the regular way by a jury.

[210] GURNEY, B. The defendant is sued as the public officer of a joint-stock bank, and is taken in execution as being a partner. He applies to be discharged from custody, but does not allege that he was not a partner, either at the time of the judgment, or of the execution, or when the debt was incurred which is the subject of the action. Under these circumstances, I think a *scire facias* is not necessary.

ROLFE, B. I concur with the Lord Chief Baron in thinking that no *scire facias* is necessary in this case. In the first place, it appears to me to be very doubtful whether the plaintiff is bound in the first instance to proceed against a party who was a member of the co-partnership at the time of the execution ; for the act only says, "That execution shall and lawfully may be issued against any member for the time being of such corporation or co-partnership," and in case of its being ineffectual, then against other parties. Now, independently of the provisions of the statute, no one could be liable on a contract made by the Company, except those who were members at the time the contract was entered into ; but in order to enable plaintiffs to proceed against parties who may have subsequently purchased shares, the legislature says, that they may have execution against any one who is a member of the Company for the time being. If it be taken to refer to those persons who were not partners at the time of the contract, but became so afterwards, the construction is perfectly natural, and I find nothing in the act inconsistent with it. The section then goes on to say, that if the execution against those members should prove ineffectual, the plaintiff may proceed against any one who was a member at the time of the contract, or before its execution, or at the time of the judgment : i.e. although he may have chosen to take out execution against those who were members at the time being, he may still proceed against those who were [211] members at the time of the contract entered into or executed, or of judgment recovered. There is certainly considerable difficulty in putting a construction upon the act ; but it is not possible that the consequence, which has been mentioned by my Lord Abinger as necessarily resulting from the construction contended for by the defendant, could have been contemplated by the legislature ; there would, as he has remarked, necessarily be a series of writs of *scire facias* one after another. An attempt is made to get over this difficulty, by supposing the *scire facias* to be understood as the beginning of the execution ; but if it be necessary to put such a construction upon the statute, why not as well say that the judgment is the beginning of the execution ? For these reasons, I concur in opinion that a *scire facias* was not necessary, and that this rule must be discharged.

LORD ABINGER, C. B., added—I cannot agree in the opinion that the *scire facias* can be considered as the beginning of the execution.

Rule discharged, without costs.

POYNER v. HATTON. Exch. of Pleas. 1840.—Where an arbitrator, to whom a cause was referred, awarded that the action should cease, and that a sum of money should be paid by the plaintiff to the defendant ; and the defendant's costs having been taxed, both sums were demanded of the plaintiff :—Held, that, inasmuch as the arbitrator had exceeded his authority in directing payment of the sum of money to the defendant, an affidavit which stated that the defendant demanded of the plaintiff the said sum of money, and also the amount of the costs, but that the plaintiff did not pay the same, or any part thereof, was not sufficient to ground an attachment.

[S. C. 8 Dowl. P. C. 891 ; 10 L. J. Ex. 64.]

In this case, all matters in difference in the cause having been referred under a judge's order, the arbitrator awarded that the action should cease, and be no further

prosecuted; and that the plaintiff, on a day named, should pay to the defendant the sum of 2l. 18s. 6d. The costs were afterwards taxed in favour of the defendant at the sum of £37.

[212] Hance had obtained a rule for an attachment against the plaintiff for non-performance of the award. The affidavit on which the rule was granted stated, that the defendant demanded of the plaintiff the said sum of 2l. 18s. 6d., and also the sum of £37, the amount of the taxed costs, but that the plaintiff did not pay the same, or any part thereof.

J. Henderson shewed cause, and contended, that as the reference was merely of the matter in difference in the cause, the arbitrator had no power to award payment of a sum of money by the plaintiff to the defendant; and therefore, that the defendant, by demanding payment of that sum, as well as of the amount of the costs, had asked for too much, and consequently was not entitled to an attachment.

Hance, contra, admitted that the arbitrator had exceeded his authority, and that the defendant could not enforce payment of the 2l. 18s. 6d.; but urged, that the award was good for the residue, and that as the defendant had demanded the two sums separately, one not in a gross sum, and it was sworn that the plaintiff had not paid the money demanded, or any part thereof, it sufficiently appeared that he had refused to pay the amount due for costs, in respect of which, therefore, the plaintiff was entitled to an attachment.

LORD ABINGER, C. B. The affidavit only states that the plaintiff did not pay the said sums, or any part thereof; if it had gone on to say "or either of them," it might have been sufficient. It is consistent with it that the plaintiff tendered the amount of the costs. You ought to make out a clear case of refusal.

PARKE, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged, without costs.

[213] ATKINSON v. HOWELL. Exch. of Pleas. 1840.—Where the original writ of summons was sent by the plaintiff to the defendant at his request, but he kept it, and did not appear, the Court refused to allow the plaintiff to enter an appearance for the defendant sec. stat., without indorsing on the writ the date of the service, pursuant to the rule of M. T. 3 Will. 4.

[S. C. 8 Dowl. P. C. 872; 10 L. J. Ex. 64.]

O'Malley applied for a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to enter an appearance for the defendant according to the statute, without indorsing upon the writ of summons the day of the week and month of service, as required by the rule of M. T. 3 W. 4. It appeared from his affidavit, that the original writ had been sent by post to the defendant, at his request, on the 14th of October. On the 9th of November, he acknowledged the receipt of it, and said that he would direct a settlement of the debt to be made; but he had done nothing since, and kept possession of the writ. In *Brook v. Edridge* (2 Dowl. P. C. 647), where the defendant, on being served with process, snatched the original writ out of the hands of the person serving it, the Court granted a similar rule, and made the defendant pay the costs of it. Here, also, as it was in consequence of the improper conduct of the defendant that the indorsement could not be made in conformity with the rule of Court, the Court would interfere to assist the plaintiff.

Per Curiam. Here the plaintiff has brought himself into the difficulty by not following the usual course. No doubt, as a man of honour, the defendant ought to appear, but if he does not, we cannot assist you.

Rule refused.

[214] DIXON v. WALKER.^(a) Exch. of Pleas. 1840.—Where a plaintiff claims more than £20, but obtains a verdict for a sum under £20, by reason of a tender of

(a) This and the two following cases were decided by Alderson, B., sitting alone on the last day of the term.

the remainder of the amount claimed before action brought, his costs must be taxed on the reduced scale applicable to the recovery of a sum under £20.

[S. C. 8 Dowl. P. C. 887; 10 L. J. Ex. 43; 4 Jur. 1188. Approved,
James v. Lord Vane, 1860, 2 El. & El. 883.]

This was an action of debt, in which the plaintiff by his particulars claimed a sum exceeding £20. The defendant pleaded as to part of the demand, a tender before action brought, and as to the residue *nunquam indebitatus*. The plaintiff took out of Court the money paid in under the plea of tender, and entered a *nolle prosequi* as to that amount; and at the trial, he had a verdict for the balance claimed by him, viz. £13. The Master, on taxation, allowed the plaintiff his costs according to the ordinary scale. Petersdorff having obtained a rule nisi for a review of the taxation, on the ground that the costs ought to have been taxed on the reduced scale applicable, according to the "Directions to Taxing Officers," H. T. 4 Will. 4, to a recovery of a sum under £20,

Wightman shewed cause, and relied on *Masters v. Tickler* (2 Harr. & Woll. 81), where it was held that if the amount recovered by the verdict, together with the money paid into Court, exceed £20, the plaintiff is entitled to costs on the higher scale. If the lower scale were held to be applicable to a case like this, it would always be in the defendant's power to force the plaintiff down to that scale. For instance, if the demand were for £25, the defendant would only have to tender £6 before a writ was served, and then the plaintiff would recover his costs according to the reduced scale only, which would be highly unjust.

Petersdorff, *contra*. The effect of a finding in favour of the defendant on a plea of tender, is to shew that the [215] plaintiff was not entitled, at the time of the commencement of the action, to any more than the balance beyond the sum tendered. It defeats the right of action to that extent, before action brought. It now appears on the face of the record, that the plaintiff had no cause of action to the amount of £20. The case of payment into Court after action brought is different; that is not a denial of the existence of any part of the cause of action at the time of issuing the writ. That distinguishes the present case from *Masters v. Tickler*. In *Savage v. Lipscomb* (5 Dowl. P. C. 385), it was held, that even where the plaintiff's demand is reduced below £20 by a cross demand of the defendant, which is made the subject of a set-off, he is entitled to costs on the reduced scale only. That is a much stronger case than the present. So also, where to an action of assumpsit the defendant pleaded non-assumpsit and a set-off, and paid £2 into Court, and the cause was referred to arbitration, the party in whose favour the award was made being at liberty to enter up judgment for the sum awarded as upon a verdict, and the arbitrator awarded to the plaintiff a sum under £20, it was held that this was a sum recovered, within the meaning of the rule, and that the costs must be taxed according to the reduced scale: *Wallen v. Smith* (3 M. & W. 138).

ALDERSON, B. I think the rule must be absolute for reviewing the taxation. The cases of set-off, which have been cited, govern the present; indeed they are stronger, because there it is in the option of the defendant to set off his counter claim or not; therefore the plaintiff must bring his action for the whole of his demand: yet in the two cases cited, it was taken for granted that the plaintiff's right of action is defeated to the extent of the set-off, and that the "sum recovered" in the action is only the balance. A multo fortiori, the plaintiff here is defeated to [216] the extent of the money tendered, and the sum recovered is only the surplus. Those cases, therefore, must govern the present. I am not, however, to be considered as deciding that money paid into Court after action brought is not part of the sum recovered, but only that where the payment or tender amounts to matter of defence *pro tanto*, the sum recovered is only the difference.

Rule absolute.

JAMES v. PRITCHARD. Exch. of Pleas. 1840.—The defendant having bought a rick of hay from the plaintiff, (who was the executor de son tort of M. S.), before payment of the price, received a notice from a third party, stating that he was the administrator of M. S., and demanding payment of the sum for which it had been sold. The defendant being subsequently sued by the plaintiff for the price

of the hay :—Held, that he was not entitled to relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1.

[S. C. 8 Dowl. P. C. 890 ; 10 L. J. Ex. 92 ; 4 Jur. 1038, 1189.]

This was an action of debt, to recover the price of a rick of hay agreed to be sold by the plaintiff to the defendant. In the early part of this term, Montagu Chambers obtained a rule under the first section of the Interpleader Act, 1 & 2 Will. 4, c. 58, calling on one William Saunders to appear and state the particulars of his claim. The affidavit of the defendant, in support of the motion, stated, that on the 7th of April, 1839, he agreed with the plaintiff for the purchase of the hay in question : that on the 21st of June last, seven days before the commencement of this action, he was served with a notice by the attorney of Saunders, informing him that the hay had belonged to one Martha Simlett, deceased, to whom Saunders had taken out administration ; that he only was entitled to receive the price of the hay, and that if the defendant should pay it over to any body else, Saunders would nevertheless hold him accountable for the amount, and take immediate steps to recover it : that in consequence of such notice, the defendant did not know to whom the said hay belonged, or to whom he was liable for the same : that this action was commenced on the 29th of June last, and the declaration delivered on the 26th of October ; and that the defendant had not pleaded to the [217] action. The affidavit then proceeded to state that the defendant expected to be sued by Saunders for the value of the hay, and to deny collusion with Saunders.

E. V. Williams now appeared for the plaintiff, (who claimed as executrix de son tort of Martha Simlett), and contended that the case was not within the Interpleader Act. A purchaser cannot call upon his vendor to interplead with a third party. The plaintiff merely claims the performance of a contract made with her by the defendant, and of which the defendant has received the benefit. [Alderson, B. That seems to be an answer to the application. If the circumstances amount to a defence for the defendant, he should plead them.] The Court then called on

Chambers, for the defendant. The defendant is within the words and intent of the Interpleader Act. He is merely in the condition of a stakeholder, claiming no interest in the money which both these parties are calling upon him to pay, but being willing to pay it to whichever of them shall appear to be entitled to it. [Alderson, B. He has entered into a contract to pay the plaintiff. He must either perform that contract, or set up some defence which may justify him in refusing payment.] The money belongs to the administrator. As against an executor de son tort, the rightful representative is entitled to the estate, and the produce of it : this is an invalid contract, with which the rightful administrator may intervene ; and here the letter written on his behalf claims the money as part of the estate, and amounts to an affirmation of the contract. Besides, it is clear that the act of Parliament was intended to apply to cases of adverse claims in which a bill of interpleader might have been maintained ; and here it might, this being a case in which two parties “are claiming the same thing by different or [218] separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by one of them” (Mitford’s Eq. Pl. p. 39 (3rd edit.).

ALDERSON, B. I think the rule must be discharged, and that this is not a case within the Interpleader Act. The defendant has made a bargain with the plaintiff, and he must perform it, or shew good cause why he does not.

Rule discharged, with costs.

LANDER v. GORDON. Exch. of Pleas. 1840.—Where a Judge at Nisi Prius has granted a certificate for speedy execution, under the stat. 1 W. 4, c. 7, s. 2, and final judgment has been signed accordingly, the Judge has no power afterwards to order a stay of proceedings.

[S. C. 8 Dowl. P. C. 910 ; 10 L. J. Ex. 39 ; 4 Jur. 1188.]

This cause was tried at the last Summer Assizes for Surrey, before Gurney, B., and a verdict having been found for the plaintiff, the learned Judge, before the end of the Assizes, certified under the stat. 1 Will. 4, c. 7, s. 2, that execution should issue in a month. The certificate was dated the 7th of August. On the 31st of

August final judgment was signed. On the 5th of September, the same learned Judge, on an application made to him at chambers on behalf of the defendant, ordered that all proceedings in the action should be stayed until the 5th day of this term (November 6), and that the defendant should in the mean time give the plaintiff security for a certain amount of the damages and costs. On the 5th of November, James obtained a rule to shew cause why this order should not be set aside.

Platt and Montagu Chambers now shewed cause, and contended that, independently of the stat. 1 Will. 4, c. 7, [219] the Court or a Judge had power, at any stage of a cause, to stay the proceedings, where the equity or justice of the case in his judgment required it: that the 2nd section of that statute, which gave the Judge at Nisi Prius power to certify for speedy execution, did not imply any limitation of his independent authority to stay the proceedings: and that the 4th section, which empowered the Court, in term time, to vacate the judgment, and to stay or set aside the execution, was equally consistent with the Judge's power, antecedently to the term, to stay the course of the proceedings on his certificate: at all events, this rule ought to be discharged, as having been unnecessarily obtained, since it was not returnable until after the expiration of the time named in the Judge's order.

James, contra. A Judge has no power, after judgment has been signed, to rescind his certificate for speedy execution, or to stay the proceedings upon the judgment. The power of certifying must, according to the 2nd section, be exercised before the end of the sittings or assizes; and upon that certificate judgment may be signed forthwith, the period of issuing execution thereon being determined by the terms of the certificate. After the end of the sittings or assizes, the Judge is functus officio as to that certificate. If the defendant seeks to annex to it any condition or qualification, he ought to make the application during the assizes. It is inconsistent with the object of the statute, that after the plaintiff has obtained a judgment, and the time for reaping the fruits of it has been postponed, (which is in effect a stay of proceedings), a Judge should have power to postpone it a second time. Then the 4th section, which provides that "notwithstanding any judgment signed or recovered, or execution issued by virtue of this act, it shall be lawful for the Court in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set [220] aside, &c., as justice may appear to require," obviously implies that a Judge alone has no such authority. The power there given to the Court would be idle and nugatory, on any other supposition than that of the Judge at Nisi Prius being divested of all authority after the granting of his certificate, or at all events after the end of the assizes. It is analogous to cases under the Interpleader Act, 1 & 2 Will. 4, c. 58, under which, until the amendment introduced by the stat. 1 & 2 Viet. c. 45, s. 2, the Court only, and not a Judge at Chambers, could give relief. [Alderson, B. A Judge who has certified under the 34 Eliz. c. 6, to deprive a plaintiff of costs, may rescind his certificate within a reasonable time.] That is upon the particular terms of that statute; but it cannot be annulled after final judgment (*Whalley v. Williamson*, 7 Scott, 135; 5 Bing. N. C. 200; 7 Dowl. P. C. 253). Here judgment has been signed before the order complained of was made. This was in effect granting a new certificate extending the time, after the end of the assizes.

ALDERSON, B. This is a question of some importance as to the power of the Judge, and I will consult the other Judges of this Court before I decide. The motion, however, is quite useless, and therefore there should be no costs on either side. [The learned Baron shortly afterwards retired from the Court, for the purpose of consulting the other Judges; and on his return, said]—I am of opinion that this rule must be discharged, as being useless, without costs. As to the question which has been argued before me, I am of opinion, that when once final judgment has been signed, the power of the Judge is at an end, and the execution follows as of right according to the terms of the certificate, which the Judge has no power afterwards to alter. The party has a right to have the amount of the judgment secured to him, and that right cannot be [221] affected by any act of the Judge after judgment has been signed. I am confirmed in this opinion by at least one other member of the Court. In this particular case, however, this rule became useless, and ought therefore to be discharged. The plaintiff might have disregarded the Judge's order altogether, and gone on with his execution notwithstanding.

Rule discharged, without costs.

GREENWAY v. TITCHMARSH. Exch. of Pleas. 1840.—An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages.—In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county.—*Quære*, whether a letter of the plaintiff's attorney to the defendant, written in Middlesex, but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day, (verbal notice to the same effect having been previously given to him), was sufficient to satisfy such undertaking?

[S. C. 9 Dowl. P. C. 279; 10 L. J. Ex. 86.]

Assumpsit on the warranty of a horse. The declaration alleged as special damage, that the plaintiff had been put to great charges and expenses in the keep of the horse. Pleas, first, non assumpsit: secondly, that the plaintiff did not buy of the defendant, nor did the defendant sell to the plaintiff, the horse in the declaration mentioned: on which issues were joined. The venue had been changed by the defendant, on the ordinary affidavit, from Middlesex to Hertfordshire, but had been brought back to Middlesex on the usual undertaking of the plaintiff to give material evidence in that county. At the trial before Lord Abinger, C. B., at the Middlesex sittings after last term, the question in dispute between the parties was, whether the horse had been bought by a person named Grout on his own account, or as the agent of the plaintiff. Grout bought the horse of the defendant at Biggleswade fair in Bedfordshire, on the 14th of February, 1840, with a warranty of soundness. On the 4th of March following, he first saw the defendant again at Royston fair in Hertfordshire, and told him that the horse was unsound, and that he would be required to take him back. On the 5th of [222] March, the plaintiff's attorney wrote, in Middlesex, a letter addressed to the defendant, which was posted in London, informing the defendant that the horse was unsound, and demanding back the price of it, and giving him notice that unless the amount were paid, and the horse taken away, by a certain day, the horse would be sold, and proceedings would be commenced for the difference. The horse remained for some days after this date on the premises of Grout, in Surrey, where it was provided by him with food and stabling, the charges for which were paid by the plaintiff at Enfield in Middlesex. On the 11th of March, the horse was sold by the plaintiff pursuant to the notice given in the letter of the 5th, and this action was brought to recover the difference between the sum for which he was so sold, and the amount of the price paid for him to the defendant, and of the expenses of his keep up to the time of the re-sale. It was objected for the defendant, that the plaintiff ought to be nonsuited, on the ground that he had not complied with his undertaking to give material evidence of some matter in issue arising in the county of Middlesex. The Lord Chief Baron reserved the point, and the case being left to the jury, they found a verdict for the plaintiff for the full amount claimed in the action.

In the early part of this term, Kelly obtained a rule nisi for a nonsuit, pursuant to the leave reserved at the trial: against which

Erle and Miller now shewed cause. The actual issue in the cause was, whether the plaintiff bought the horse of the defendant or not; but it was a necessary part of the jury to determine, if they found that question in the affirmative, to what damages the plaintiff was entitled; it was material, therefore, to ascertain from what period the defendant had notice of the unsoundness, so as to entitle the plaintiff to recover the expenses of the keep [223] of the horse from that time. For that purpose, the letter of the 5th of March, which was written in Middlesex, was material evidence in that county. *Collins v. Jenkins* (4 Bing. N. C. 225; 5 Scott, 589) was a case much resembling the present in its circumstances. There, in an action on the warranty of a horse, a letter written by the plaintiff's attorney in Middlesex, apprising the defendant of the breach of warranty, and that the horse was standing at livery at the defendant's expense, coupled with an admission by the defendant's agent in Middlesex of the receipt of that letter, was held a sufficient compliance with an undertaking to give material evidence of some matter in issue arising in Middlesex, on the ground

that its effect was to increase the damages, by rendering the defendant liable for the keep of the horse, in case the warranty were established. That case was decided on the authority of *Curtis v. Drinkwater* (2 B. & Adol. 169), where, in an action against a coach proprietor for negligence in conveying the plaintiff from Oxford to Leominster, the injury having happened to the plaintiff in Oxfordshire, it was held that inconvenience suffered and expense incurred by the plaintiff in Worcestershire, was material evidence of a matter in issue arising in that county, within the meaning of the undertaking. It seems to be established, therefore, that if the evidence bears materially on the quantum of damages, it is material within the meaning of the undertaking, although it does not go to the verdict. The "matter in issue" means all that the jury are to determine. It may be said the letter was unnecessary, because a parol notice had before been given to the defendant at Royston fair. But the written evidence is not the less material because the fact may perhaps be proved by parol also; the witness who is to prove the parol communication may fail or be discredited. Besides, the letter was material, as shewing that the plaintiff dealt with the horse as his, and assumed to sell it. [Parke, B. The [224] letter was written in Middlesex, but the communication to the defendant by the post is the material thing, and that was done in London.] The letter was dispatched to the post in Middlesex, and that was part of its transit to the defendant. Suppose the plaintiff had been obliged to give secondary evidence of the letter, he must have called the clerk who took it to the post from the office in Middlesex. On this point they cited *Linley v. Bates* (2 C. & J. 659).

But secondly, the payment for the keep at Enfield was clearly material evidence to satisfy the undertaking: *Curtis v. Drinkwater*.

Kelly and Byles, *contra*. The argument on the other side is, that where any damage is proved in the county in which the venue is retained, that is sufficient. That is laying down the rule much too broadly. The undertaking is, to give "material evidence of some matter in issue" arising within that county. *Curtis v. Drinkwater* is distinguishable. There the inconvenience and expense incurred by the plaintiff were part of the injury done, without proof of which the action was not maintainable. It was, therefore, not merely matter in aggravation of the damages in Oxfordshire, but an integral part of the cause of action in issue. The mere negligence of the defendant would have given no cause of action, without the injury arising from it. But here the cause of action in issue is the making of the promise by the defendant—the buying of the horse; and the action would be maintainable without any damage. The evidence of the payment for the keep was wholly unnecessary: after proof of notice to the defendant, the plaintiff would be entitled to the reasonable expenses of the keep, wherever the horse was kept, and whether they were paid or not. The plaintiff can only recover a reasonable sum, for such time as would be required to resell the horse to the best advantage: *McKenzie v. Hancock* (Ry. & M. N. P. C. 436). [225] [Parke, B. Of which the actual payment may be shewn as the just measure.]

Secondly, as to the letter. It is admitted that the defendant had before had verbal notice of the unsoundness: could the subsequent written notice be material? It is said the witness to prove the verbal notice might be unsatisfactory; but he was not discredited in this case. But further, the mere sending of the letter from the office in Middlesex is not sufficient. In *Collins v. Jenkins*, there was an admission of the receipt of it in Middlesex—here it was only written in Middlesex. The fact to be proved is, that the defendant had notice: it is immaterial to that fact where the letter was written. [Lord Abinger, C. B. The notice is proved by two things, one done in Middlesex, and one in London.] The putting it into the post is the evidence (as in *Linley v. Bates*) to shew the receipt of it; the contents speak for themselves.

LORD ABINGER, C. B. I think this rule must be discharged. We are not considering the policy of the rule by law relating to this subject; it is sufficient to abide by the decided cases, more especially on a question of this nature. The law permits the plaintiff to try certain actions in any county; and where the action chiefly consists in damages, it is much better to bring it in the county where the damages accrued, and where the witnesses reside. Now the Courts have considered the undertaking to give material evidence in a particular county, as going, not merely to the actual question in issue on which the verdict depends, but also to the damages, as being a "matter in issue" between the parties. If this case stood upon the letter only, it might be doubtful whether that would be sufficient; although it would seem

that the writing of the letter would be material in order to shew the answer to it, or the inference to be derived from there being no answer. That admission by the silence [226] of the defendant could but be put to the jury, without shewing that the letter was written. But at all events, the evidence of the payment for the keep of the horse fulfilled the plaintiff's undertaking, as being material to the damages.

PARKE, B. I agree that the rule must be discharged. The case of *Collins v. Jenkins* shews, that the evidence to be given under an undertaking like the present is not confined to the mere issue in the cause, but includes also the question of damages, which are to be considered for this purpose as a matter in issue between the parties. Here part of the amount claimed and recovered by the plaintiff was paid in Middlesex, and that payment was good evidence on the question whether the sum claimed was a reasonable amount or not. If the case had stood merely on the letter, I should have had considerable doubt.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. What the plaintiff has to shew is, the reasonable expenses which he is liable to pay for the keep. It is cogent evidence of that, to shew what he actually did pay.

Rule discharged.

DOE D. BENNETT v. TURNER. Exch. of Pleas. 1840.—Where A., in 1817, let B. into possession of lands as tenant at will; and in 1827, A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—Held, that this entry amounted to a determination of the estate at will; and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties: and therefore, that unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, i.e. in the year 1818.

[S. C. 10 L. J. Ex. 213: affirmed, 9 M. & W. 643. Distinguished, *Lynes v. Snaith*, [1899] 1 Q. B. 489. Referred to, *Jarman v. Hale*, [1899] 1 Q. B. 996.]

At the trial of this ejectment, at the last assizes for the county of Gloucester, before Parke, B., it appeared that [227] the lessor of the plaintiff, who was admitted to have been in the year 1817 the owner of the lands in question, in that year let the defendant into possession of them as tenant at will. In the year 1827, the defendant being still in possession, the lessor of the plaintiff entered upon the land, and took and carried away a quantity of stone from a quarry on the estate. The defendant, however, continued in possession as before, until the year 1839, when the lessor of the plaintiff, after the expiration of six months' notice to quit, brought this ejectment to recover possession of the property. It was contended for the defendant, that the action was brought too late, the right of the lessor of the plaintiff having been, under the provisions of the stat. 3 & 4 Will. 4, c. 27, ss. 2 & 7, barred at the expiration of twenty-one years from the commencement of the original tenancy in 1817. The learned Judge, however, thought that the original tenancy at will was determined by the entry in 1827, if it was without the tenant's consent; that a new tenancy at will was then created, and that, consequently, the ejectment was well brought within twenty-one years from that period. It was then objected that the plaintiff was precluded, by his having given a notice to quit, from treating it as other than a tenancy from year to year. The learned Judge thought that the lessor of the plaintiff was not concluded thereby, and left it to the jury to say, first, whether the defendant was tenant at will, or from year to year; and next, whether the act done by the plaintiff in 1827 was or was not done with the consent of the defendant. The jury found that the defendant was tenant at will, and that the entry in 1827 was without his consent, and the verdict was thereupon entered for the plaintiff.

At the commencement of this term, Kelly obtained a rule nisi for a new trial, on the ground of misdirection; against which, on a subsequent day,

[228] The Attorney-General, Ludlow, Serjt., W. J. Alexander, and Talbot, shewed cause. The question is, whether, under the circumstances of this case, the lessor of

the plaintiff is barred by lapse of time from recovering in this ejectment. It is admitted that the original possession of the defendant, from 1817 to 1827, was as tenant at will. Nor can it be disputed that that tenancy at will was determined by the entry of the lessor of the plaintiff, and the taking and carrying away of the stone, in 1827. It is clearly laid down in Co. Litt. 55 b. that "if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him; unless the trees were excepted, and then it is no determination of the will, for then the act is lawful albeit the will doth continue." So, in *Ball v. Cullimore* (2 C. M. & R. 120), it was held that a feoffment by lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will. The Lord Chief Baron there lays it down as the general rule of law, that any act done upon the land by the lessor, in assertion of his title to the possession, determines the will. The length of time during which the lessor continues in possession is immaterial; having actually entered, the pre-existing estate at will is absolutely determined, and the occupation of the party is thenceforward under a new tenancy at will. Under these circumstances, the stat. 3 & 4 Will. 4, c. 27, is clearly no bar. The second section of that statute enacts, generally, that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or [229] distress, or to bring such action, shall have first accrued to the party, or to some person through whom he claims. Then section 7 defines the period at which the right to bring an action shall be deemed to have first accrued, in the case of a tenancy at will; viz., "either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." That is, if the will be determined by any act of the lessor, then the twenty years shall be computed from that act done; if not, then they shall be computed from the expiration of one year next after the original commencement of the tenancy. Here the will was determined by the entry of the lessor in 1827, and he then re-demised to the defendant at will; he has, therefore, twenty-one years from that period in which to bring his ejectment. The argument on the other side must go to this, that the fact of the determination of the tenancy in 1827 must be struck out of the case, and that there has been a continuous holding by the defendant since his first period of possession in 1817, from which date the time is to be computed. But in order to defeat the right of the lessor, there must have been, not only a continuous holding, but a continuous tenancy at will, for twenty-one years. Here, however, there has been, within twenty years, not only an interval during which the tenancy at will was suspended, but an actual change of the possession. [Rofe, A. It does not seem to be necessary to decide whether the defendant continued to be tenant at will after 1827; if he were a trespasser, or a tenant from year to year, it is the same. Parke, B., referred to section 10, which enacts, that no person shall be deemed to have been in possession of any land, within the meaning of the act, merely by reason of having made an entry thereon.] That was to do away with the old doctrine of entry and continual claim, [230] but has no application to the 7th section, in which nothing is said about being in possession of the land.

Kelly, R. V. Richards, and Gray, contra. In the first place, it ought to have been left to the jury to say whether the entry in 1827 was made with an intention to determine the tenancy at will. The law does not say that every entry on the land by the lessor is a determination of the will, without an intention on his part to determine it. The assent or dissent of the lessee makes no difference; otherwise the lessor could not go on the land at all without the assent of the tenant. The law prevents the lessor from being a trespasser by going upon the land; but, although it is commonly said that his entry on the land determines the will, that must be taken sub modo, when the entry is made with the intention to determine it. [Parke, B. Any act of ownership on the land which is not excused at the time, is a determination of the will: Co. Litt. 245 b.] The lessor has a right to say, rather than be treated as a trespasser, that he entered to determine the will; but that is only in case the tenant chooses to treat him as a trespasser. It was not found that the taking of the stone in 1827 was against the consent, but without the consent, of the defendant; i.e., without his first consenting. That did not necessarily shew that it was an adverse

act. There was nothing to convey to his mind that anything was done or intended to be done to the disturbance of his possession.

But, assuming that the original tenancy at will was determined in 1827, it was not a new tenancy at will that was then created, but the defendant became tenant at sufferance, and there was nothing to shew that the character of his occupation was subsequently changed. If so, the statute ran from the expiration of a year after the commencement of the only tenancy at will, viz., that which [231] commenced in 1817. In Com. Dig. Estates, (Tenant by Sufferance, I. 1), it is said, "Tenant by sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession. . . ." "So any, who continues in possession after a particular estate is ended, without agreement." So, in Vin. Abr. Estate, (Tenant at Sufferance, D. c.), "If a man leases at will and dies, and afterwards lessee continues in possession, though the lease was determined by the death of the lessor, yet lessee is tenant at sufferance." Again, (Lease at Will, S. b. 2), "There cannot be tenant at will till there is agreement of both parties, or till there is an entry." For this reason it is that there cannot be a tenant at sufferance to the Crown, because it is said to be the laches of the lessor to suffer his lessee at sufferance to continue in possession of the land after his term, which laches cannot be imputed to the Crown: *Finch's case* (2 Leon. 143). Even "a bare agreement that J. S. shall have the land," will not amount to a lease at will: *Munifas v. Baker* (Keb. 26): there must be some act done between the parties, in order to commence a tenancy at will. [Parke, B. Conceding that to be the law, and that here there was no evidence of a new tenancy at will, the question is, what effect that has on the plaintiff's right to recover. That depends on the construction to be put on the 7th section of the 3 & 4 Will. 4, c. 27.] Here the defendant was tenant at will from 1817 to 1827, and no longer; he was, therefore, within the operation of the 7th section, and the right of entry or action accrued in 1818; because, to satisfy the words of that section, the determination of the tenancy at will must be deemed to have occurred at the expiration of one year next after its commencement. The lessor, for the purpose of the limitation imposed by the statute, is at all events to be considered as having entered at the end of a year. If it be otherwise, [232] then, by some act of which the tenant is altogether ignorant, the lessor may have a period of forty instead of twenty years within which to sue, and that without any evidence of acknowledgment of his title. The 7th section was framed chiefly for the purpose of protecting the possession of small patches of land taken from commons, &c., of which the parties might have been allowed to remain in possession without interruption for a long period, but of which it would be difficult to prove the commencement of the holding. The reasonable construction, therefore, is, that in any event the right of action shall accrue ultimately at the end of a year from the commencement of the tenancy, though it may accrue sooner by the actual determination of the will. This construction is strengthened by reference to the 8th section, which, in the case of a parol tenancy from year to year, provides that the right of the party shall be deemed to have first accrued at the determination of the first of such years, or at the last payment of rent, which shall last happen. Here, therefore, the right of the lessor of the plaintiff first accrued in the year 1818, more than twenty years before the commencement of this action.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B. The question in this case was, whether the lessor of the plaintiff was barred by lapse of time from recovering the property in dispute. It appeared on the trial, that the lessor of the plaintiff had let the defendant into possession of the land in question, as tenant at will, in the year 1817. In the year 1827, he entered on the land without the consent of the tenant, and cut and carried away stone therefrom. This was undoubtedly a determination of the tenancy at will, for the reason given in Co. Litt. 55 b., viz., that otherwise it would be a wrongful [233] act. Notwithstanding this determination of the tenancy at will, the defendant continued in possession of the land as before, and the lessor of the plaintiff did not bring his ejectionment till the year 1839, being twenty-two years from the time when the defendant first became tenant at will. The jury found, that during the whole period from 1817 to the bringing of the action, the defendant was tenant at will to the lessor of the plaintiff. It was contended on behalf of the defendant, that the action was brought too late,

for that the right of the lessor of the plaintiff was, under the provisions of the statute 3 & 4 Will. 4, c. 27, barred at the end of twenty-one years after the commencement of the original tenancy in 1817. By the 2nd section of that statute it is enacted, that no person shall bring any action to recover any land, but within twenty years next after the right to bring such action shall first have accrued; and by the 7th section it is enacted, that when any person shall be in possession of any land as tenant at will, the right of the person entitled, subject thereto, to bring an action to recover such land, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. The defendant therefore argued, that the right of the lessor of the plaintiff to bring his action first accrued, according to the provisions of the 7th section, in the year 1818, being one year after the commencement of the tenancy; and that by the express enactment of the second section, the action could only be commenced within twenty years of that time, i.e., in or before the year 1838; whereas in fact the present action was not commenced till the following year, 1839. It appears, however, to the Court, that this view of the case, attending to the finding of the jury, and if that be correct, and a new tenancy at will was created in 1827, cannot be sustained. If, indeed, the tenancy throughout the whole period had been one [234] continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, then the reasoning of the defendant would be correct. In either of those cases, the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period, would have been barred. But the facts of the present case, if the finding of the jury be taken to be correct, exclude both hypotheses, on one or the other of which the defendant's argument must rest. There was not a continued tenancy at will, for the will was determined in 1827. There was not a tenancy by sufferance, for the jury have found that the defendant was all along tenant at will. The finding of the jury necessarily supposes, that, after the determination of the will in 1827, a new tenancy at will was constituted. The effect of this was to destroy the right of action which had accrued in 1818, for it is clear that after creating a new tenancy at will, the lessor of the plaintiff could bring no action until that new tenancy was determined. This construction is in strict conformity with the language of the 7th section, which provides that the right of action shall accrue at the end of the first year next after the commencement of such tenancy; i.e., of the tenancy under which the tenant is actually holding, not at the end of one year next after the commencement of any preceding tenancy. The consequence is, that the lessor of the plaintiff had twenty years from the year 1826, for bringing his ejectment, and was therefore not affected by the statute. But we think that the present finding of the jury cannot be fully relied upon. I certainly did not direct the attention of the jury, on the trial, to this point—that the effect of a determination of the will was to make a tenancy by sufferance only, [235] during which the landlord might have brought his ejectment without any demand of possession, or other act; and such tenancy at sufferance would continue until the parties created a new tenancy at will, by fresh agreement between them, express or implied. Slight evidence would probably satisfy a jury that a relation so inconvenient as that of a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry, as he has no right to emblements (*Vin. Abr. Emblements*, 79), would not be long continued. But as this point was not submitted to the jury, we think the defendant, if he thinks it worth while to insist upon it, is entitled to a new trial, in which the question for the jury will be, whether a new tenancy at will was created, after the determination of the old one in 1827.

Rule absolute for a new trial.

BLOOR v. DAVIES AND BLOOR. Exch. of Pleas. 1840.—In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant.

[S. C. 10 L. J. Ex. 222.]

Debt on bond, in the penal sum of £2000, brought against the defendants as the devisee and heir of Thomas Bloor, deceased. Plea, by the defendant Davies, non est factum: by the defendant Bloor, riens per descent. At the trial before Patteson, J., at the Denbighshire Summer Assizes, 1839, the defence on the part of the defendant Davies, the devisee, was that the signature of the testator to the bond was a forgery. Many witnesses were called on both sides to speak to their knowledge of the handwriting, and among those called for the defendant was a grand-daughter of the testator, who stated on the voir dire that she was entitled under his will to an annuity of £10 for her life, charged upon his real property (which it appeared was of considerable value). The witness was thereupon objected to as being incompetent, by reason of her interest to prevent the funds applicable to the payment of the annuity from being diminished by the plaintiff's obtaining judgment in this action: and the learned Judge (after referring to the stat. 1 Will. 4, c. 47, s. 2), being of that opinion, rejected the witness. A verdict having been found for the plaintiff,—

Welsby, in the following Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the evidence ought to have been received:—relying on *Nowell v. Davies* (5 B. & Adol. 368). In last Easter Term,

Jervis and W. Yardley shewed cause. The witness was properly rejected. The case of *Nowell v. Davies*, upon which the defendant relies, appears to have been decided altogether upon the supposed authority of *Paull v. Brown* (6 Esp. 34), from which Lord Denman says, "there is no distinguishing it:" and no other reasons are given for the decision. *Paull v. Brown* was an action by an executor for a debt due to the intestate, and a creditor of the intestate was held to be a good witness for the executor to prove the debt, on the ground, as stated by Macdonald, C. B., that it was not distinguishable from the case of an action by the intestate himself, for whom his creditor would clearly have been a witness. *Nowell v. Davies*, on the other hand, was an action against executors for a debt of the testator, in which an annuitant under the will was held not to be disqualified by interest from giving evidence for the executors. But supposing the authority of *Paull v. Brown* to have been applicable, it may be questioned whether the doctrine laid down by Macdonald, C. B., be a sound one. After the death of the testator or intestate, the creditor has nothing further to look to than the specific limited fund of which the estate consists, which cannot be altered by future circumstances, and which he comes to increase by his evidence; but that is not the case during the life of the debtor—his estate is fluctuating until his death. It may well be doubted, therefore, whether *Nowell v. Davies* was well decided. It is further to be observed, that in that case it did not appear whether the annuity was charged on the real or personal estate. [Lord Abinger, C. B. It does not appear that there was any real estate.] There are also some other authorities which will probably be referred to on the other side, but they all appear to be distinguishable from the present. In *Carter v. Pearce* (1 T. R. 164), which was an action against an administratrix for work and labour, &c., a co-obligor in a bond to the ordinary, under the 22 & 23 Car. 2, c. 10, was held a competent witness to prove a tender by the administratrix: and the Court said, that even if a creditor of the administratrix had been offered as a witness, there could have been no objection to his evidence being received. Buller, J., said, that in order to shew the witness to be interested, it was necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other; whereas, supposing there were no assets, though the defendant would be answerable for the costs, she would not be liable on her bond to the Ecclesiastical Court. In *Davies v. Davies* (Moo. & M. 345), Parke, J., ruled, that on a plea of plenè administravit to an action against an administratrix, an unsatisfied creditor of the intestate was a competent witness for the defendant: putting it on the same ground as in *Paull v. Brown*, that he would have been a competent witness for the intestate, if alive, and that there was no ground of distinction between the cases.

This question was raised also in the case of *Burghart v. Hall* (4 M. & W. 727), but the Court gave no [238] judgment upon it. On the other hand, in *Craig v. Cundell* (1 Campb. 381), Lord Ellenborough ruled, that, in an action at the suit of an executor or administrator, if the estate were insolvent, an unsatisfied creditor was not a competent witness for the plaintiff, as he came to create a fund out of which he might be satisfied. In *Baker v. Tyrwhitt* (4 Campb. 27), the same learned Judge held, that in an action by an executor, the residuary legatee was not a competent witness for the plaintiff, and that he could not be made so even by releasing all claim to the debt sought to be recovered, having still an interest to support the action, that the costs might not be a charge upon the estate. So, in *Allington v. Bearcroft* (Peeke's Add. Cas. 212), and in *Matthews v. Smith* (2 Y. & J. 426), a party entitled to a distributive share of an intestate's estate was held not to be a competent witness in support of an action by the administrator. The present case, in fact, falls entirely within the principle which excludes the creditor of a bankrupt from giving evidence to support a claim by the assignees, because he comes to increase the fund out of which his dividend is to arise. [Lord Abinger, C. B. There the law assumes that there are not funds to pay all the debts.] The Court will not inquire whether the estate be insolvent or not, in determining the question as to the competency of the witness. In *Nowell v. Davies*, Parke, J., says, "It is difficult to see how the solvency of the estate could make any alteration as to the competency of the witness."

But, further, the stat. 1 Will. 4, c. 47, s. 2, which provides that all wills, &c. concerning lands, shall be deemed, as against persons with whom the testator shall have entered into any bond, covenant, or specialty, binding his heirs, to be fraudulent and utterly void, clearly had the effect of making this witness incompetent; because she [239] came to shew, in effect, that this will is a good disposition notwithstanding the statute, by shewing that the bond on which the plaintiff sues is not a genuine instrument. If the bond be established, the will is void as against the plaintiff, and he will have execution against the land itself, out of which the witness's annuity is payable.

Welsby, contra. It may be admitted that there is no distinction in principle, as to the competency of the witness, whether the estate be solvent or insolvent; because otherwise the Court would be compelled, on every inquiry into the competency of a creditor or legatee, to take an account of the assets, which would lead to collateral inquiries almost interminable. But the case of a bankrupt differs in this respect from that of a party interested under a will, that there is an assumed insolvency: the creditor or bankrupt necessarily comes to benefit himself. No such assumption will be made in the case of a creditor or legatee under a will. In *Clarke v. Gannon* (Ry. & M. N. P. C. 31), where Lord Tenterden ruled, that in an action by executors for a debt due to the testator, a paid legatee was a competent witness for the plaintiffs, it was urged that he was inadmissible, inasmuch as he would be obliged to refund in case the estate should turn out to be deficient; but the learned Judge said that he could not assume that there was no other estate sufficient to pay the debts. The cases referred to on the other side are distinguishable, or must be taken to have been overruled by *Nowell v. Davies*. *Baker v. Tyrwhitt* was the case of a residuary legatee. A verdict for the executor would necessarily increase the residue; he stood, therefore, in a similar position to that of the creditor of a bankrupt. The same observation applies to the cases of parties entitled to a distributive share of an intestate's estate. *Craig v. Cundell* was decided on the ground of the insolvency of the estate; and Parke, B., in [240] *Davies v. Davies*, treats the dictum of Lord Ellenborough in that case as not being maintainable. *Nowell v. Davies* appears to be directly in point to the present case. But it is said that that decision is unsatisfactory, because it proceeds, according to the language of Lord Denman in giving judgment, altogether on the authority of *Paull v. Brown*. Even, however, if the language of the Lord Chief Justice may be considered open to observation, the decision itself, which was pronounced after a full argument, and time taken for consideration, must be taken as the deliberate judgment of the whole Court in favour of the competency of the witness. The Courts have of late adopted a much less narrow view of this subject than formerly; and it is not considered sufficient to disqualify a witness, that he will derive a great, probable, or even a certain benefit from the verdict; it must appear that some legal or equitable right of his will be affected thereby. In the case of *Burghart v. Hall*, this Court, in the first instance, refused the rule moved for a new trial on the ground of the incompetency of the legatee; and although it was afterwards granted, it was with

a strong intimation of the opinion of the Court against the objection. In *Doc d. Wildgoose v. Pearce* (5 M. & W. 506), which was an ejectment by a party claiming an undivided interest in an estate under a will, the question in the cause being the competency of the testator, a party claiming another undivided interest in the same estate, under the same will, was held to be a competent witness for the lessor of the plaintiff, on the ground that the result of the verdict would not affect his rights; although he had doubtless the strongest possible interest in establishing the validity of the will. [Parke, B. In that case of *Nowell v. Davies*, time was taken for consideration; and having been a party to the deliberation of the Court, I may say, that I believe the reason for the judgment was,—at least so far [241] as I was a party, my reason certainly was,—that a verdict for the defendant could not be used by the witness, nor a verdict for the plaintiff against the witness, in a suit between that witness and the executor, on the ground that it was *res inter alios acta*. But I was afterwards satisfied that this was wrong; because a verdict and judgment for the plaintiff would have been admissible evidence for the executor, to prove a debt to that amount, and discharge the executor *pro tanto*, in a suit between him and the legatee, unless the verdict and judgment had been impeached on the ground of fraud: and I so stated on the argument of the case of *Burghart v. Hall*. The judgment, therefore, in *Nowell v. Davies*, so far at least as related to myself, proceeded on an untenable ground. The statute 3 & 4 Will. 4, c. 42, s. 26, which passed afterwards, removed this objection, by putting an end to the incompetency of a witness, on the ground of the verdict being evidence against him. But Sir William Follett contended, and, as I thought, rightly contended, in the case of *East v. Hall* (4 M. & W. 727, n.), that the legatee was not incompetent simply on the ground of the admissibility of the verdict; but that he was interested in the event of the suit, as having an interest in the fund itself, in the hands of the executor, which would be directly affected by a verdict for the plaintiff: and this consideration escaped attention, so far at least as I was concerned, in the case of *Nowell v. Davies*.] At all events, there having been no decision of the Court against the competency of a witness under such circumstances, the question is still open to consideration, and it must be admitted to be one of considerable importance.

The only remaining question is, whether, this being a devise of an annuity issuing out of the real estate, the case is affected by the operation of the statute 1 Will. 4, c. 47, s. 2. That statute only makes the will void *pro* [242] *tanto*, as against the specialty creditor; but the devisee is still entitled in equity to reimburse himself out of the personal estate, unless creditors would be prejudiced thereby (see the cases collected, Williams on Executors (2nd edit.), 1206). Here there is nothing to shew that there was not an ample fund, both real and personal, after the satisfaction of the debt on this bond; and the Court will not assume the contrary.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was a case in which a rule was obtained for a new trial, on the ground of the rejection of a witness, under circumstances which appeared at first sight to be similar to those of a case decided in the Court of King's Bench, *Nowell v. Davies*. That was an action against executors for a debt of their testator, and an annuitant under the will was held to be a good witness for the executors. But the present case was that of an action by a bond creditor of the testator against the devisee of his real estate, in which the object of the plaintiff is to have execution against the real estate, out of which same estate an annuity is payable to the witness under the will. The witness, therefore, was directly interested, for the object of her evidence was to prevent the plaintiff from recovering against the very estate devised for payment of her annuity. She had a direct interest in the result of the suit, not at all depending upon the question involved in the case of *Nowell v. Davies*; and the rule must therefore be discharged, without reference to the authority of that case, or of the other cases referred to, upon which we say nothing.

Rule discharged.

[243] THE GREAT NORTH OF ENGLAND RAILWAY COMPANY v. BIDDULPH. Exch. of Pleas. 1840.—In an action by a Railway Company for calls, the declaration alleged that “the defendant subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the act,” &c. The Company were empowered by the 3rd section of the act to raise a million of money for constructing and maintaining the railway; and by the 195th section it appeared that £660,000 had been subscribed for by several persons, under a contract binding themselves and their heirs, before the passing of the act. A motion having been made in arrest of judgment, on the ground that the declaration should have alleged a subscription by deed:—Held, that the declaration was good after verdict.—Semble, that it would have been also good on special demurrer.—By the 121st section, the directors were empowered to make calls, the aggregate amount not to exceed £100, and no call to exceed £10 upon each share, and an interval of three calendar months was to elapse between the days of payment of each call. It also required that twenty-one days’ notice should be given of every call, by advertisement in certain newspapers, and enacted that all money so called for should be paid to such persons, at such times and places, as in the said notice should be appointed. A resolution of the directors was made for a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify the place where, or person to whom, the payment was to be made. The notice of that call, inserted in the local newspapers, according to the directions of the act, specified the time and place of payment and the persons to whom the payment was to be made:—Held, first, that the publication of the notice must be assumed to be the act of the directors; secondly, that the call was properly made.

[S. C. 2 Railw. Cas. 401; 10 L. J. Ex. 17; 5 Jur. 221. See *Newry and Enniskillen Railway v. Edmunds*, 1848, 2 Ex. 122; 5 Railw. Cas. 277; *Johnson v. Lyttle’s Iron Agency*, 1877, 5 Ch. D. 690.]

Debt for calls on shares subscribed for by the defendant. The first count of the declaration stated, that whereas the defendant, before the several times of making the several calls in this count, and in the second count hereafter mentioned, to wit, on &c., subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the said act, (a) [6 & 7 Will. 4, c. cv.], and [244] in the act made in

(a) The following sections of the act are those which were most material to the case:—

Section 3 enacts, “That it shall be lawful for the said Company to raise amongst themselves any sum of money for constructing and maintaining the said railway and other works by this act authorized, not exceeding in the whole the sum of one million pounds, the whole to be divided into shares of £100 each, and each share shall be numbered, beginning with number one, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same, and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators and assigns, to their proper use and benefit, proportionably to the sum they shall severally contribute, and all corporations and persons and their several and respective successors, executors, administrators, and assigns, who have subscribed, or shall severally subscribe for any such share, or such sum as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive in proportionable parts according to the respective sums so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of this act.”

Section 100 enacts, “That the directors for the time being of the said Company shall superintend all the affairs thereof, and shall have the custody of and power to use the common seal of the said Company on their behalf, and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said Company, or relative thereto, which the said Company are by this act authorized to do, except

the first year of the reign of her present Majesty, for enabling the said Company to extend [245] the line of their railway, and to make two branches therefrom, and for other purposes relating thereto, and for di-[246]-vers, to wit, fifty shares of £100 each in the said undertaking. And whereas the said Company, after the pass-[247]-ing of

such as are herein required and directed to be done at some general or general special meeting of the said Company." [Powers are then given to the directors to appoint and displace officers and servants, and to allow salaries, &c., and to meet and adjourn: five directors are made necessary to constitute a meeting; all questions are to be determined by a majority of the members present; each director is to have but one vote, except the chairman, who is to have a casting vote; and the directors are to "keep a regular minute and entry of their proceedings at every meeting of the said directors," and account of all monies disbursed and received. The section then proceeds] "and shall regularly enter into some books to be from time to time provided at the expense of the said Company for that purpose, notes, minutes, or copies, as the case shall require, of such appointments, receipts, and disbursements, and of all contracts and bargains entered into or made by them, and of other their orders and proceedings, and which books shall be deposited with and kept under the care and direction of the said directors." Proviso, that the directors shall not fix their own remuneration, and shall take security from persons having the custody or control of any money received by virtue of the act.

Section 103 enacts, "That the orders and proceedings of all meetings, as well general as special, of the said Company, and of the said directors and committees respectively, shall be entered in some book to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings, being proprietors, or being directors or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed."

Section 119 enacts, "That the several parties who have subscribed, or who shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this act, at such times and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any courts of law or equity, together with interest on such unpaid sum of money, at the rate of £5 per centum, per annum from the time when the same was directed to be paid as aforesaid up to the day of actual payment thereof."

Section 121 enacts, "That the directors to be appointed as aforesaid shall have power from time to time to make such calls of money from the subscribers to and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made or money paid for or in respect of any such shares shall not amount to more than the sum of £100 on any such share, and so that no such call shall exceed the sum of £10 upon each share which any corporation or person shall be possessed of or entitled unto in the said undertaking, and an interval of three calendar months, at the least, shall elapse between the day appointed for payment for one call and the day appointed for payment of another call, and twenty-one days' notice at the least shall be given of every such call by advertisement inserted in two or more Durham, Newcastle, and York newspapers, aforesaid; and all monies so called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed; and the respective proprietors of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid, to such persons, and at such times and places, and in such manner as shall be appointed as aforesaid; and if any proprietor for the time being of any such share

the said first-mentioned act, to wit, on &c., and from thence continually until the commencement of this [248] suit, have been and still are making and constructing the railway and other works in the said acts mentioned, and otherwise carrying the said acts into execution. And whereas also, after the passing of the said first-mentioned act, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares, to wit, on &c., the directors for the time being of the said Company, then duly appointed pursuant to the said first-mentioned act, made a certain call not exceeding £10 a share, to wit, a call of £8 a share, from the several subscribers to, and proprietors of, the said undertaking for the time being, upon and in respect of their respective shares therein, according to the said act, the same call being then found by the said directors to be necessary, and being then necessary, for defraying the expenses of and carrying on the said undertaking, and the aggregate amount of the said call, and all other calls made or money paid for or in respect of the said shares, not exceeding £100 on any share; which said call was then made payable by the said directors at a time before the commencement of this suit, [249] and after an interval of three calendar months next after the day appointed for payment of any preceding call had elapsed; to wit, on &c. And whereas, after the making of the said call as in this count mentioned, and more than twenty-one days before the same was made payable as aforesaid, to wit, on &c., notice of the said call and of the time at which

shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of £5 per centum per annum, from the day appointed for the payment thereof, up to the time the same shall be actually paid; and if any proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest (if any), then or at any time thereafter it shall be lawful for the said Company to sue for and recover the same in any of his Majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, or the said directors may, and they are hereby authorized to declare the shares belonging to such proprietor to be forfeited, and to order such shares to be sold: Provided nevertheless, that no advantage shall be taken of any forfeiture of any share in the said undertaking, until notice in writing under the hand of the clerk or treasurer of the said Company, that such share hath been declared forfeited, shall have been given or sent by the post unto or delivered to some inmate of the last known place of abode of the proprietor of such share, nor until the declaration of forfeiture of the said directors shall have been confirmed either at a general or special general meeting of the said Company, such general or special general meeting being held after the expiration of three calendar months at the least from the day on which such notice of forfeiture shall have been given as aforesaid; and after such declaration of forfeiture shall have been confirmed by such general or special general meeting, the said Company, by an order to be made at the same or at any subsequent general meeting or special general meeting, shall have power to direct the said directors to dispose of the shares so forfeited, or any of them, in manner by this act directed; and the said directors may, in that case, sell and dispose of such shares at a public auction, or by private contract, or public tender, and together or in lots, or in such other manner and for such price as they may think fit, and a solemn declaration in writing, made by some credible person not interested, before any Justice of the peace, or before any Master or Master extraordinary in the High Court of Chancery, stating that such call had been made by the said directors, and that such notice had been given, and that such default in payment had been made in respect of the share so sold, and that the same share had been declared to be forfeited, and that such declaration of forfeiture had been confirmed in manner hereinbefore mentioned, shall be sufficient evidence of the facts therein stated, and the purchaser of such share shall not be bound to see to the application of his purchase-money, nor shall his title to such share be affected by any irregularity of proceeding in reference to such sale, but such solemn declaration, and the receipt of the treasurer of the said Company for the price of such share, shall be sufficient evidence of title thereto for all purposes whatsoever."

Section 123 enacts, "That in any action to be brought by the said Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a

the same was made payable as aforesaid, was duly given by advertisement then inserted in the several newspapers following, that is to say, two Durham newspapers, respectively called, &c. [naming them], three Newcastle newspapers, respectively called, &c., &c., and three York newspapers, respectively called, &c., &c., according to the said first-mentioned act, in and by which said notice, a certain place in the said notice mentioned was appointed and notified for payment of the said call, at the said time at which the same was made payable as aforesaid, to the then treasurer of the said Company, to wit, &c., which period of twenty-one days next after the giving of the said notice elapsed before the commencement of this suit, whereby the defendant became liable to pay to the said Company a large sum of money; to wit, £400, being the amount of the said call upon and in respect of the said shares to which the said defendant was so entitled as aforesaid; yet the defendant hath not paid the said sum of £400, or any part thereof, or any interest thereon; whereby, and by virtue of the said first-mentioned act, an action hath accrued to the said Company to demand and have of and from the defendant the sum of £400, and interest thereon, after the rate of £5 for £100 for a year, from the time the same became payable as aforesaid, amounting to a large sum, to wit, £100.

The second count stated—That whereas also afterwards, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares in the said under-

share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call, or so many calls, of such sums of money, upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid on such calls, unless it shall appear that any such call exceeded £10 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required; and in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the clerk of the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the several corporations and persons who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 183 enacts, "That in all cases in which it may be necessary for the said Company to serve any summons or demands, or any notice, or any writ, or other proceeding at law or in equity, or otherwise, upon any corporation or person, under the provisions of this act, personal service thereof respectively upon such person, or upon some member, or upon the clerk or other officer of such corporation, or delivering the same to some inmate of the last or usual known place of abode of such person, or of such member, clerk, or other officer of such corporation, or at the office of such clerk or other officer, shall be deemed good and sufficient service of the same respectively upon such corporation or person (as the case may be), except in cases in which any other mode of service is by this act particularly directed: Provided always, that every summons, demand, or notice, or other document, requiring authentication by the said Company, may be signed by the clerk or treasurer of the said Company, and need not be under the common seal of the said Company, and may be in writing or in print, or partly in writing and partly in print."

Section 195, after reciting "that the probable expense of making the said railway, and the other works hereby authorized, amounting to the sum of £660,000, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for," enacts, that the act may be put into execution immediately after the passing thereof.

taking, and after the passing of the said acts, and whilst the said Company were so making and constructing the said rail-[250]-way and other works in the said acts mentioned, and otherwise carrying the said acts into execution as aforesaid, to wit, on the several days and times in this count in that behalf hereafter mentioned, the several calls in this count hereafter mentioned were respectively made by the directors for the time being of the said Company, according to the said acts, from the several subscribers to, and proprietors of, the said undertaking for the time being, upon and in respect of their respective shares in the said undertaking, the same calls being respectively, at the respective times of making the same, found necessary by the said directors, and being respectively then necessary for defraying the expenses of and carrying on the said undertaking, and no one of the said calls exceeding £10 a share, &c., and the aggregate amount of the same calls, and all other calls and money paid for or in respect of the said shares, not exceeding £100 on any share, which same calls respectively, at the respective times of making the same, respectively were, by the said directors, made payable before the commencement of this suit, on the respective days in this count in that behalf hereafter mentioned; that is to say, one call of £3 a share made on the 5th day of December, A.D. 1837, and payable on the 17th of January, A.D. 1838 [seven other calls were then specified in like manner]. The count then averred, that an interval of three calendar months at least had elapsed between the respective days of payment of the calls and between the day of payment of the first of the same calls and the day of payment of any preceding call, and of the insertion in the newspapers of twenty-one days' notice in respect of each of the calls, specifying the days, times, and places of payment, and of the defendant's liability to pay the amount of the calls, viz. £2250. Breach, non-payment of the calls, or any of them, or any part thereof, or any interest thereon, whereby and by virtue of the said first-mentioned act an action hath accrued, &c. [as in the first count].

[251] The third count stated—That whereas also the defendant, after the passing of the said first-mentioned act and before the commencement of this suit, to wit, on &c., then and at the time of making the call in this count hereafter mentioned, being a proprietor of divers, to wit, fifty shares in the undertaking in the said first-mentioned act mentioned, was and is indebted to the said Company in the sum of £400 for a call, to wit, a call of £8 a share upon his the defendant's said shares in this count mentioned, before then, to wit, on &c., made by the directors for the time being of the said Company, pursuant to the said first-mentioned act; and then made payable at a time before the commencement of this suit, to wit, on &c.; which said sum of £400 is still due and unpaid; whereby and by virtue of the first-mentioned act, an action hath accrued to the said Company, &c.

The fourth count was for eight calls made upon the defendant as proprietor of shares amounting to £2250, specifying the days of making the calls.

The fifth count was for £500 for interest.

Pleas, 1st, to the third and fourth counts, *numquam indebitatus*; 2nd, to the first and second counts, that the defendant did not subscribe to the undertaking mentioned in the said act of Parliament, *modo et formâ*; 3rd, to the first and second counts, that the said Company were not nor are making or constructing the said railway and other works in the said acts mentioned, and otherwise carrying the same into execution, *modo et formâ*; 4th, to the first count, that the said directors did not make the said calls *modo et formâ*; 5th, to the first count, that notice of the calls in the said first count mentioned was not duly given *modo et formâ*; 6th and 7th, to the second count, traversing the making of the calls and giving of the notices, as in the 4th and 5th pleas to the first count; 8th, to the first and second counts, that after the said alleged subscription by the defendant, in the introductory part of the first count mentioned, to wit, on &c., [252] the defendant sold, disposed of, assigned, and transferred all his the defendant's right, title, and interest, of and in the said fifty shares so by him subscribed for as aforesaid, and then and there and thenceforth continually hath ceased to be the proprietor thereof or interested therein, whereof the said Company had due notice. Verification.

Similiter to all the pleas except the last, which the defendant traversed, and thereupon issue was joined. At the trial before Rolfe, B., at the last Summer Assizes for the county of Durham, it appeared that the defendant had executed the subscription deed, according to the parliamentary regulations, before the passing of the first act which was obtained by the Company, for £5000, or fifty shares, in the undertaking,

and had received scrip for his shares. The first act, which was obtained in 1836, empowered the Company to make a railway from the river Tees to the river Tyne, and the second act, obtained in 1837, empowered them to extend their line southward to York, and to make two branches. A small portion of the original line had been commenced, and the whole of it had been surveyed, and a sum of £100,000 paid for land. The extended line and the branches were nearly finished. The defendant had disposed of ten of the fifty shares he had subscribed for, and the amount claimed by the Company was in respect of the remaining forty. The defendant had never been registered as a proprietor. On the 10th of August, 1836, the directors resolved upon a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify any place where, or person to whom payment might be made. The following notice was afterwards inserted in the local newspapers, according to the directions of the act of Parliament:—

“Great North of England Railway.

“Notice is hereby given, that at a meeting of the directors of the Great North of England Railway Com-[253]-pany held this day, a call of £8 per share was ordered to be paid to the treasurer of the Company, at the Bank of Messrs. Backhouse & Co., in Darlington, on or before Monday the 5th of September next.

(Signed, by order) FRED. NEWMAN,

“Clerk to the Company.

“Railway Office, High Row,
“Darlington, August 10, 1836.”

Several other calls were made subsequently. At the trial, it was objected for the defendant that the plaintiffs were not entitled to recover in respect of the first call, inasmuch as the resolution ordering it to be paid did not specify the place where, or the person to whom, the call was to be paid. The learned Judge however overruled the objection, and a verdict was found for the plaintiffs for £2325, which included the amount of the first call as well as of the others. No objection was made at the trial that the notice, inserted in the papers, of the first call, was not shewn to have been the act of the directors.

In the early part of this term, Wightman obtained a rule to shew cause why the judgment on the first and second counts should not be arrested, or why the verdict should not be set aside and a new trial had, unless the parties should agree to reduce the verdict by the amount of the first call; and also why there should not be a new trial on other grounds.

Cresswell, Addison, and S. Temple, shewed cause. The question whether the verdict ought to be reduced depends upon this, whether the call was properly and correctly made. The execution by the defendant of the deed of subscription was duly proved, and it was also proved that notice of the call was given by an advertisement in the newspapers, as required by the act, appointing the time and place of payment, and the person to whom it was to be paid. But it is said, that the original resolution of the directors was invalid, on the ground that it did not specify any place [254] where, or person to whom, payment was to be made; and the question therefore is, whether, under the act of Parliament by which the company was formed (6 & 7 Will. 4, c. cv.) the plaintiffs were bound to prove a resolution to have been made in terms equally specific with the notice. There is no necessity for the resolution to appoint the place where the call is to be paid, or the person to whom it is to be paid; because the notice must give full information of those matters, in order to enable the parties liable to the calls to make due payment of them. Much inconvenience will be created if it be held that the notice must correspond, in all its terms, with the resolution. [Alderson, B. Suppose a resolution were to specify a time and place of payment, and the notice were to appoint a different time and place?] In that case the payment must be according to the notice. The 121st section of the act requires that twenty-one days' notice of the call shall be given by advertisement in the newspapers, and the money called for is to be paid “to such persons, at such times and places, and in such manner as in the said notice shall be appointed.” The notice of the call in question did appoint the persons, time, and place, according to that provision, and gave every necessary information to the shareholders. That was the

object which the act contemplated, but it did not require that the place of payment should be named in the resolution by which the call is directed to be paid; that may form the subject of a subsequent resolution. Suppose a call were resolved upon, and ordered by the resolution to be paid at a particular bank of high reputation, and on the following day the bank were to fail, could it be said that the directors would not have power to alter the place of payment by a subsequent resolution? Again, a notice signed by a clerk to the company must be the same as if it were signed by the directors themselves; for it is provided by the 183rd section, that all notices or other documents may be signed by the clerk or treasurer of the company, and need not be under the common seal of the company. This notice, therefore, must [255] be taken, in the absence of any proof to the contrary, to be a notice given by the directors. The restriction with respect to calls applies only to the amount and the time of payment, and there is no further restriction as to the form or contents of the resolution. Every subscriber, though not registered, is a proprietor of shares within the meaning of the act, as far as respects the liability for calls, and if that be so, then the 123rd section, which enacts, that evidence that "the call was in fact made, and that such notice was given as is directed by this act," shall be sufficient, shews that a resolution to make a call, simpliciter, is good. The objection, therefore, to the first call ought not to prevail.

Then, as to the motion in arrest of judgment. The objection is, that the action is in debt on simple contract; and that the liability of the defendant as a subscriber being founded upon a deed, it ought to have been declared upon specially. But there is nothing in the act which requires the subscription to be by deed. By the first section of the act, all persons are incorporated who had subscribed, or should thereafter subscribe; but it does not say that the parties shall subscribe by deed, and the law does not require an engagement of this nature to be by deed. The 3rd section, empowering the company to raise £1,000,000 of money, and the 119th section, requiring subscribers to pay the amount of their subscriptions, says nothing as to the subscription being by deed. The preamble to the 195th section recites, that £660,000 only had been subscribed for at the time of the parliamentary deed, and there was consequently a large sum still to be subscribed for to raise the amount, which may have been done otherwise than by deed, as nothing is said requiring the future subscriptions to be by deed. It is matter of evidence whether the subscriptions were by deed or not, and it is consistent with what is alleged in this declaration, that the defendant may have been one of the subsequent subscribers not included in the parliamentary deed. [256] The objection, therefore, ought not to prevail. Besides, the defendant being a subscriber, is also a proprietor of shares; and the 123rd section shews that the plaintiffs are not bound to allege that there was a deed, even although a deed may be the proper mode of proving the proprietorship. Assuming, however, that a deed is essential to constitute a valid subscription, the allegation, that the defendant "subscribed," must, after verdict, be taken to import a subscription by deed. The Company could not sue upon the parliamentary deed, because it is to be executed before the Company is in existence under the act. The deed was mere matter of inducement to the formation of the Company, and might be pleaded without a profert: *Banfill v. Leigh* (8 T. R. 571). Perhaps this might have been a good objection on special demurrer, but it is not so after verdict. The rule, as laid down by Mr. Serjeant Williams, in note (1) to the case of *Stennel v. Hogg* (1 Wms. Saund. 228), is, that "where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." In the present case, the fact of subscription is distinctly put in issue by the second plea, and the verdict for the plaintiff on that issue must be presumed to have been given upon proper evidence.

[They also contended that the plaintiffs were entitled to retain their verdict for the whole amount upon the 3rd and 4th counts, which charged the defendant as a "proprietor" of shares under sect. 123.]

[257] W. H. Watson, (with whom was Wightman), contra. First, with respect to the amount of the first call. According to the terms of the act of Parliament, it is clear

the shareholders were entitled to the benefit of the judgment and the exercise of the discretion of the directors, who, by sect. 100, are intrusted with the general management of the affairs of the Company, for and on the behalf of the entire body of the shareholders; and they, like agents and arbitrators, have no right to delegate their authority. It is of the greatest importance that the place of payment, and the person to whom it is to be made, should be expressly selected by the directors. The instance supposed on the other side, of the failure of the bank where the calls are to be paid, shews how necessary it is that that discretion should be exercised with caution. The 119th section must be read with the 121st; and, if that is done, it will clearly appear that the place of payment is to be fixed upon at the time of making the call. By section 119 the subscribers are expressly required to pay the calls "at such times and at such places, and to such persons, as shall be directed by the said directors." And, upon looking to the former part of that section, it will be found that the said "directors" are the directors making the call. The notice directed to be given by the 121st section, is to be a mere copy of the resolution, and the words, "notice of every such call," refer to the words of the 119th section. The notice must specify the time, place and person, and, if it omit either, it is bad. The notice is to be given by the secretary; but the authority to appoint the place of payment is confined to the directors. [Alderson, B. A notice given by the secretary without the authority of the directors, would be bad altogether. The objection, that the notice was not given by the authority of the directors, was not taken at the trial.] The Company ought to have proved that they directed the terms of the notice. [Parke, B. No: that must be as-[258]-sumed now.] Section 183 does not aid the plaintiffs, for that relates only to the service of an ordinary notice or summons, and the proviso there does not apply to a notice by advertisement. There must be a decision by the directors, appointing the time, the place, and the person, which must be come to at some meeting, and entered in a book by them. The directors can act only at their meetings.

Then, as to the 2nd point. The allegation in the first and second counts is, that the defendant "subscribed for" a certain sum; but there is nothing to shew that this was such a subscription as the act contemplated. The term subscription in the act has a defined meaning. The 195th section shews that the subscription was made upon a contract binding upon the heirs, and it must therefore have been by deed. [Parke, B. The subscription was not necessarily antecedent to the act; and it does not appear that the subscription in question was by deed.] The declaration alleges that the defendant was a subscriber, which is very different from a proprietor. The 3rd section, which enables the Company to raise a million of money, refers to shares only, and not to subscriptions; and the words in the concluding part of that section, "who have subscribed or who shall severally subscribe," do not affect this distinction. A proprietor may part with his share, and yet not be a subscriber. [Parke, B. I incline to think that a subscriber is under this act of Parliament a proprietor also.] The 121st section empowering the directors to make calls upon "the subscribers to and proprietors of the said undertaking," clearly recognises them as two distinct classes. In sections 86, 87, 89, 91, 93, 94, 97, 98, and 118, the terms "proprietor" and "subscriber" are used, clearly shewing that there is a distinction between them. The 86th section describes the first meeting as a meeting of the "Company," at which the names of the parties "entitled to shares" are to be entered in a book, and a [259] certificate is to be given to every "such proprietor," (i.e. every subscriber whose name is so entered), and in that certificate the party is designated as a "proprietor." A proprietor is therefore a person who has been registered; which explains the terms used in the various sections referred to, and which relate chiefly to transactions subsequent to the first meeting. [Alderson, B. The 121st section speaks of calls upon "subscribers to and proprietors of the said undertaking," and enables the Company to sue any proprietor failing to pay his call. Does not that shew the words to be equivalent?] That section gives a right to sue proprietors only, the 119th section having already empowered the Company to sue subscribers. If the 3rd section be referred to, it will appear that a person subscribes for shares, and afterwards upon being registered he becomes a proprietor of shares. It is therefore submitted, that every unregistered subscriber is not a proprietor within the meaning of the act.

But then it is assumed that the fact of making a call, to which the 123rd section refers, implies a simple resolution of the directors, ordering the payment of certain sums of money by the shareholders, without specification of time, place, or person.

That, however, is begging the question, which is, whether that specification be necessary or not. Next, the preamble to the 195th section shews that the original subscribers had executed a deed, and it was to be inferred that other subscribers who afterwards came in would do so also. If the defendant is to be presumed to be, not an original but a future subscriber, it must be presumed that he became so by having executed a deed. And therefore the first and second counts ought to have alleged a deed, as it was the foundation of the defendant's liability. The 123rd section is inapplicable to the case of a subscriber not registered, as has been already shewn, and the argument drawn from it therefore fails altogether. The deed is the gist of the action, [260] and not mere inducement. If it were executed after the passing of the act, the Company would be a party to it; if executed before the act was passed, the Company, though not party or privy in the ordinary sense, are made statutory assignees by section 119, inasmuch as they take the benefit of the deed, and may enforce payment of the subscriptions.

But it is said, that, if a deed be necessary, the omission to set it out is cured by verdict; but that is not so. The first and second counts allege that the defendant was a subscriber for such a sum of money, and entitled to the shares in the undertaking, but not that he subscribed with reference to the act of Parliament, or in the sense in which that word is used in it. This is therefore the statement of a defective title, and not a good title defectively or imperfectly stated. It was not requisite to prove the existence of a deed, in order to support the verdict on the issue as to the subscription, which might be proved, consistently with the first and second counts, by a contract in writing not under seal, or even by a parol contract. The examples given by Mr. Serjeant Williams in note (1) to *Stennel v. Hogg* (1 Wms. Saund. 228), as illustrations of the rule there laid down, are distinguishable from the present. In the action for rent by the bargainee of a reversion, the omission to allege the attornment of the tenant, (before the statute 4 Anne, c. 16, s. 9), was cured by the verdict for the plaintiff upon the issue on nil debet; because the verdict must be presumed to have proceeded upon evidence of an attornment, which at that time was a necessary ceremony to complete the title of the bargainee: *Hitchins v. Stevens* (2 Show. 233). So in the cases there mentioned, of pleading the grant of a reversion, a rent-charge, an advowson, or any other hereditament which lies in grant, and can only be conveyed by deed. On the other hand, in *Rushton v. [261] Aspinall*, it was held, in an action against the indorser of a bill, that the want of an allegation of a demand upon and refusal by the acceptor at the time when the bill became due, or of notice to the defendant of the acceptor's refusal, was error, and not cured by verdict; because proof of these circumstances was not required to support any allegation in the declaration. In *Jackson v. Pesked*, which was an action on the case by a reversioner, the judgment was arrested after verdict for the plaintiff; because as the plaintiff had not alleged that his reversionary interest was prejudiced, or stated any injury of such a nature as to be necessarily injurious to his reversion, no evidence was required on these points, and therefore none could be presumed to have been given. The case of *Rawson v. Johnson* (1 East, 203) went upon the ground, that a readiness and willingness to receive and pay for a quantity of malt, according to the terms of sale by which the defendant had undertaken to deliver on request, and which he had refused so to deliver, was sufficient without any allegation of a tender of the price. In this case the allegation that the defendant was a subscriber did not necessarily imply the existence of any deed.

PARKE, B. I am of opinion that this rule must be discharged. The first point, as to the reduction of the verdict by the amount of the first call, depends upon the question, whether that call was correctly made; and the objection is, that the resolution of the directors making the call, although it makes it payable within a limited time, does not state the place at which, or person to whom, it is to be paid. The advertisement, however, which is published in the newspapers, does state both the place where, and the person to whom, the money is to be paid, and in other respects follows the requisitions of the 121st [262] section. As the objection, that there was no distinct proof of the publication of the notice being the act of the directors, was not taken at the trial, we must assume it to have been their act; and the question then is, whether, in addition to the specification of the place of payment in the notice, it is necessary that the place should be specified also in the resolution for the call. By the 121st section, the directors are empowered to make such calls for money, &c. as they from

time to time shall find necessary ; and it is enacted, that the aggregate amount of calls shall not exceed £100, and that no call shall exceed the sum of £10 upon each share ; and an interval of three calendar months is to elapse between the days of payment of each call. Now there is not one word in this enactment requiring that the place of payment, or person to whom payment is to be made, shall be named at the making of the call. That section then proceeds to provide, that twenty-one days' notice shall be given of every call, by advertisement in certain newspapers therein mentioned, and enacts that all money so called for shall be paid to such persons, and at such times and places, as in the said notice shall be appointed. The notice, therefore, must contain those requisites. In this instance the notice does state the time and place of payment, and in other respects complies with the act of Parliament. Assuming the resolution, therefore, to be the act of the directors, I think that the call in question was properly made.

Then, with respect to the motion in arrest of judgment, the question is, whether it is necessary to state in the declaration that the subscription was by deed. It has been suggested that there is a distinction between proprietors of shares and subscribers ; upon that part of the case, however, we give no opinion. The first and second counts allege a liability in the defendant as a subscriber ; and it is contended, that it ought to have been alleged in those counts that his subscription was by deed. I think the answer given to that [263] argument on the part of the plaintiffs is a satisfactory one. It does not follow that the parliamentary deed should contain the names of all the persons who subscribed ; for the subscription is not confined to the parties named in the deed. But assuming that the defendant was of necessity a party to it, it is evident that the Company need not, and indeed could not, be made a party to such deed ; because it is required to be executed before the existence of, and as preliminary to, the formation of the Company. That is a conclusive reason why the Company ought not to sue upon the deed. If, however, the action is to be considered as founded upon the deed, so as to make the statement of it in strictness necessary, then the case falls within the rule laid down in *Stennel v. Hogg*. It is there said, that "where a grant of a reversion, or any other hereditament which lies in grant, and can only be conveyed by deed, be pleaded, but is not alleged to have been by deed, yet if the grant be put in issue, and found by the jury, the verdict cures such imperfection by the common law." The defendant is alleged to have become a subscriber, and if, in order to prove that fact, the production of the deed was requisite, it must be assumed, after verdict, that such proof was given. I think the declaration is good, at all events after verdict, and probably before.

ALDERSON, B., GURNEY, B., and ROLFE, B. concurred.

Rule discharged.

[264] WALLACE AND TWO OTHERS v. KELSALL. Exch. of Pleas. 1840.—To an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant :—Held, that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement.

[S. C. 8 Dowl. P. C. 841 ; 10 L. J. Ex. 12 ; 4 Jur. 1064. Referred to, *Steeds v. Steeds*, 1889, 22 Q. B. D. 541.]

Debt demanding £264, that is to say, £88 for goods sold and delivered, £88 for work and materials, and £88 for money due on an account stated.

Pleas. 1st, except as to £88, parcel &c., nunquam indebitatus. 2nd, as to the said sum of £88, parcel as aforesaid, the defendant says, that the plaintiffs ought not further to maintain their aforesaid action thereof against him ; because he says, that, before and at the time of the satisfaction and discharge hereinafter mentioned, the plaintiff Andrew Wallace was indebted to the defendant in the sum of £75, and that before and at the time of the satisfaction and discharge hereinafter mentioned the defendant was indebted to the plaintiffs in the sum of £88, parcel as aforesaid, and to the said plaintiff Andrew Wallace in the sum of £44 ; for the recovery of which said sum of £44, amongst other things, the said plaintiff Andrew Wallace, before the said discharge and satisfaction, to wit, on the 1st day of March, 1840, commenced an action

of debt in the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, which said action before and at the time of the said discharge and satisfaction was still pending. And the defendant further says, that he the defendant, so being indebted in the said sum of £88 and £44, amounting together to the sum of £132, and the said plaintiff Andrew Wallace being so indebted in the said sum of £75, he, the defendant, after the commencement of this suit, to wit, on the 31st day of March, 1840, set-off and allowed to the plaintiff Andrew Wallace the said sum of £75 so due to the defendant, against the sum of £75, parcel of the said sum of £132, and then paid to the said Andrew Wallace [265] the sum of £57, and then delivered to the said Andrew Wallace a piece of flannel of great value, to wit, of the value of 2l. 6d. in full satisfaction and discharge of the said debts of £88 and £44, and of all damages by the plaintiffs, and by the said plaintiff Andrew Wallace, sustained, either jointly or solely, by reason of the detention of the said sums of £88 and £44 respectively, and of the costs and charges of the plaintiffs by them in and about their suit in this action, so far as the same relate to the said sum of £88, parcel as aforesaid, in that behalf expended, and of the costs and charges of the said plaintiff Andrew Wallace by him about his suit in the said other action, so far as the same relates to the said sum of £44 in that behalf expended, and in full satisfaction and discharge of the said debt of £75 so due to the defendant, and of all damages by the defendant sustained by reason of the non-payment thereof; which said set-off and allowance, payment, and delivery of the said piece of flannel, the said plaintiff Andrew Wallace then agreed to, accepted, and received in full satisfaction and discharge of all the said debts, damages, and costs, in satisfaction and discharge whereof they were so made by the defendant as aforesaid. Verification.

Special demurrer to the second plea, on the ground that it did not state any agreement between the other plaintiffs and Wallace that the set-off should be allowed, or any authority to him to receive the debt due to the three, or in any way to settle it; and that the accord and satisfaction alleged was insufficient, inasmuch as the set-off of mutual, private, and separate debts between the defendant and Wallace could be no satisfaction of any part of the debt due to the plaintiffs jointly, without their request or concurrence. The defendant's points, as marked for argument, were, that one of several joint creditors acting *bonâ fide*, which is to be presumed, may discharge the debtor; that no actual authority from the others is [266] required; that if it were, the want of it should be alleged by the plaintiffs, as it is a matter within their knowledge rather than the defendant's; and that if one of several plaintiffs is satisfied, the others cannot recover, because they cannot do so without joining the one, and he is barred.

Hoggins, in support of the demurrer. The plea is bad. On the face of this plea, it does not appear that there was any consent given by the other two plaintiffs that Wallace should allow this set-off in reduction of the debt which was due to the three jointly; nor does it shew that he had any authority, express or implied, to do so. In cases of partnership, one partner may receive payment of a debt due to the firm, and may give a receipt for it: *Henderson v. Wild* (2 Camp. 561). But in those cases there is an implied authority in one partner to receive payment of and release the partnership debts, and to deal generally with the partnership property. But here there was no partnership between the plaintiffs, and the plea does not allege that it was with the authority or knowledge of the other two that Wallace accepted the money and goods in satisfaction and discharge. It is clear that one of several joint creditors cannot release a debt due to all, except with the consent of the others. This was done by Wallace in fraud of his two co-creditors, and the question is, whether, he having, in fraud of his two co-creditors, set off his own private debt against a debt due to the three, that can be pleaded as an answer to an action by the three for the recovery of the debt. It is submitted that it clearly cannot. Besides, the accord and satisfaction alleged in the plea is stated to have been after the action brought, and there can be no set-off after the commencement of the action. Com. Dig. Accord (B. 4); *Evans v. Prosser* (3 T. R. 186). [Parke, B. That is where the plea is in bar [267] of the action generally; but this is a plea to the further maintenance of the action.]

Cowling, in support of the plea. It is admitted that this is not a case of partnership in the ordinary sense of the word; but any one of several joint creditors, whether in strictness a partnership exists or not, may give a receipt to a joint debtor, which

will bind them all. If three persons sue as plaintiffs, a release by one will bar the others. In the case where a release is given, the probability is that there is no consideration given at all; but this is not a mere release, for the plea states that Wallace received value for it. Where several persons are joined together in suing, all are bound by the act of one. In *Ruddock's case* (6 Rep. 25 a., b.) it is laid down, that "When in the writ of error the plaintiffs shall recover any personal thing, as if they were barred in an action of debt, trespass, &c. for there the release of one shall not bar the other, but (only) when the ground of the action is a joint interest which may be released." And that "When two are to recover a personal thing, there the default of the one is the default of both; but when they are to discharge themselves of a personalty, there the default of one is not the default of both." A release by one operates by way of estoppel, and may be without consideration; but here there was a full and valuable consideration, viz a set-off of an equal sum of money; it is the same as if the defendant had paid so much money in cash to Wallace; and the satisfaction was therefore complete. The general principle laid down in the cases is, that a satisfaction to one of several plaintiffs in a personal action is a satisfaction to all. In *Richmond v. Heapy* (1 Stark. N. P. C. 202), where one of three partners undertook to provide for two bills drawn by the three partners, and accepted by a fourth person, it was held that such acceptances [268] would not support a commission on the petition of the three partners against the acceptor, although the conduct of the one partner might as against his co-partners have been fraudulent. Lord Ellenborough there said, "Assuming fraud, and that Spear was the most fraudulent man alive; yet since you must recover through him, if he has so behaved that he cannot recover as one of the three, he cannot be a petitioning creditor." In *Sparrow v. Chisman* (9 B. & C. 241); 4 M. & R. 206, where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon condition that the drawer should provide for it when due; it was held that no action on the bill lay against the acceptor, either by the drawer alone or by his firm jointly. There Bayley, J., says, "A party to whom an acceptance is given upon a condition that he will provide for it when due, and who does not perform that condition, cannot sue the acceptor; and if Peckover, (the partner who drew the bill), could not have sued alone, how can he sue jointly with others? His partners, being bound by his acts, cannot recover through him." *Jones v. Yates* (9 B. & C. 532; 4 M. & R. 613) is also an authority to shew, that where one partner has rendered himself incapable of suing for partnership assets, the firm cannot maintain an action to recover those assets, even although the transaction out of which his disability arose was a fraud upon his co-partners. In that case, Sykes being in partnership with Yates and Young, and also in a separate partnership with Bury, indorsed three bills, (the property of Sykes & Bury), to Sykes, Yates, & Young, in discharge of Sykes's private debt to the latter firm, and immediately indorsed the bills to a creditor of theirs. Sykes and Bury became bankrupts; and it was held that their assignees could not maintain trover for the bills, nor [269] assumpsit for money paid, against Yates & Young. Lord Tenterden, in delivering the judgment of the Court, says, "We are not aware of any instance in which a person has been allowed, as plaintiff in a Court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do so was suing in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons who have a joint right of action, dies, the right then vests in the survivor, so that in this case, (if it be held that Sykes & Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act by alleging his own misconduct." Every remark there made applies to this case. If this plea be held not to be a good answer to the action, it would follow that if Wallace were to survive his co-plaintiffs, he might, in fraud of his own agreement, sue the defendant for the very same debt for which he had himself received full satisfaction. It is therefore no answer to this plea to say that this accord and satisfaction was fraudulent as to Wallace's co-creditors; but even if it were, if the plaintiffs intended to rely upon the fact of fraud, they ought to have replied it: even, however, assuming the existence of fraud, the cases of *Jones v. Yates* and *Richmond v. Heapy* are an answer to that objection. [Parke, B. Are there not cases which seem at variance with the principle laid down in *Jones v. Yates*, as far at least as relates to the question of fraud?] In *Longman v. Pole* (Moo. & Mal. 223),

Lord Tenterden held that if a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action on the case against the person so colluding. It is submitted, however, that that case cannot be supported. [Rolfe, B. That would go to shew that the other [270] two plaintiffs, without Wallace, might have brought an action against Kelsall for the injury done to them.] In *Bristow v. Eastman* (1 Esp. 172; Peake, 223), it was held at nisi prius that one of the assignees of a bankrupt estate could not give a valid receipt for money due to the estate, where the express dissent of the other appeared. That decision, however, does not apply to this case: it did not proceed on the ground that one plaintiff could not bind another, by giving a discharge or a release. *Fitch v. Sutton* (5 East, 230) is no authority against the defendant. And in *Smith v. Jameson* (1 Esp. 114), Lord Kenyon entertained an opinion directly opposed to that expressed in *Bristow v. Eastman*, and held, that where there are several assignees of a bankrupt's estate, one of them may receive money belonging to the estate, and give a good discharge for it. Besides, there is a great difference between the case of assignees and that of partners or co-creditors, for the assignee of a bankrupt is like a trustee: upon which ground it was held by Lord Hardwicke, in *Cann v. Reid* (3 Atkins, 695), that one assignee could not give a valid receipt, and that the co-assignees must join. In *Skaife v. Jackson* (3 B. & Cr. 421), receipts signed by one of two co-trustees, and in *Farrar v. Hutchinson* (1 P. & D. 437; 9 Ad. & El. 641), a receipt given by one partner in the name of the firm, but without the knowledge of the other partners, were held not to be conclusive. But those cases are not opposed to the principle laid down in *Jones v. Yates*, but were decided on the ground that evidence was properly admissible to shew fraud, notwithstanding the receipt; and the principle, that that which operates as a bar to one plaintiff is a bar to the other co-plaintiffs, is not affected by those decisions. Where there are several joint creditors, a party has a good defence if he has paid any one of them. In Bayley on Bills, 5th edit., 347, it is [271] said—"Satisfaction of a bill or note, as to one of several partners, is a satisfaction as to all; and if a person be a partner in two firms, satisfaction as to one firm is so as to both; what would bar one firm would bar the other." That is not confined to partnerships, but extended to the case of a party being a member of two firms, which would be like the case of two co-creditors. Suppose the other parties were to die, and Wallace were to sue alone, surely he would be barred; then why should he not in the present case? In Fitzh. N. B. 138, note (a), by Lord Hale, it is said, "In detinue of charters by two, if the defendant delivers them to one of them, he shall be excused against the other." If that be a good defence as to a chattel, why should it not be so as to a debt? With respect to fraud, none is here alleged, and it cannot be implied.

Hoggins, in reply. No case has been cited to shew that where one co-creditor, after action brought, goes to the debtor and receives the debt, and gives him a discharge, it is a good answer to the action. But even if it were, it has not been so pleaded in this case. If the effect of that which took place between Wallace and the defendant was to discharge the defendant as against all the plaintiffs, the plea ought to have alleged that, and not to have alleged that Wallace only accepted in satisfaction and discharge. In *Kinnerley v. Hossack* (2 Taunt. 170), where an agreement to set off a specific joint debt against specific separate debts was pleaded, it was alleged that all the parties had agreed. The plea should either have shewn that Wallace had authority to make the settlement, or should have stated that all the three had agreed. It should have been pleaded as satisfaction to all. [Lord Abinger, C. B. If payment to one is payment to all, it is the same as if pleaded as payment to all.] The [272] defendant should have said that payment to one was payment to all. [Parke, B. Have you any authority for that position, that payment to one may be pleaded as payment to all?] The ordinary rule of pleading is to set out the legal effect of a transaction, which here was, as it is said, payment to all. The case of a release is an exception, because otherwise there would be a variance between the allegation and the deed. Almost all the cases which have been cited occurred before the new rules came into operation, when a defence of this kind need not have been specially pleaded. They are, therefore, not in point as to the form of the plea.

LORD ABINGER, C. B. I am of opinion that this plea is good; and that, as it is competent for one of three joint plaintiffs to release a joint debt, it is competent to one of three joint plaintiffs to settle the action, so as to protect himself from being obliged to sue. The case that might be suggested has been properly put in argument.

Suppose, after this accord and satisfaction, two of the plaintiffs were to die, and the only person surviving were the person who gave the accord and satisfaction, it is quite plain, in that case, that he could not have sued for this debt. If it is not illegal, the accord and satisfaction operates as a release by him; and if it is a release by him, that is sufficient. This is an accord and satisfaction by one, and no fraud is suggested, nor can it be presumed: we have just as much right to presume that the other parties authorized him to settle the action, as that the settlement was fraudulent. If any question of fraud were to arise, so as to do away with this transaction, it ought to be put upon the record, so that we might see the effect of it. Upon this case as it stands, it appears to me to be a clear case of accord and satisfaction; it is a payment of the debt by this defendant to that one party, who has agreed to accept it, and no longer to go on with the action.

[273] PARKE, B. I entirely concur in opinion with my Lord Chief Baron, that this is a good plea. It is pleaded in bar to the further maintenance of this action, and if it is a good accord and satisfaction, it may be so pleaded. The question is, whether it is a good accord and satisfaction. There was another action for a separate demand. There was a sum of money due from the defendant to one of the plaintiffs, and there was a sum of money due from that plaintiff to the defendant. A settlement of accounts took place: the one plaintiff to whom a certain debt was due agreed that the one debt should be set off against the other, and so the balance was paid. If that transaction be free from fraud, (and I do not see that the record imputes fraud to any one), it is distinctly agreed that there should be accord and satisfaction between the plaintiffs jointly and the defendant. In the case referred to, of *Jones v. Yates*, the principle of the decision is, that if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act. In this case, no doubt, the plaintiff Wallace, who has made this agreement, is barred by his own agreement to set off one debt against the other; and he cannot undo the transaction by joining the other two plaintiffs with him for that purpose. I am of opinion, therefore, that this is a good plea, supposing there was no fraud, and there is no imputation of any. We cannot assume that there was any fraud, unless it be alleged in the pleadings: and when the question arises whether the fact of fraud would make any difference, I apprehend the same answer may be given as was used in the case of *Jones v. Yates*, that a person cannot be allowed, as a plaintiff in a court of law, to rescind his own act by joining his co-partners with him. The case of *Skufe v. Jackson* and *Farrar v. Hutchinson* steer clear of that point, and are plainly distinguishable; they were decided on the ground that a receipt given for money is not conclusive, and that a plaintiff may, notwithstanding, shew that the [274] money has not in fact been paid. It is unnecessary for us to give an opinion on the case of fraud, because that is not presumed; and this case is decided simply on the ground, that one of the parties has received satisfaction for a joint demand due to himself and others, which puts an end to such joint demand, and that he cannot afterwards, by joining the other parties with him as plaintiffs, recover that debt.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. Were we to decide otherwise, it is plain it might lead to this absurdity, that supposing the plaintiff Wallace to have received a full discharge of the debt; yet he might, if he survived the other parties, recover the whole of it over again.

Judgment for the defendant.

BODENHAM AND OTHERS v. HILL. Exch. of Pleas. 1840.—A plea merely in the negative need not conclude with a verification. To an action of assumpsit for work and labour as an attorney, the defendant pleaded non assumpsit infra sex annos, and concluded with a prayer of judgment, omitting the verification:—Held, on special demurrer, that the plea was good.

[S. C. 8 Dowl. P. C. 862; 10 L. J. Ex. 27.]

Assumpsit for work and labour as attorneys, with a count on an account stated.

Plea, that the defendant did not within six years next before the commencement of this suit promise in manner and form as the plaintiffs have above alleged, where-

fore she prays judgment if the plaintiffs ought to have their aforesaid action against her.

Special demurrer, assigning for causes, that the plea, though purporting to contain matters in bar of the damages and rights of action in the declaration mentioned, [275] does not conclude either with a verification or to the country; that though pleaded to the whole declaration, it nevertheless concludes with a prayer of judgment; and that it is wrong in form, inasmuch as it states that the defendant did not promise within six years &c., whereas it ought to have stated that the cause of action did not accrue within six years.

The defendant's points marked for argument were, that negative pleas, which contain no affirmative allegations, do not require to be verified, and according to the rules of good pleading ought not to conclude with a verification; that pleas which do not conclude to the country, must at common law conclude to the Court, by praying judgment from the Court; and that the new rules of pleading, H. T. 4 Will. 4, provide "that it shall not be necessary to use any prayer of judgment," but those rules have not forbidden the use of such a prayer, the introduction of which appears to be necessary, or at least convenient, when a plea being in the negative, its termination is not denoted by a verification; that when the cause of action is complete at the time of the promise, as in cases like the present, of *indebitatus assumpsit*, the defendant may plead *non assumpsit infra sex annos*, or *actio non accrevit infra sex annos*, at his election.

Whateley appeared to argue in support of the demurrer; but was stopped by the Court, who called upon

Manning, Serjt., to support the plea. This being a plea merely in the negative, and containing no averment of any affirmative matter, need not, and, according to the rules of good pleading, ought not, to be verified. There are many authorities in the old books to that effect. [Parke, B. A plea of the statute of limitations is not simply a negative plea; it is in confession and avoidance.] All that is new is a negative proposition; and it cannot be necessary to offer to prove that upon which both parties are agreed. In [276] Co. Litt. 303 a., it is said—"Counts or such as be in nature of counts (as an avowry, wherein the defendant is an actor,) need not to be averred, but all other pleas in the affirmative ought to be averred, et hoc paratus est verificare, &c., but pleas merely in the negative ought not to be averred, because a negative cannot be proved." The same position is to be found in Mr. Serjeant Eare's *Doctrina Placitandi*, 50, which is a work of the highest authority,^(a) and the same reason for the distinction is there stated as given by Lord Coke: "Pleas in the negative need not be averred, nor ought (*nec doient*) to be averred; because a negative cannot be proved." This distinction is recognised in *Millner v. Crowdall* (1 Show. 338), which is directly in point. That was an "action on the case for fees, &c., and *indebitatus* for fees and labour in al' negot. The defendant pleaded the stat. 1 Jac. 1, c. 7, s. 1, that no bill was delivered under the plaintiff's hand. Demurrer, because he had not averred his plea. But the Court said, It is needless, if a negative plea." The same point was decided in *Obin v. Knott* (Fortesc. 339), where it was held that "nul tiel record, being in the negative, need not be averred." The same distinction is alluded to in the notes to *Thursby v. Plant* (1 Wms. Saund. 235). This was the old law, and any modern practice of concluding these pleas with a verification is incorrect and altogether useless. In the forms in common use, the plea certainly concludes with an averment. But this is easily accounted for. It takes less time to insert half a dozen words, than to consider whether they may be safely omitted; a principle which has been largely acted upon in drawing conveyances and acts of Parliament, as well as pleadings. It is laid down by Lord Coke (*supra*), and by Mr. Serjt. Eare (*ib.*), that an avowry, being in the nature of a [277] count, need not be averred, and this was distinctly so held in *Brett v. Ridgen* (Plowd. 342); yet it is probable that not a single pleader in Court, either on the bench or at the bar, has ever met with an avowry or a cognizance which had not this useless and informal addition. *Brett's case* is cited by Lord Coke, who also refers to 27 Hen. 8, f. 27, which appears to be a misprint, 27 Hen. 6, and 9 Hen. 7, are also cited, without giving any page. These are probably references to some records which Lord Coke had seen, as

(a) "Nota: Willes, C. J., said, There is more law and learning in *Doctrina Placitandi*, than in any other book he knew," 2 Wils. 88.

no case has been found in either of those years to which the references can apply. In *Knowles v. Stevens* (1 C. M. & R. 26), it is stated in the marginal note, that since the rules of H. T. 4 Will. 4, a plea must conclude with a verification or to the country. But in that case there was no prayer of judgment, and all that the Court said was, that there ought to have been a conclusion to the plea. It might perhaps have been contended, that since the rules of H. T. 4 Will. 4, a prayer of judgment was not necessary; but the attention of the Court was principally drawn to the substance of the plea, and the plea being held to be defective in substance, the formal objection became immaterial, and appears not to have been much considered.

A conclusion to the country would have been clearly bad; and the only proper way of concluding is, to pray the judgment of the Court; which is unobjectionable; for there is nothing in the rule of H. T. 4 Will. 4, reg. 9, to prohibit the use of it when convenient. [Parke, B. The introduction of a prayer of judgment where it is unnecessary, is no ground of demurrer. The only consequence is that the unnecessary words will be disallowed on taxing the costs.]

As to the form of the plea, where the debt is due at the time of the promise alleged, non assumpsit infra sex annos is clearly a good plea: 2 Wms. Saunders, 63 b.

The defendant is therefore entitled to judgment.

[278] Whateley, contra. It has been the constant practice among pleaders for many years to conclude pleas of this nature with a verification, and the old law must be considered as altered in this respect. Every plea must contain a conclusion either to the Court or to the country. In *Knowles v. Stevens* (1 C. M. & R. 26), it was so held. The case of *Millner v. Crowdall* was there cited, and must be considered as having been overruled. [Parke, B. In the case of *Knowles v. Stevens*, the plea had no conclusion at all, and the Court held that a plea without any conclusion was bad; but this point was not raised at all.] In Chitty on Pleading (vol. i. p. 557), it is said—"It is an established rule in pleading, that whenever new matter is introduced on either side, the pleading must conclude with a verification or averment:" for which the author cites 1 Wms. Saund. 103 a., 3, and n.; Com. Dig. Pleader (E. 33). This is new matter, because it may be answered in several ways. [Parke, B. The defendant does not take away from you any opportunity of replying by this form of pleading.] In *Jones v. Pope* (1 Wms. Saund. 37), and *Duppa v. Mayo* (1 Wms. Saund. 280), a plea of the Statute of Limitations was concluded with a verification; and in *Courper v. Towers* (1 Lutw. 98) the same conclusion was adopted. It may be doubted whether this is a plea in the negative.

LORD ABINGER, C. B. It seems to me that it is not necessary to add a verification to a plea like the present. I am not aware that the hoc paratus est verificare is of any value, and it is desirable to get rid of useless forms. Besides which, my Brother Manning has shewn, by referring to the ancient authorities, that it is unnecessary to insert it. The general practice among pleaders in modern days has undoubtedly been in conformity with what Mr. Whateley has said; but it appears to have been unnecessary.

[279] PARKE, B. The general practice has undoubtedly been to conclude these pleas with a verification. I always adopted that conclusion myself, and the point now raised is quite new to me. However, my Brother Manning has satisfied me that it is quite unnecessary to add the verification, and I think the good sense of the matter is, that a party should not be required to verify that which it does not lie upon him to prove. In the case of *Knowles v. Stevens*, this point was not raised.

Leave to amend on payment of costs, otherwise
Judgment for the defendant.

WEBB, Treasurer to the Commissioners for Building a new Gaol, &c., for the Borough of Carmarthen v. JAMES AND OTHERS. Exch. of Pleas. 1840.—Debt on bond by the treasurer appointed by Commissioners acting under a local Lighting and Paving Act, against a collector of rates and his sureties. The defendants cravedoyer of the bond and condition, which recited, inter alia, that H. J., one of the defendants, had been appointed collector of the rates due and payable under and by virtue of the act, and had been called upon to give security for the due performance of the office; and the condition was, inter alia, for the collection of all such rates as H. J. should be directed to demand and obtain by virtue of his said

office, and for delivering a true account of and paying to the treasurer of the Commissioners, all monies by him received "by virtue and for the purposes of the said act." The defendants then pleaded, so far as related to that part of the condition, that "during the continuance of the said appointment no rate was made or in any way existed which he, the said H. J., could legally or according to law collect or get in, or could legally or according to law demand or obtain by virtue of his said office, and that he did not at any time during the continuance of his said appointment, legally receive any money by virtue or for the purposes of the said act or relative to the collectorship of the said rates:"—Held, 1st, that the plea would have been bad on special demurrer, if the objection had been sufficiently pointed out, for attempting to raise an issue of law, and for not shewing positively, either that no rate was made, or in what the alleged illegality consisted.—2ndly, that the first part of the plea, which stated "that no rate was made, or in any way existed which he, the said H. J., could legally or according to law collect or get in," &c., not being specially demurred to, was a substantial defence to the action, as shewing a sufficient excuse for non-performance of the condition; and that the rest of the plea might be rejected as surplusage.

[S. C. 9 Dowl. P. C. 314; 10 L. J. Ex. 89. See further, 8 M. & W. 645. Adopted, *Kepp v. Wiggett*, 1850, 10 C. B. 35; *Durham Corporation v. Fowler*, 1889, 22 Q. B. D. 413.]

Debt on bond. The defendants cravedoyer of the bond, which was set out, and was as follows:—"Know all [280] men by these presents, that we Henry James of the county of the borough of Carmarthen, victualler, William Morgan, of the same place, currier, and John Lewis, of the same place, timber merchant, are jointly and severally held and firmly bound to Thomas Taylor Webb, of &c., Treasurer appointed by the Commissioners acting under and by virtue of an act made and passed in the 32nd year of the reign of his late Majesty King George the 3rd, intituled, &c., in the penal sum of £250, of &c., to be paid to the said Thomas Taylor Webb, as such treasurer as aforesaid, and his successors for the time being, for which payment to be well and faithfully made, we bind ourselves jointly, and each of us bindeth himself severally, and our and each of our heirs, executors, and administrators, firmly, by these presents, sealed, &c. The defendants also cravedoyer of the condition of the bond, which was as follows:—"Whereas, in and by the above-mentioned act, it was amongst other things enacted, that the Commissioners therein mentioned, or any five or more of them, should and might from time to time nominate, constitute, and appoint one or more treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such collector of the rates thereafter mentioned, and such other officers as they should find necessary for the execution of the said act, and might from time to time remove and displace all or any of them, and nominate and appoint such other person or persons in the room of him or them who should be so removed, and that the said Commissioners should and might, and they were thereby authorised and required to take such security from time to time, for the due execution of the said offices respectively, as the said Commissioners should think proper: And whereas the said Henry James hath been duly elected and appointed collector of the rates due and payable under and by virtue of the said act, and hath been called upon to give security for the due performance of [281] the said office of collector of the rates: now the condition of the above written obligation is such, that if the above bounden Henry James shall from time to time and at all times during the continuance of the said appointment, or of any future appointment or appointments of him as collector as aforesaid, well and faithfully collect and get in all such rates as he may be directed to demand and obtain by virtue of his said office, and do and shall deliver to the said treasurer all books and papers, and a true and perfect account in writing of all matters and things committed to his charge by virtue of the hereinbefore recited act, and also of all monies which shall have been by him received, by virtue and for the purposes of the said act, and shall and do pay all such monies as shall have been received by him to the said Thomas Taylor Webb, or his successors, as treasurer for the time being, acting by virtue of the said act, relative to the collectorship of the said rates; then this obligation to be void, or otherwise to be and remain in full force and effect." The defendants then pleaded:

First, non est factum.

Secondly, that there was not any other or future appointment of him the said Henry James as collector as aforesaid, except the appointment in the condition mentioned; and that during that appointment, he performed the condition of the bond. Verification.

Thirdly, the defendants say that there was not any other or future appointment of him the said Henry James as collector as aforesaid, except the said appointment in the said condition mentioned; and that during the continuance of the said appointment, no rate was made or in any way existed, which he the said Henry James could legally, or according to law, collect or get in, or could legally, or according to law, demand or obtain by virtue of his said office; and that he did not at any time during the continuance of his said appointment legally receive any [282] money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates; and that he did from time to time, during the continuance of the said appointment, deliver to the said treasurer all books and papers, and a true and perfect account in writing, of all matters and things committed to his charge by virtue of the act recited in the said condition. Verification.

Special demurrer, assigning for causes, that the said last plea neither avers performance of the condition of the said writing obligatory, nor excuses the non-performance. That it does not contain any matter of excuse for the said Henry James not delivering an account of all monies by him received by virtue or for the purposes of the said act; or for the non-payment of all such monies as were by him received relative to the collectorship of the said rates. That the said last plea does not deny that the said Henry James received such monies, but avers that he did not receive the same legally; and that the defendants cannot be allowed to allege the illegality of the act of the said Henry James, in excuse for his non-performance of the said condition. That the said defendant, Henry James, cannot be allowed to set up or take advantage of his own wrong or illegal acts. And also for that the said last plea admits that the said Henry James did receive monies by virtue and for the purposes of the said act and relative to the said collectorship, but denies that the same were received legally by him. And also for that so much of the said last plea as relates to the said monies, is a negative pregnant, admitting the receipt of such monies; and it is uncertain and ambiguous whether by the said plea it is intended to deny the receipt of such monies, or to admit such receipt, and to allege the illegality thereof. That the plaintiff cannot take any certain issue on the said plea, or any matter of fact therein, but must take issue on the legality or illegality of the receipt by the said Henry James of the said monies. And for that, if the defendants had [283] intended to rely on any illegality in the receipt of the said money, such illegality ought to have been specially stated, and the facts constituting such illegality averred in the said plea; and it ought to have been shewn what monies had been illegally received, and why and wherein the receipt thereof was illegal. And that the said plea does not shew that the supposed illegality was not occasioned by the act of the said Henry James; and for that the said plea is confined to such monies as were received by the said Henry James during the continuance of his said appointment in that plea mentioned, or some other or future appointment, whereas the condition of the said writing obligatory is general, and extends to all monies received by virtue and for the purposes of the said act, and relative to the collectorship of rates, whether the same should have been received during the continuance of such appointments or at any other time. Joinder in demurrer.

The defendants' points, marked for argument, were,—that the last plea is good, inasmuch as it alleges a substantial performance of the condition of the bond, according to the true intention thereof, which intention was merely to insure the due collection, and payment over by the collector to the treasurer, of all monies which he could legally collect, and had legally received in his office of collector, and not to insure the collection or payment over of rates which the collector was not authorized by his office to collect.

Willes, in support of the demurrer. Independently of the special grounds of demurrer to this plea, it shews neither a performance of the condition of the bond, nor an excuse for non-performance. It is consistent with the plea that a rate may have been made with some trifling irregularity in it, and which the rate payers, either through good feeling or from a desire to avoid litigation, did not choose to contest. Then is the rate collector, the mere [284] servant of the commissioners, and who has received the amount of such a rate for them, to be permitted to set up irregularity

as an excuse for not giving an account of the monies collected under it? That would be highly inconvenient, and also contrary to the principle deducible from *Com. Dig., Accompt, A.*, where it is stated to be a good plea in account, "that the plaintiff was a disseisor, and that the disseisee hath re-entered." So here, the defendants ought at least to have shewn that the party is liable to refund the money received. He was then stopped by the Court, who called upon

E. V. Williams to support the plea. The plea is good, as shewing a substantial performance of the condition of the bond. The terms of the condition must, according to *Lord Arlington v. Merrick* (2 Wms. Saund. 403), and the authorities cited in the note to that case, be construed with reference to the recital; and it is recited here, that the defendant, "Henry James, hath been duly elected and appointed collector of the rates due and payable under and by virtue of the said act, and hath been called upon to give security for the due performance of the said office of collector of the rates." The condition cannot, therefore, apply to an irregular rate, for that would not be "due and payable under and by virtue of the act." In *Nares v. Rowles* (14 East, 510), the bond declared on was taken to secure the collection of duties imposed by statute, and the defendant moved in arrest of judgment, on the ground that the duties were not authorized by the act: and Lord Ellenborough, C. J., said, "Looking at the condition of this bond as it appears upon the record, I cannot say that if the rates were collected without authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had illegally [285] received the money, and would be entitled to retain it for his own indemnity." [Parke, B. That dictum surely ought to be qualified; for if money be paid with knowledge of the facts, it cannot be recovered back. Must not the collector pay over to the commissioners all monies received by him for them as rates?] That is not the question here. The question is, whether monies not received by virtue of the act come within the terms of this condition. The defendant James may perhaps be liable to the commissioners in an action for money had and received, though the money be collected under an irregular rate; but his sureties have a right to shew, by their plea, that the money does not come within the terms of the condition (see 1 Wms. Saund. 414, n. 5). They are responsible for his official receipts alone: he himself may be answerable for his unofficial or extra-official receipts also; but his sureties have only bound themselves in respect of the monies which shall have come into his hands officially; and if their plea discloses that no monies can possibly have so come to his hands, it affords a good answer to the action. [He cited *The Wardens of St. Saviour's, Southwark, v. Bostock* (2 N. R. 175), and *Horton v. Day*, cited by Twysden, J., in *Lord Arlington v. Merrick* (2 Saund. 414).] As to the special grounds of demurrer, they are pointed to the allegation in the plea, that Henry James did not "legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates;" but they are not sufficiently pointed to the averment, "that during the continuance of the said appointment, no rate was made or in any way existed, which he, the said Henry James, could legally or according to law demand or obtain by virtue of his said office." This allegation, for the reasons already urged, affords a substantial answer to the action. The Court [286] cannot presume that the defendant received any money, when the plea shews that there was no rate in existence which he could legally collect.

Willes, in reply. The plea if bad as to the principal, is bad also as to the sureties; and, admitting the general principle that the condition must be construed with reference to the recital, still the language of it is large enough to include the case of an irregular rate. There is a section in the local act giving protection to persons acting in pursuance of its provisions, which would be unnecessary and useless unless it extended to irregular acts, and therefore must be construed to extend to them (see *Butler v. Ford*, 1 C. & M. 662); and the condition of the bond should have a similar construction. [Parke, B. But unless there are other monies to be received by the collectors besides the rates, that part of the plea relied upon by Mr. Williams is a substantial answer to the action, for it shews that there was no rate in existence which James could legally collect, and the Court cannot presume that he collected an illegal rate.] The act mentions mortgage monies. [Parke, B. They are not within the province of the rate collectors.] At all events, the plea is incorrect in point of form; for it is a negative pregnant, and leaves it ambiguous whether the defence is that no money was received at all, or that it was received in fact, but illegally. Bac. Abr.,

Pleas and Pleadings, title "Negative Pregnant." [Parke, B. That objection is not pointed to the allegation relied on by the defendants.] Then that allegation is bad, as tending to raise an issue on matter of law. It should have shewn as a fact in what the alleged illegality of the rate consisted, and ought not to have left it to a jury to decide whether a legal rate was made or not: *Abbot of Strata Marcella's case* (9 Rep. 24), *Hume v. Liversidge* (1 C. & M. 332), [287] *Ransford v. Copeland* (1 Nev. & Per. 671; 6 Ad. & Ell. 482). *Hume v. Liversidge* shews that this objection is sufficiently raised by the statement in the demurrer, that the plaintiff cannot take any certain issue on the plea. [Parke, B. The context of the language used in setting forth the causes of demurrer, shews that that objection also is pointed to the allegation in the plea as to the illegal receipts of the money, which may be rejected as surplusage, and not to the statement, that "no rate was made, or in any way existed, which he, the said Henry James, could legally or according to law demand or obtain by virtue of his said office." That allegation must be considered as if it were pleaded alone, and came before the court on general demurrer. The rest of the plea, which is specially demurred to, may be rejected as surplusage. You had better amend.]

LORD ABINGER, C. B. The Court were at first disposed to decide with Mr. Willes, on the ground that the collector should not be permitted to set up an irregularity in the rate as a defence to the action. But the authorities referred to by Mr. Williams seem to shew that the condition must be confined to monies received by the collector as such, in pursuance of the act. That part of the plea which shews that no rate existed which the defendant James could legally collect, is therefore a sufficient answer in substance, and the special grounds of demurrer to it are not pointed out. The plaintiff may have leave to amend.

PARKE, B. The plea would have been bad on special demurrer, had the objection been sufficiently raised. It should have been stated, either that no rate was made, or have shewn in what respect it was illegal. But the demurrer does not raise this objection to the averment that no rate was made, or in any way existed, which the defendant could [288] legally or according to law collect, &c., and that part of the plea appears to me a sufficient excuse of performance of the condition, as far as it relates to James accounting for monies received by him as collector.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend, otherwise

Judgment for the defendants.

SCARFE v. HALLIFAX, ESQ.(a) Exch. of Pleas. 1840.—The sheriff seized goods in the possession of S., to satisfy a fi. fa. issued against him upon a judgment of nonsuit for £67. S. had previously conveyed all his estate and effects to H. by a deed which it was contended was fraudulent and void against creditors: and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them except on payment of £97, (the additional £30 being claimed for poundage, expenses, &c.) which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of £67. In an action for money had and received, brought by S. against the sheriff to recover back the £30:—Held, that it was not necessary to prove a tender of the £67.—Held, also, that a letter from the under-sheriff to the officer in possession, directing him to demand only the £67, if S. came to pay the amount of the execution, was not admissible in evidence on behalf of the defendants.—Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not, and that if it was not, he was not entitled to recover: and that the sheriff was not estopped by his return to say that the excess beyond the £67 was not the money of S.

[S. C. 10 L. J. Ex. 332.]

Debt for money had and received—Plea, nunquam indebitatus. At the trial before Vaughan, J., at the Norfolk Summer Assizes, 1839, it appeared that one Morgan,

(a) This case was by mistake omitted in its proper order.

having obtained a judgment of nonsuit against the present plaintiff (*b*) for 67l. 11s. 6d., had issued a writ of fieri facias upon that judgment, directed to the defendant, the sheriff of Suffolk. The defendant having seized the goods in the plaintiff's house, claimed to retain them until the sum of 97l. 13s., viz. 67l. 11s. 6d. for the debt and costs, and 30l. 1s. 6d. for poundage, expenses, &c., should be paid to him by the plaintiff. Before the execution issued, the plaintiff had conveyed all his estate and effects by deed to two persons named Hayward and Insby, which conveyance the defendant contended to be fraudulent and void as against creditors; and Hayward and Insby gave notice to the sheriff's officer not to sell, and sent to him a person of the name of Woods, who demanded the goods, and on his refusal to deliver them without payment of the whole sum of 97l. 13s., paid that amount under protest, and took a receipt as for a payment by Hayward. The plaintiff afterwards ruled the sheriff to return the fieri facias, and he returned that he had levied of the goods and chattels of the plaintiff, Scarfe, 67l. 11s. 6d. The defendant offered in evidence a letter from the under-sheriff to the officer, instructing him not to demand the greater sum, if the plaintiff came to pay the amount of the execution, but the less only. This letter was rejected. For the defendant, several objections were made to the plaintiff's right to recover. First, that the action could not be maintained without proof of a tender to the defendant of the precise sum due from the plaintiff. The learned judge overruled this objection, being of opinion that an action would lie for the excess, which the sheriff had no right to claim, and could not therefore retain, and that it would lie without any proof of tender of the sum actually due; but he reserved to the defendant's counsel leave to move to enter a nonsuit on this objection. Secondly, it was contended that the money was not the plaintiff's, but that of his assignees: thirdly, that if it was the plaintiff's money, it could not be recovered, because the goods were not his: a payment by one to redeem the goods of another was not a payment under duress, but voluntary. This last objection the learned Judge overruled. On the case going to the jury, his Lordship was requested to leave to them the question whether the money was the plaintiff's or not, but he declined to do so, and the plaintiff had a verdict for 30l. 1s. 6d. In the following Michaelmas Term,

Byles moved, pursuant to the leave reserved, to enter a [290] nonsuit, or for a new trial, and renewed the objections taken at the trial. First, the plaintiff ought either to have proved a tender of the sum really due, or to have shewn that a tender was dispensed with. In *Astley v. Reynolds* (2 Stra. 915), which was an action of a similar nature, a tender was proved; so it was also in *Leake v. Pigott* (Selw. N. P. 87). Suppose this had been an action of trover for the goods: the plaintiff could not have recovered without proving a tender of the debt. There being, then, no evidence of a tender, or of a dispensation with it, there was no evidence to go to the jury of any extortion: and this action, though not founded expressly upon the stat. 1 Viet. c. 55, is in effect an action for extortion. [Parke, B. The money was paid to redeem the goods, and so under a species of duress. Whosoever money it was, he was entitled to recover the surplus beyond the sum really due. If they were Scarfe's goods, the circumstances under which they were seized and retained are sufficient to constitute extortion from him. The sheriff had no right to hold the goods as against any body, except for the amount of the levy.]

Secondly, the letter from the under sheriff ought to have been received in evidence, to shew the real nature of the instructions under which he made the levy. [Parke, B. The officer represented the sheriff for all purposes relative to the execution of the writ, and the sheriff was responsible for him, whether he disobeyed his instructions or not.]

Thirdly, the question whether the money or the goods were the plaintiff's or not, ought to have been left to the jury. The foundation of his claim is, that the defendant would not give up the goods until he, the plaintiff, had paid out of his own money an illegal claim. Neither can the plaintiff sue in respect of duress exercised upon another man's goods.

Upon the last point only a rule was granted; against which, in the following Hilary Term,

[291] Biggs, Andrews and Gunning shewed cause, and contended, first, that the learned judge did substantially leave the question to the jury whether the money was

(*b*) See *Scarfe v. Morgan*, 4 M. & W. 270.

the plaintiff's; and secondly, that if it was the plaintiff's money, it was paid under duress of his goods, for the defendant by his return was estopped to say that the goods seized were not those of the plaintiff.

Per Curiam. As to the first point, we have referred to the report of the learned Judge, and we are not satisfied that the question was properly left to the jury: and if the money was not the plaintiff's, and the goods had been fraudulently assigned to defraud the creditors, they were the goods of the assignees as against the plaintiff, and all the world except creditors, and consequently the payment was not made under duress of his goods. The sheriff is not estopped by the return, for it affirms only that, to the extent of the levy, it had been made on the plaintiff's goods; and that is perfectly true, for, notwithstanding the assignment, they were (assuming it to have been fraudulent) for the purposes of the execution, and to that extent, the goods of the plaintiff: but beyond that, they were the goods of the assignees, and the sheriff is not, therefore, estopped to contend that they were so. The rule must be absolute for a new trial.

Rule absolute accordingly.

[292] DOE D. JEARRAD v. BANNISTER AND ANOTHER. Exch. of Pleas. 1840.—A testator, by his will, devised as follows:—"I give my house, gardens, &c., at G., to Mrs. S. S., and her heirs, if she has any child; if not, then, after the decease of herself and her husband, Mr. R. S., I give it to F. M. and her heirs." S. S. had a child, who was living at the date of the will, but who died four days after the date of it, in the lifetime of the testator:—Held, that S. S. took an estate tail; and that upon her death without heirs of her body, the property passed to F. M.

[S. C. 10 L. J. Ex. 33; 5 Jur. 102.]

This was an action of ejectment, brought by the lessor of the plaintiff against the defendants, to recover the possession of a house and premises at Gittesham, in the county of Devon.

The defendants having entered into the usual consent rule to confess lease, entry, and ouster, and pleaded "not guilty," with a view to obtain the opinion of the Court on the point at issue, the parties, under the order of Parke, B., stated the following case:—

The lessor of the plaintiff is a gentleman residing at Cheltenham, in the county of Gloucester, and claims to be entitled to the property in question as tenant by the curtesy, in right of his late wife Frances Jearrad, deceased, formerly Frances Macdonald, hereinafter mentioned. Nicholas Pridice, late of Honiton, in the county of Devon, made his last will and testament, executed and attested in the manner then required by law for devising freehold estates, of which the following is a copy:—"In the name of God, amen. I, Nicholas Pridice, of Honiton, in the county of Devon, do give and bequeath unto my niece's daughter, Frances Macdonald, as under:—first, I give her my house and appurtenances thereunto belonging, situate in Gerrard-street, Soho, London, which now Thomas Fitzhenry, Esq., lives in, freehold; and I likewise give her my two houses in Featherstone Buildings, where now Mr. William Somervill lives, No. 21, and Mrs. Griffiths, No. 20, near Holborn, for a term of years." Then came other bequests to her, after which he bequeathed as follows:—"I likewise give my house, gardens, and *orchers*, where *likes* Mrs. Warren, at Gittesham, in Devonshire, to Mrs. Sarah Smark, and *has* heirs, if she [293] has any child; if not, after the decease of she and her husband, Mr. Richard Smark, then I give it to the above Frances Macdonald and her heirs; and I do hereby make and constitute Mr. Richard Smark my executor of this my last will and testament; Frances Macdonald to pay him £10 for his trouble. February 18th, 1803."

The testator Nicholas Pridice died in the month of December, 1804, without altering or revoking his said will. At the date of the testator's will, and from thenceforth to the time of his death, he was seised to him and his heirs in fee-simple of the house and premises at Gittesham, devised by him to Sarah Smark.

Sarah Smark had a child born on the 21st day of November, 1802, but which died on the 22nd day of February, 1803, in the lifetime of the testator; and on the 27th day of March, 1804, she had a still-born child.

Mrs. Smark's husband died in the month of December, 1806, in her lifetime, and she continued in possession of the property up to the time of her decease, on the 12th day of May, 1839, having by her will, dated the 19th day of April, 1834, devised the property in question to the defendants and their heirs, upon certain trusts in her will expressed.

Frances Macdonald, in the testator's will named, after his decease, intermarried with Robert William Jearrad, the lessor of the plaintiff; and died subsequently to Sarah Smark.

The question submitted for the opinion of the Court is, whether, under the devise in the will of Nicholas Pridice, the said Sarah Smark was, at the time of her death, seised for an absolute and indefeasible estate of inheritance in fee-simple of the property thereby devised to her, or whether, under the circumstances hereinbefore stated, the devise over to Mrs. Frances Macdonald and her heirs took effect. If the Court should be of opinion that Mrs. Smark was, at the time of her death, seised of the devised [294] property for an absolute and indefeasible estate of inheritance in fee-simple, then a judgment shall be entered against the plaintiff of nolle prosequi, immediately after the decision of the case, or otherwise as the Court shall think fit; but if, on the other hand, the Court shall be of opinion that the limitation over to Frances Macdonald, afterwards Frances Jearrad, took effect, then judgment is to be entered for the lessor of the plaintiff against the defendants by confession, for 1s. damages, immediately after the decision of the case, or otherwise as the Court may think fit.

Hodgson, for the lessor of the plaintiff. The lessor of the plaintiff claims as tenant by the curtesy, on the ground that the fee in possession of the property in question became vested in Frances, his late wife, called in the will Frances Macdonald. The case does not expressly state that there has been any issue of the marriage, but this the Court will understand and presume to have been the fact, as the case has been sanctioned by one of the learned Judges of the Court. [To this the Court intimated their assent.] The case states that Sarah Smark had in fact one child born alive, and who died in the testator's life time, and another child born dead. At his death she was without issue. Now the gift is to her, and (assuming that the Court will read the word "has" for "her") to her heirs, if she has any child. It could not be the intention to give her the fee absolutely, because there is a gift over to Frances Macdonald, to take effect in some event which the testator contemplated, and has expressed by the negative of Sarah Smark having any child. There are three constructions to which the gift is open. First, that S. Smark was to take the fee upon the birth of a child, and Frances Macdonald to take on the opposite event. Secondly, that S. Smark was to take the fee [295] determinable at her death without a child then living. Thirdly, that she took an estate tail.

1. It is plain that the testator, by the way in which he joined the words "heirs" and "child," meant the same thing by both terms. But the sense in which both agree is that of "heirs of the body." "Child" is nomen generale, and may stand for issue, or heirs of the body, as "son" was held, in *Mellish v. Mellish* (2 B. & Cr. 520; 3 D. & R. 804), to stand for male issue, or heirs male of the body. The intention was, not that the birth of a child should vest the absolute fee in the mother, with the power to defeat that child, nor that it should be a condition precedent to the vesting of an estate in her, but that it should be necessary, in order to fulfil the character of the persons intended by the word "heirs," that they should be children or issue of her body.

2. There is nothing in the devise to support the second construction. If the words are to be construed as giving Sarah Smark an estate, either in fee or for life, with a gift over on the event of her never having any issue or heirs of her body, such a gift, unconfined, was void for remoteness. There is nothing to confine it to a failure in her lifetime, except the words already observed upon, which, properly construed, can have no such meaning.

3. The remaining construction is, that Sarah Smark took an estate tail. This species of estate is an inheritance, but limited in its character. The heirs to take must take by descent, and with most of the qualities of inheritance; but none can take but such as are issue of the body of the donee. Here the testator says, Sarah Smark is to have an estate which is to go to her heirs, not generally, nor in all events, but if she has a child. Is it not natural, and even necessary, to supply the words "to

take as such heirs?" It would thus be, "to her and her heirs, if she shall have a child to be her heir." But, fur-[296]-ther, a child, to be "heir of the body" of its parent, must survive the parent, and "issue," to be heirs of the body, must survive the ancestor. The meaning, therefore, of the devise, taken altogether, is, that she was to take an estate of inheritance, provided she had a child or issue to succeed as heir of her body, and to endure as long as she had such child or issue; and that is clearly an estate tail.

Another reason, if any were wanted, for the construction contended for by the plaintiff, is, that the Court can, by that construction, give vested estates to both objects of the testator's bounty. If the first of the above constructions could prevail, the fee would be in the heir till Sarah Smark had a child born, and would then shift to her. If the second should prevail, the gift over would be an executory devise, or at most a contingent remainder. But upon the third construction, that of an estate tail, Sarah Smark would take a qualified estate well known to the law, and Frances Macdonald would take a vested estate in remainder. Where the construction is doubtful, the Courts prefer a remainder to an executory devise (*Purefoy v. Rogers*, 2 Saund. 380 (b)), and a vested to a contingent remainder (*Ives v. Legge*, 3 T. R. 488, n.).

Erle, *contra*. If there be no ambiguity on the face of the will, the Court are bound to give effect to it according to the intention of the testator, as expressed in it; and in this case there is no ambiguity. Taking it that the testator did not know whether Mrs. Smark had a child or not, the intention clearly was to give her the fee-simple if she should have a child or children; if not, then that it was to go over at her death to Frances Macdonald. He gives the property to Mrs. Smark and her heirs: if it had stopped there, the devise would clearly have created a fee-simple; but then follows the condition, "if she has any child:" and as she had a child, the condition was [297] satisfied, and the property went absolutely to her. There is nothing stated to shew a different intention, or any conflicting or ambiguous meaning. It is quite possible for the testator to have intended to say, "I mean her to have the estate if she has had a child." [Rolfe, B. It would be strange for him to say, "I mean Sarah Smark to have the estate in fee-simple if she has a child," when he knows that she has had one.] The words are applicable to a past or future child; it is either has, or shall have. This matter was considered with respect to personal property, in *Wall v. Tomlinson* (16 Ves. 413). In that case there was a residuary bequest to Harriet Wittle Strangeway for ever, "in case she should have legitimate children: in failure of which" to go over. She afterwards married one William Cowles; and having only one child born alive, who died before her, it was held that she was entitled absolutely. [Rolfe, B. The words which would operate to create an estate tail, would give an absolute interest in personal property.] There the Master of the Rolls, Sir William Grant, says, "The testator's object seems to have been, in the event of Mrs. Cowles having children, to give her the means of making a provision for them. It cannot be contended, that from the event of her having only one child, there is to be a different construction, so that in that case the child was to be left without a provision. As to the words, 'in failure of which,' it is very difficult in this case to give those words the construction of not having children at her death, which would tie it up during her whole life." Suppose, in this case, Mrs. Smark had several children, and for their benefit wished to mortgage or sell the estate, to make provision for their education and maintenance, she would not be able to do so if this devise were held to confer a life estate only, which would be a great hardship on them, and one which the testator never could have intended.

[298] Hodgson, in reply. It is not meant to be contended that Sarah Smark took a life estate, but an estate tail; which estate she could, of course, by a proper assurance, convert into a fee, and thereby gain the power of charging or disposing of it to answer the necessities of her family. The case of *Wall v. Tomlinson* was one of personal estate, and it was held that the first taker was entitled to the absolute interest. That is consistent with the Court having thought the words such as would have created an estate tail in real property, as has already been observed from the Bench. It is agreed that the testator's intention is to prevail: the question is, whether, upon the true construction of the devise, he did not use the word "heirs" in the sense of "heirs of the body."

LORD ABINGER, C. B. I think the proper construction for us to adopt is that for which Mr. Hodgson contends. It would seem, from some part of the testator's will,

that he was not precisely acquainted with technical language, for there is some obscurity in his expressions. However, we must take the whole together, and put the best construction upon it that we can. It appears to me, that what the testator intended clearly was, that, at all events, Sarah Smark should have an estate for her life. How could he effect that intention? If he had given her an estate in fee, it would have defeated all the remainders over. But he says, if she has no child, that is, after her decease, in that case I give the property over to Frances Macdonald and her heirs. According to Mr. Erle's construction, if she did not leave any children at her decease, she has it to her and her heirs absolutely. It appears to me, however, that the testator probably considered the word heirs to mean children of the body, and intended that the property should go to her for her life, and at her death, to her children, if any; but if she should have no children to be heirs of her body, then that it should go over to Frances [299] Macdonald. That seems the reasonable construction of the will, and it is justified by authorities. According to Mr. Erle's construction, if she had no child, she would take nothing. It appears to me that she took an estate tail, her "heirs" being interpreted to mean the heirs of her body.

GURNEY, B. I think the intention of the testator was clearly to give the estate over to Frances Macdonald, if Sarah Smark died without children.

ROLFE, B. I am of the same opinion. The argument of Mr. Erle might be urged in many cases where the word heirs is not qualified; but here, by the subsequent words, it is cut down to mean heirs of the body. The testator says, "I give to Sarah Smark and her heirs, if she has any child;" that is, I presume, to her and her heirs if she has children; in other words, to her heirs, being the heirs of her body; and in default of these, then over. I think that is the most reasonable construction; but of course, in cases of this sort, where people make their own wills, we are obliged to decide a little in the dark, and to guess at the intention of the testator.

Judgment for the plaintiff.

[300] LEWIS v. EDWARDS. Exch. of Pleas. 1840.—A. entered into partnership with B. & C., who had previously carried on the same trade together, and who shortly afterwards became bankrupt: and by an agreement, to which A., and the assignees of B. & C., were parties, it was agreed that A. should realize the assets and liquidate the debts of the firm; and that the official assignee of the bankrupts should be empowered by A. to collect the outstanding debts, and pay the amount to S. & Co., bankers, to the account of A., being allowed the usual per centage:—Held, that A. could not alone sue the official assignee, in an action of money had and received, for monies collected by him under this agreement, which remained in his hands, and of which he had rendered an account to A.

[S. C. 10 L. J. Ex. 323.]

Assumpsit for money had and received. Pleas, non assumpsit, and a set-off for money paid, and on an account stated. Issues thereon. At the trial before Rolfe, B., at the Middlesex Sittings after last Trinity Term, the facts appeared to be as follows:—In January, 1838, the plaintiff and two other persons of the name of Bailey and Potter, entered into partnership in the business of wholesale druggists, which Bailey and Potter had previously conducted together. Bailey and Potter shortly afterwards became bankrupt, and the defendant was the official assignee of their estate. On the 19th of May, 1838, an agreement was entered into, between the defendant and the elected assignees of Bailey and Potter on the one part, and the plaintiff on the other, with a view of liquidating the affairs of the late firm, of which the following is a copy:—

"It is this day agreed between the assignees of Bailey and Potter on the one side, and Mr. Kensington Lewis on the other, as follows:—

"1. That with a view to liquidate the affairs of the above firm, Mr. Lewis shall be empowered to realize the assets of the new firm, for the purpose of paying the debts and liabilities due by the new firm, as and when the same became payable; it being understood and agreed, that the partnership of the new firm is to date from the 1st of January, 1838, inclusive; without prejudice to Mr. Lewis's right to contest the payment of any securities or bills drawn, accepted, or endorsed, for which the new firm have not received value; and that he shall have full power, with the consent of Mr.

Edwards, to compound debts, or to give time, either in the whole or in part, as he shall think fit.

"2nd. That Mr. Lewis provide the funds to cover any deficiency, the amount of such deficiency to be consi-[301]dered a primary charge upon the remaining assets of the new firm.

"3rd. That Mr. Lewis shall be allowed his reasonable costs and expenses incurred in liquidating the said partnership accounts, and also his costs in and about the proceedings in Chancery.

"4th That the stock, lease, plant, and good-will be forthwith sold, either in one lot, or the lease and goodwill at an agreed sum, taking the stock and plant at a valuation, and that Mr. Lewis be at liberty to become the purchaser, at an advance of £5 per cent. upon the highest offer which the assigness shall be prepared to accept.

"5th. That if in the result there shall be a balance in favour of Mr. Lewis as such liquidating partner, he shall be entitled to prove for the amount of such balance; or if the balance be in favour of the said Bailey and Potter, then the amount shall be paid to the assignees, or other uncollected estate assigned over to them, after all amounts due to Mr. Lewis and the creditors are fully satisfied.

"6th. That Mr. Lewis be authorized to receive and cancel the bills held by Mr. Abbott.

"7th. That the liquidation of the said partnership accounts, and all that relate thereto, be conducted agreeably to the articles of copartnership lately subsisting between the said Bailey, Potter, and Lewis, as far as the same may be applicable to the present state of things.

"8th. That the assignees, or their accountants, shall be at liberty to inspect Mr. Lewis's liquidation account at all reasonable times.

"9th. That the assets of the new firm shall be considered subject to the following charges, and in the following order of succession [setting out certain charges].

"10th. That Mr. Edwards be empowered by Mr. Lewis to collect the outstanding debts due to the new firm, and pay the amount to Messrs. Stone & Co. to the account of Mr. Lewis, being allowed the usual per centage.

[302] "11th. That Mr. Edwards be repaid the sums advanced by him in the purchase of goods, out of the first receipts for goods sold since the date of the fiat."

(Signed)

"K. LEWIS.

"CROWDER & MAYNARD
"(for the Assignees)."

After the execution of this agreement, the defendant pursuant to the 10th clause, collected the debts due to the firm of Bailey & Potter, to the amount of £4050, of which he rendered an account to the plaintiff. To recover this amount the present action was brought, the plaintiff contending, that upon the true construction of the agreement, it was, when in the hands of the defendant, money had and received to his, the plaintiff's, use. The learned Judge, however, thought the plaintiff had no right to maintain the action, and accordingly directed a nonsuit, giving the plaintiff leave to move to enter a verdict for him for the amount claimed, subject to deductions for such payments as an arbitrator should think ought to be allowed.

In the beginning of this term Sir F. Pollock obtained a rule accordingly, against which

Crowder and C. A. Wood shewed cause, and contended that the agreement could not be construed to operate as an assignment to the plaintiff of the whole or any part of the outstanding funds of the partnership, to be collected by the defendant—which alone could entitle the plaintiff to sue in this form of action—since at the time of the agreement there was no certainty as to what might be found to be due; and that at all events the plaintiff could not sue alone, for that he was only a tenant in common of the fund with the assignees of the other partners. The Court called upon

Sir F. Pollock and Cowling, in support of the rule. By the operation of this agreement, the defendant became a [303] mere receiver for the plaintiff. He was bound, when he received the money, to pay it into the bank to the plaintiff's account; but the plaintiff might excuse him from the necessity of so paying it in, and receive it himself. If, according to the argument on the other side, the parties are tenants in common of the fund, what meaning is there in the provision that the defendant shall pay the money to the plaintiff's account? And even if they be, it may be

doubted whether the solvent partner may not sue alone, without joining the assignees of the bankrupt partners. Assignees of a bankrupt take only such an interest as was equitably as well as legally vested in the bankrupt. [Parke, B. It is perfectly clear that the assignees ought to join with the solvent partner, unless by the agreement their interest is transferred to him. The law is clearly laid down by Littledale, J., in *Carvalho v. Burn* (4 B. & Adol. 382; 1 Nev. & M. 700).] At all events, partners may always, by express agreement, isolate their accounts. "There may be special bargains by which particular transactions are insulated and separated from the general winding up of the concern, and are taken out of the general law of partnership:" per Bayley, B., in *Jackson v. Stopherd* (2 C. & M. 366): *Coffee v. Brian* (3 Bing. 54; 10 Moore, 341). If the plaintiff cannot sue upon the special promise in the agreement, the promise is altogether futile. The defendant's own account is evidence of an appropriation to the plaintiff in pursuance of the agreement: but even if there was no appropriation, the plaintiff had a right to sue for money had and received. Nothing remained to be done but the payment over of the money for his use. It is in the nature of an equitable assignment of the fund to the plaintiff. In *Grissell v. Robinson* (3 Bing. N. C. 10; 3 Scott, 329), Tindal, C. J., says, "Where anything remains to be done under the contract, of which the plaintiff must prove performance, [304] the action should be on the special contract; but where all has been done, and the plaintiff has only to prove payment of the money, then he may recover on the general count for money paid." [Parke, B. That appears to be a little at variance with the law as laid down in *Spencer v. Parry* (3 Ad. & Ell. 331; 4 Nev. & M. 771). At all events, it does not apply to money had and received. How much of the outstanding funds do you say is assigned to the plaintiff by this agreement?—all of them, or all that the defendant collects?] All that he collects under the 10th clause of the agreement. [Parke, B. It is difficult to say there is an assignment of them, because the subject matter of the assignment is uncertain; non constat de corpore.] The defendant must be taken, when he received them, to have appropriated them to the plaintiff, and the only thing remaining to be done is the form of going and paying them into the bank.

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day by

PARKE, B. The question in this case was, whether the plaintiff alone could sue the defendant for money had and received under the following circumstances:—

The plaintiff, Bailey, and Potter, entered into partnership in the beginning of the year 1838, in a business which Bailey and Potter had previously conducted. Soon afterwards the two latter became bankrupts, and the defendant was appointed the official assignee, and other persons the assignees of their estate. The plaintiff, as solvent partner, was liable to pay the partnership debts of the firm of which he was a member; and on the 19th of May, 1838, an agreement was entered into between the plaintiff, [305] and the defendant and the other assignees, for liquidating the affairs of the concern. After the agreement, the defendant collected £4000 and upwards, of the debts due to the partnership; and the question is, whether that sum of money could be recovered against him, in this action for money had and received, by the plaintiff.

This depends upon the construction and effect of the agreement. It consists of several articles. [His lordship stated them.] The principal question is as to the meaning of the 10th article, and what its legal effect is.

Its meaning certainly is, that Mr. Edwards, when empowered by the plaintiff to collect, should collect the debts, and should pay such debts as he should collect to Stone & Co., for the plaintiff's account; and as Stone & Co. were not stake-holders, and had no trust to perform for any other party than Lewis, it was just the same as if the monies had been agreed to be paid to the plaintiff himself, which, it may be well contended, is equivalent to an undertaking to hold the monies when received on the plaintiff's account. But admitting this to be so, the question is, whether this agreement is obligatory, and operates as an assignment to the plaintiff alone, for a good consideration, of the funds belonging to the assignees jointly with the plaintiff; and we are of opinion that it does not. There is no consideration moving from the plaintiff, sufficient to make the agreement binding on all parties, and capable of being enforced as a matter of legal obligation. The agreement imposes upon the plaintiff no burthen which he was not before liable to: the assignees and defendant have no benefit which they had not before. The whole instrument is nothing more than a

statement of their relative duties and rights, already existing, with some matters of arrangement, which cannot be made the subject of an action. The 10th section might possibly be construed to mean that the plaintiff should abstain to collect any of the outstanding debts, and give up the whole [306] to the defendant, which would constitute a good consideration for the defendant's promise to collect and pay over; but we do not think this is the fair construction: there is nothing to prevent the plaintiff from collecting, if he thought proper, as well as the defendant. We are therefore of opinion, that there is nothing in this agreement to divest the assignees of the bankrupts of their legal interest in the joint funds, and transfer it to the plaintiff; and consequently that the plaintiff alone cannot maintain this action: and he certainly cannot without having such a transfer, as it is clear that the shares of the bankrupt parties vested in the assignees originally, and there is no validity in the argument that, in consequence of the little prospect of a surplus to the estate of the bankrupts, the assignees took no interest: the doctrine so clearly laid down in the case of *Curvalho v. Burn* (4 B. & Adol. 382), leaves no doubt upon this point: and if it has not been transferred from them to the solvent partner, he alone cannot sue.

The rule must therefore be discharged.

Rule discharged.

ELLIOTT AND WIFE, Administratrix of Elizabeth Lane, Deceased v. KEMP. Exch. of Pleas. 1840.—L. was possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E. and continued during that period to use the furniture. In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did. In 1838, the furniture was sold by the defendant, (who had married another daughter of L.) with E.'s concurrence. In 1840, (disputes having arisen about the distribution of the proceeds), E. took out administration to her mother:—Held, that E. could not maintain trover for the furniture, without having taken out administration de bonis non to L.

[S. C. 10 L. J. Ex. 321. Approved, *Barclay v. Owen*, 1889, 60 L. T. 223. Referred to, *In re Beverly*; *Watson v. Watson*, [1901] 1 Ch. 684.]

Trover for furniture, &c. Pleas, first, not guilty; secondly, that the female plaintiff was not possessed as of [307] her own property, as administratrix, of the goods and chattels in the declaration mentioned; on which issues were joined. At the trial before Parke, B., at the London Sittings in last Trinity Term, the facts appeared to be as follow:—

The intestate, Mrs. Lane, was the mother of the plaintiff Mrs. Elliott, and also of the defendant's wife. Mrs. Lane's husband died in 1827, and on his death she removed the greater part of his household furniture to another house, in which she resided until her death with her daughter, afterwards Mrs. Elliott, and continued to use the furniture. A small part of the furniture, for which there was not room in that house, was at the same time sent to the defendant's house. In October, 1829, Mrs. Lane caused the furniture and other effects of her late husband to be valued, in order to her taking out administration to him, which she afterwards did. Some leasehold property of his was subsequently sold, but it did not appear whether the proceeds were applied to the payment of his debts. Mrs. Lane died in July, 1832. In 1838, the whole of the furniture was sold by the defendant's order, with Mrs. Elliott's concurrence: but some disputes arising about the distribution of the proceeds, Mrs. Elliott, in the year 1840, took out administration to her mother, and, as her administratrix, brought this action for an alleged conversion by the sale of the furniture in 1838.

Upon this state of facts, the learned Judge thought the plaintiffs were not entitled to recover, but that administration de bonis non should have been taken out to the estate of Mr. Lane. For the plaintiffs it was contended, first, that the defendant, who was a mere wrong doer, could not dispute the title of Mrs. Lane, who had been for several years in actual possession of the furniture in question, or of the plaintiff as her representative; and next, that there was evidence to go to the jury that Mrs. Lane had become entitled in her own right to the furniture. [308] The first point

was reserved for the opinion of the Court, and it was agreed that the question upon the evidence also, instead of being left to the jury, should be submitted to the Court, and its effect determined by them; and a verdict was thereupon taken for the defendant on the second issue, leave being reserved to the plaintiff to move to set it aside, and enter a verdict for the plaintiff, with £50 damages.

Bompas, Serjt., having obtained a rule nisi accordingly,

Humfrey, in this term, shewed cause, and contended, that it was clear upon the evidence that Mrs. Lane had no title except as the administratrix of her husband, to whom it was admitted that the furniture originally belonged; and therefore that the plaintiffs could derive no title from her, but ought, to entitle them to the possession, to have obtained administration de bonis non to the effects of Mr. Lane. The Court desired to hear

Bompas, Serjt., and Gurney, in support of the rule. There are two grounds, one of law, and the other of fact, on which the plaintiffs ought to recover. First, a *primâ facie* case was proved in point of law, to which there was no answer on the part of the defendant. As against a wrong-doer, the actual possessor of any chattel may maintain an action for it. Nay, the mere finder of it, though he does not thereby acquire an absolute property or ownership, has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover: *Armory v. Delamirie* (1 Stra. 505). So, possession under a general bailment, or under a transfer invalid for non-compliance with a statute, is sufficient title in trover against a stranger: *Sutton v. Buck* (2 Taunt. 302). So here, the proof of Mrs. Lane's having [309] been in possession of this furniture for two years and a half, is sufficient evidence of title in her, as against a mere wrong-doer. [Parke. But here the wrong is done to no particular party in actual possession; the goods were then *bona vacantia*; then the question is, who has the legal right, by relation to the grant of administration. What defence would the defendant have against the party who should afterwards take out administration de bonis non?] A wrong doer may be answerable to more than one party. A person may be liable for use and occupation both to the party who put him into possession, and also to the paramount rightful owner.] Parke, B. There he would have a right of indemnity against the party who put him into possession, and therefore ultimately would not be compelled to pay twice over. [Primâ facie, there were the goods of Mrs. Lane herself: if so, *primâ facie*, they belong to her representative. Then, can a party, who shews by evidence no right whatever, take them out of the possession of the representative? In *Crosskey v. Mills* (1 C. M. & R. 298), where the plaintiff, being in possession of the goods of an intestate under a bill of sale, employed the defendant, an auctioneer, to sell them, it was held, that notwithstanding notice to the contrary from the widow of the intestate, the defendant was bound to account to the plaintiff for the proceeds: and there Parke, B., says, "The plaintiff was the person who originally employed the defendant to sell. Therefore, *primâ facie*, the defendant was bound to account to the plaintiff. Admitting that the defendant could set up the *jus tertii*, and shew that he was liable to account to a third person, it is not shewn here that there was a title in any third person: no person has taken out letters of administration." A real *jus tertii* must be shewn, not a mere possibility of one. Suppose a party is in possession of goods as bailee, under a responsibility to account for [310] them to the real owner, cannot he sue a wrong doer in trover? Now the responsibility of an administrator, according to his bond given to the ordinary, is to make a true inventory of the goods of the intestate; well and truly to administer them according to law; to make a just and true account of his administration; and to deliver and pay the residue as the Judge by decree or sentence shall appoint. He is, therefore, a bailee under bond to distribute according to law, and to redeliver what he does not distribute. Has he not a right to enforce possession of the goods which he is so to account for and redeliver? [Parke, B. The plaintiff is under no obligation by virtue of the bond entered into by Mrs. Lane. Rolfe, B. The condition of the bond is, not that the party, his executors, administrators, &c., shall account, but only that the party himself shall make out an inventory and render an account.] Supposing these goods to have been part of the estate of the husband, yet by the conversion of them to her own use, the widow committed a breach of the bond, for which her estate is liable: *In the Goods of Hall* (1 Hagg. Cons. Rep. 130); *Archbishop of Canterbury v. Roberts* (1 C. & M. 690): then is not her representative entitled to the possession of them, in order to protect herself from that

liability? In 2 Saund. 47 a., it is said, "Where an executor declares [in trover] upon the possession of his testator, and of a conversion by the defendant after his death, it is sufficient, because the property is vested in the executor, and that draws after it the possession in law."

But, secondly, these goods might, upon the facts proved, be considered as having been reserved to Mrs. Lane, as her share of her husband's property. They were valued, and for two years and a half afterwards she continued, with the knowledge of the other parties entitled, to use them as her own, and no claim was shewn to have been made to them. It was more natural that she should [311] keep than sell them. It is reasonable to suppose that on the sale of the leasehold property, the estate was, by agreement of the parties, so divided as that, the widow taking these goods as part of her share, the proportions were according to their respective rights. It is analogous to the case of a bequest of a legacy to an executor, in which case his assent is presumed, and mere possession is almost enough to vest it. Here the only facts leading to the contrary conclusion are, that five years before the goods were her husband's, and that she was his administratrix: but that does not rebut the presumption to be derived from her user of them, which, unless she had acquired a title to them as her own, could only be by a violation of her duty as administratrix, which will not be presumed.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

PARKE, B. This case was argued a few days ago, on shewing cause against a rule nisi to enter a verdict for the plaintiff.

The facts were these:—The plaintiff, Mrs. Elliott, was the administratrix of her late mother Mrs. Lane, who was also the mother of the defendant's wife. Mrs. Lane's husband died in November, 1827. His household furniture was removed after his death by his widow to another house, in which she took up her residence with her daughter Mrs. Elliott: a small part, for which there was not room in that house, was sent to the defendant's. In October, 1829, the furniture and the effects of Lane were valued by Mrs. Lane, in order to take out administration to her husband, which she afterwards did, and died in July, 1832. The furniture at Mrs. Lane's was used by her; and some leaseholds of her late husband's were sold, but whether the proceeds were applied to the payment of her husband's debts, what was the amount of these debts, and whether Mrs. Lane had any funds of her own to pay [312] them with, did not appear. After the death of Mrs. Lane, in 1838, the furniture, formerly Lane's, was sold, with Mrs. Elliott's concurrence, by order of the defendant; and some dispute having taken place about the proceeds between the parties entitled, Mrs. Elliott, in 1840, took out administration to her mother, and brought this action in that character for the conversion, which took place by the sale in 1838.

On the trial, it appeared to me that the plaintiffs were not entitled to recover, but that administration de bonis non should have been taken out of the estate of Mrs. Lane. My brother Bompas contended, that as the defendant was a wrong doer, he could not dispute the title of Mrs. Lane and the administratrix. This point was reserved. He also contended, that, at all events, there was evidence to go to the jury that Mrs. Lane had become entitled in her own right to the furniture afterwards sold. I should have left that evidence to the jury, but it was agreed on both sides, that it should be submitted to the Court above, and its effect determined by us, as well as the point of law which was reserved. On the motion for a new trial, the same objections were made, and very ably argued.

It is unnecessary, in this case, to decide the question, whether, in an action of trespass or trover for personal property, the simple fact of possession, which is unquestionably evidence of title, is conclusive evidence, and constitutes a complete title, in all cases, against a defendant who is a mere wrong doer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels; for in the present case the plaintiffs were not in possession of the chattels, the subject of this suit, at the time of the conversion; and the only way in which this action can be supported, is by virtue of the relation which takes place by law to the death of the deceased, in [313] favour of his personal representative, in all cases of intermediate injury to his chattels. But the title of the plaintiff as personal representative of Mrs. Lane, relates back to her death, with respect to these chattels only which were her own, and which vest in her administrator; and the simple question then is, whether the

chattels in question were her own property. If they were not, the plaintiffs have no title whatever to them, and cannot maintain this action.

It was ingeniously contended, that, even admitting that the effects were not Mrs. Lane's own, still the administration bond, into which Mrs. Lane no doubt entered, gave a sort of custody or special property in her husband's effect unadministered, until an administration de bonis non should be taken out: which special interest would enable him to maintain an action for their conversion after her death. But we are clearly of opinion that such is not the effect of the bond; her own administrator is liable to the extent of her assets, for all breaches of the condition of the bond; but he has no right or interest in the unadministered effects, all of which devolve on the administrator de bonis non after the death of the administratrix.

The only question then is, whether those chattels, which were formerly the husband's, became, by any means, his widow's in her own right: and this is the question of fact which we have to dispose of, by the consent of the parties, instead of the jury.

The administratrix might have acquired a title by payment of the debts of the intestate to an equal value with the chattels, or by taking those chattels, by an agreement with the next of kin intitled under the statute of distribution, or even without such agreement, by appropriating them to herself as her own share. There was no direct proof either of payment of debts by Mrs. Lane, or of any division of the effects, by agreement with the next of kin, or otherwise; and we think that we are not warranted in [314] this case in inferring any of these circumstances, from the simple fact of the possession by Mrs. Lane for two years and a half, and the use of the furniture. Her possession, and still more the use of these chattels, is no doubt evidence of title in her own right; and if there was no other proof in the case, would unquestionably be sufficient: but when it appears that the goods were her husband's at his death, and her possession that of an administratrix, it becomes a question upon all the facts, whether she had acquired a title or not in her own right; and we are not satisfied that she did. For any thing that appears in the case, we think the goods would, at the time of the alleged conversion, have been liable to an execution at the suit of a creditor of the husband. A little more evidence might have given a different complexion to the case; but upon the facts in proof, we think we are not warranted in coming to any other conclusion, than that the property remained uncharged; and therefore the rule must be discharged.

Rule discharged.

CLEWORTH v. PICKFORD AND OTHERS. Exch. of Pleas. 1840.—Indebitatus assumpsit for work and labour, and for services in navigating certain barges for the defendants. Plea, that the claim was for wages due for services performed by the plaintiff as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that the plaintiff was hired by them under an agreement, that, as master of the said boat, he was to be responsible for the safety and due delivery of all goods taken on board by him, and was to be chargeable for all pilferages of, or damage or losses to any goods under his charge; and that the amount thereof should be deducted from his wages, and might be pleaded or set off accordingly. The plea then averred the delivery of a pipe of wine to the plaintiff on board the boat; and that, whilst it was so in the plaintiff's charge, the wine was pilfered and water substituted in lieu thereof, whereby the pipe of wine was greatly damaged, for which damage the defendants were liable, and which damage amounted to a certain sum, &c., which far exceeded the amount of the causes of action in the declaration mentioned. The defendants then claimed to set-off the loss they had thereby sustained, against the plaintiff's demand. To this plea the plaintiff replied de injuriâ:—Held, that the replication was improper.—Semble, that the plea amounted to the general issue.

[S. C. 8 Dowl. P. C. 873; 10 L. J. Ex. 41; 5 Jur. 174.]

Assumpsit for work and labour done, and for services in navigating certain barges, &c., for the defendants; with a count for goods sold and delivered.

[315] Plea, that the sum of money in the first count mentioned was and is wages which accrued due to the plaintiff for work and services done and performed by the

plaintiff and his servants for the defendants, as a master in the service and employ of the defendants, of a certain boat used by them for the earriage of goods for hire, they being common carriers of goods for hire; and the said sum of money in the second count of the declaration mentioned, was and is the price of certain goods sold and delivered by the plaintiff to the defendants, upon the occasion of his leaving their said employ, and which had been used by him in and about and in respect of the navigation of the same boat, and the horses which drew the same. And the defendants further say, that the plaintiff was hired by them as master of the said boat, under and by virtue of an express contract and agreement theretofore and before the accruing of the said causes of action, to wit, on the 1st of January, 1835, made between the defendants and the plaintiff in that behalf, and which said contract and agreement contained therein certain terms and conditions subject to which the defendants took the plaintiff into their service and employ, and, amongst others, to the following, that is to say; that, as master of the said boat, he was to be fully and absolutely responsible to the defendants for the preservation, safety, and due delivery of all goods taken on board by him, and he was to be charged for all pilferages of, or damages, or losses whatever, to or in respect of any goods then under his charge, by whomsoever committed or sustained, and from whatsoever cause, so as and that the amount of the said pilferages or damages so sustained, although not actually paid by the defendants, were to be deducted from his wages or other demand of his against the defendants, and might be pleaded or set off accordingly. And the defendants further say, that whilst the plaintiff was so in their service and employ under the said contract and agree-[316]-ment, and upon the terms and conditions contained therein, to wit, on the 5th of February, 1835, a certain pipe of wine of great value, to wit, of the value of £100, was delivered to the defendants as such common carriers, to be carried and conveyed by them from London to Leek, in the county of Derby, and thereupon they, to wit, on the same day and year last aforesaid, caused to be delivered to the plaintiff on board the said boat whereof he was such master as aforesaid, and the plaintiff then received from them and took under his charge as such master, the said pipe of wine to be carried and conveyed by him in the said boat, upon a part of the passage aforesaid, to wit, to Stoke, in the county of Stafford. And the defendants further say, that whilst the said pipe of wine was so in the possession and under the charge of the plaintiff upon the said part of the said passage as aforesaid, and before it arrived at Stoke aforesaid, certain of the contents of the said pipe of wine, to wit, twenty gallons of the wine therein contained, were pilfered and lost out of the said pipe, and water substituted in lieu thereof, whereby the said pipe of wine was greatly damaged and injured, and for which damage and injury the defendants were by law liable and responsible to the owner of the said pipe of wine. And the defendants further say, that the said damage and loss amounted to a certain sum, to wit, the sum of £50, which far exceeded the amount of the causes of action in the said first and second counts of the said declaration mentioned; and they, the defendants, heretofore and before the commencement of this suit, to wit, on the same day and year last aforesaid, sustained and were obliged to pay money and damages, and sustained losses for and by reason and on account of the said damage and loss to the said pipe of wine as aforesaid, to a large amount, to wit, to the amount of £50; and they, the defendants, have always claimed and do claim to set off and allow to the plaintiff, out of the amount of the said money, [317] damages, and losses so paid and sustained by them, the amount of the said causes of action in the introductory part of this plea mentioned, in pursuance and according to the said contract and agreement as aforesaid, whereof the plaintiff hath always had notice. Verification.

To this plea the plaintiff replied *de injuriâ*.

Special demurrer, assigning for causes, amongst other things, that the replication *de injuriâ* is not by law admissible to be pleaded in reply to the said plea, and also for that the said replication is bad for duplicity and multifariousness, in attempting to put in issue the several matters contained in the plea.

The plaintiff's points for argument stated the following, amongst other objections to the plea: viz., "that the agreement therein stated is for the settlement of future causes of action in a manner different from that pointed out by the law, and seeks to controul the jurisdiction of the Courts of law in the decision of such causes of action, and to interfere with the order and method by which, by law, they ought to be decided."

Martin, in support of the demurrer. It will be said that the plea is not a good plea, because it sets up an agreement which is illegal; but that is not so. It in substance sets forth an agreement that the defendant should be at liberty to set off against the plaintiff's wages or other claim, any loss or damage which they might sustain in respect of any goods which they intrusted to the plaintiff or put under his charge. Before the statutes of set-off, these agreements were very common. *Dobson v. Lockhart* (5 T. R. 133) and *Kinnerley v. Hossack* (2 Taunt. 170) are instances of it. Then the next question is, whether the replication is good, and it is submitted that it is not. It puts in issue the agreement, the delivery of the goods to the [318] defendants, and the loss of them. A great variety of circumstances stated in the plea are put in issue, instead of the issue being confined to one single point. It is true that in *Selby v. Bardons* (3 B. & Ad. 2), a plea in bar to an avowry involving several matters of fact, was held good by Parke, J., and Patteson, J., but Lord Tenterden was of a contrary opinion; and Patteson, J., said, that if the question were *res integra*, he should have had no hesitation in holding that the pleas were bad, on account of the issue tendered by them being multifarious. This plea falls within the exception in *Crogate's case* (8 Rep. 66). It is not in excuse, for it claims authority from the plaintiff to set off the defendants' demand; it is in the nature of a set-off; and there is no instance of a replication *de injuriâ* being held good to a plea of set-off, *Isaac v. Farrar* (1 M. & W. 65) is the first case in which such a replication was held good in assumption, and the other Courts have only so held in conformity with that decision. But there is no case where it has been held to be good even in assumption, except in actions on bills of exchange, and this Court appears to have come to the decision in *Isaac v. Farrar*, on the ground that there was a matter in existence at the time of the breach, which constituted a *prima facie* case of liability. This is a case of *indebitatus assumpsit*, and the plaintiff must shew by proof, that a debt was due on a certain day, at which time an excuse existed for its non-payment. In *Crisp v. Griffiths* (2 C. M. & R. 164), Parke, B. puts the question on that ground: "The plea does not allege that before the breach of the defendant's promise, something occurred which took away the plaintiff's right to sue; but that after the breach was committed, something was done which suspended that right." It ought to be something which excuses the performance at the time when the act ought to be performed; but this matter of defence had not [319] occurred at the time the debt accrued. This plea, therefore, alleges matter not of excuse but of discharge, and if so, the replication is bad: *Jones v. Senior* (4 M. & W. 123). And assuming the plea to be bad, as amounting to the general issue, it has been decided by this Court, that in such a case the replication *de injuriâ* is improper: *Elwell v. The Grand Junction Railway Company* (5 M. & W. 669); *Parker v. Riley* (3 M. & W. 230). And it was also held in the last case that the replication *de injuriâ* was bad, where the plea amounted to an avoidance of the contract itself. [Lord Abinger, C. B. I doubt whether the plea does not amount to the general issue.] Then as there is no special demurrer to the plea, it will stand, and the replication must be held bad.

Miller, *contrâ*. The plea confesses a breach of the promise at the time of the action brought, and seeks to excuse it by alleging matter *ex post facto*. The moment the goods are sold and delivered, the defendants become indebted, and the breach arises, as the law implies a promise to pay on request. Here the loss occurred during the continuance of the plaintiff's service; and the defendants were to be indemnified for losses which they might sustain during the service. The breach of that agreement could not have arisen until the defendants were called upon to pay the damage. The plea admits that the defendants promised to pay for the services of the plaintiff on request, but alleges, that since then they have been called upon to pay damage to a greater amount than what became due for his services. It does not amount to the general issue, because the right of set-off accrued subsequently to the time at which the defendants were in fact indebted to the plaintiff; it is therefore merely an excuse for non-payment. It is only since the new Rules that this replication has been held to be good in assumption.

[320] Secondly, the plea is bad in substance. There can be no right to set off unliquidated damages. The contract relied upon by the plea is applicable only to the first count, not to the count for goods sold. Again, the agreement is not averred to be in writing. At the time the goods were sold and delivered, the defendants became indebted, and then they say they did not pay for them, because they had this

excuse; but it constitutes no excuse at all in law. [Lord Abinger, C. B. This is not pleaded as a set-off by statute, but by agreement, and if so, it amounts to the general issue.] In order to bring it within that rule, the plea ought to have shewn that the damage had accrued at the time the goods were sold and delivered; but this plea in effect says, at the time the goods were sold, we had nothing to set off, but now we have:—that is not the general issue. He cited *Noel v. Rich* (2 C. M. & R. 360) and *Hemingway v. Hamilton* (4 M. & W. 115). In the latter case it was held, that if a plea admit an actual breach, it can only amount to an excuse for the non-performance of the contract. Besides, this plea sets up as a defence an agreement which was invalid: for it is clear that a Court of law cannot be ousted of its jurisdiction by an agreement to refer the matter in dispute to the decision of a private tribunal; and the Court will not allow the plaintiff, by such means, to be deprived of the compensation for services to which he is entitled.

LORD ABINGER, C. B. It appears to me that this plea substantially amounts to the general issue. It states that the plaintiff, by the original contract under which his services were rendered, agreed to accept in satisfaction and payment for the services rendered in the course of his employment, such sum as might be due after deducting any payments which the defendants were liable to make in consequence of his negligence. If that was the contract, [321] it was not a contract which entitled the plaintiff to maintain an action of indebitatus assumpsit for his services; and the plea therefore amounts to the general issue, as it denies that there was any legal contract resulting from the services performed. In all cases of assumpsit, either the circumstances of the case are such as that the law will raise a promise from them, or it arises out of a special agreement. This is a special agreement; and upon the face of the plea it appears, that whether the plaintiff is entitled to be paid for his services, depends upon the question whether, at the time he was entitled to his wages, the money which the defendants had been obliged to pay by reason of his negligence exceeded the amount due to him for services; if it did, then he has agreed that such payments shall go in satisfaction of his demand. That shews that his demand accrues under a special contract, and not by legal inference. If so, the plea amounts to the general issue; and then the replication de injuriâ is bad. With respect to the last point made by Mr. Miller, it appears to be entirely a misapplication of the well known rule of law, that an agreement to refer is not binding. It is true that such an agreement is not binding unless it is acted upon, but when the reference has taken place, and the award is made, it becomes so. In one sense it does not oust the Court of its jurisdiction, but in another sense it does; for when the award is made, the jurisdiction of the Courts is gone; and all the Courts have to say is, whether it is a good award or not. The case of an agreement to refer, therefore, does not apply here. But supposing this plea does not amount to the general issue, then it is either a plea of set-off, or a plea of payment in satisfaction; in either of which cases the replication de injuriâ would be equally inadmissible. I am of opinion, however, that it amounts to the general issue.

ALDERSON, B. I am of opinion that this plea is either [322] equivalent to the general issue, or else is a plea of set-off, which has not been answered by the replication, that being inconsistent with the circumstances stated in the plea. The replication says, that the defendants broke their promise without the excuse mentioned in the plea; but the plea does not offer an excuse for breaking the contract declared on; it says the defendants have not paid the plaintiff, because, under the agreement between them, they have a demand against the plaintiff in respect of the damages sustained by them by reason of his negligence, to a greater amount, which they are willing to set off.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend on payment of costs, otherwise Judgment for the defendants.

HUNTER v. PARKER AND ANOTHER. Exch. of Pleas. 1840.—Semble, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested.—At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratifi-

cation by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him.—So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.—And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, under seal, but in other respects complying with the requisitions of the Registry Act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer under seal, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.—The purchaser of a vessel under such circumstances cannot set up any defence of lien against an action of trover by the owner.

[S. C. 10 L. J. Ex. 281.]

Trover for a ship called the “Persian.” Pleas, 1st, not guilty; 2ndly, that the plaintiff was not lawfully possessed; and issues thereon.

At the trial before Gurney, B., at the London Sittings after Michaelmas Term, 1839, the following appeared to be the facts of the case:—

The ship in question, being then the property of the plaintiff, as the surviving partner of the firm of Hunter and Elliott, who were her registered owners, was stranded, [323] during a heavy gale, on the bar of the harbour of Bathurst, in New Brunswick, on the 11th of November, 1835. The master forthwith called a survey of the vessel, and under the advice of the surveyors caused certain necessary repairs to be done for her immediate safety, and wrote home to the plaintiff for instructions, but received none of any kind. The vessel remained on the strand the whole of the following winter and spring; and in the month of June, 1836, the master called a final survey. The surveyors reported the vessel to be unseaworthy; and, acting upon their report, the master sold her in her then state, by auction, to Mr. Cunard; and the following bill of sale was signed and sealed by the auctioneer:—“Whereas the ship or vessel called the ‘Persian,’ of the burthen of $257\frac{5}{8}\frac{9}{4}$ tons, belonging to the port of Sunderland, arrived at the harbour of Bathurst, in New Brunswick, and loaded there a cargo of timber destined for Liverpool, Great Britain; and the said ship or vessel, having her said cargo on board, while riding at anchor in the roads of the said harbour, preparing to proceed to sea on her said voyage, and on the 11th day of November, in the year of our Lord 1835, experienced a heavy gale of wind, which drove her from her said anchorage on the shoals or flats on the north west side of the harbour, where she bilged and struck: That Henry Stratford, the master of the said ship or vessel, caused immediately thereon a survey or examination to be made of the state of the said ship or vessel, and according to the report or recommendation of the surveyors, the said Henry Stratford, master as aforesaid, and acting as the agent for the owners, underwriters, and all others concerned in the said ship or vessel, caused certain things to be done and performed for the safety and preservation of the said vessel, with her cargo: That on the 2nd day of June next following, which was in the present year of our Lord 1836, the said ship or vessel being still on the flats or shoals aforesaid, and having experienced additional damage [324] by the ice during the intervening winter, the said Henry Stratford caused another and final survey to be held on the said vessel by competent persons, and according to the custom of the country, the result of which survey was the condemnation of the said ship or vessel as unseaworthy, &c.; all of which has been made to appear unto me, as well by the protest of the said Henry Stratford, as by the testimony of the surveyors and otherwise; whereupon the said Henry Stratford, acting as aforesaid, applied to, directed, and authorized me, Henry W. Baldwin, an auctioneer, duly licensed and qualified, to advertise for sale, and to sell for the best advantage, for the benefit of owners, underwriters, insurers, and all others whomsoever interested in the said vessel, the hull, masts, spars, rigging, boats, and furniture of or belonging to the said ship or vessel; and, accordingly, at Bathurst aforesaid, on the 15th day of June, 1836, after sufficient notice being published and generally made known of the same, the said ship or vessel and furniture as aforesaid, were offered and exposed by me for sale at public auction; and the hull being then and there set up, Henry Cunard, of the firm of Cunard & Co., of Bathurst aforesaid, appearing the highest bidder, therefore it was

accordingly to the said Henry Cunard knocked down and sold : Therefore, know all men by these presents, that I, Henry W. Baldwin, a licensed auctioneer for the county of Gloucester, acting under and by the authority aforesaid, and for and in consideration of the sum of £280, lawful money of New Brunswick, to me in hand well and truly paid by the said Henry Cunard, of the firm of Joseph Cunard & Co., the receipt whereof I do hereby acknowledge, for the uses and purposes aforesaid, have granted, bargained, sold, assigned, transferred, and set over, and by these presents, do fully and absolutely grant, bargain, sell, assign, transfer, and set over unto the said Henry Cunard, his executors, administrators, and assigns for ever, all that ship or vessel called the 'Persian,' of 257 tons' burthen, [325] or thereabouts, now lying stranded on the shoals on the north side of Alston Point, at the mouth of the harbour of Bathurst aforesaid, with the lower masts, bowsprit, windlass, and all furniture remaining on board at the date of these presents, which said ship or vessel had been duly registered pursuant to an act of Parliament for that purpose, and a copy of the certificate of registry is as follows, viz. [the certificate of registry was then recited] :— To have and to hold the said ship or vessel called the 'Persian,' and all and singular the premises hereinbefore mentioned, and hereby bargained and sold, or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said Henry Cunard, his executors, administrators, and assigns, to and for his and their own proper use and benefit, and as their own proper goods and chattels, henceforth for ever : and I, Henry W. Baldwin, do covenant and agree to and with the said Henry Cunard, his executors, administrators, and assigns, in manner following, that is to say, that I have in myself, by the authority and for the purposes hereinbefore named, and by and for none other, full power and absolute authority to grant, bargain, sell, transfer, and set over the said ship or vessel called the 'Persian,' with the appurtenances, unto the said Henry Cunard, his executors, administrators, and assigns, in manner and form aforesaid, according to the true intent and meaning of these presents. In witness" &c.

The auctioneer had no authority for the sale, except a letter from the master directing it. Cunard, the purchaser, paid part of the purchase-money to the master for necessary expenses, and the balance was transmitted by him to his agent in England, by whom it was paid over to the plaintiff. Cunard got the vessel off the shoals with great difficulty ; and having been at considerable expense in fitting her for sea, sent her with a cargo to England, where [326] he offered her again to the plaintiff for the money he had expended upon her, but which the plaintiff refused to give, saying, that she was not worth so much ; that she had been fairly sold and bought, and he was sorry Mr. Cunard had made a bad bargain. Cunard afterwards entered into a negotiation for the sale of her to a Mr. Briggs, to which negotiation the plaintiff was a party, and told Briggs that if he bought her, he (the plaintiff) would not interfere. Briggs did buy her, and subsequently resold her to the present defendants, and the plaintiff supplied her with stores on their credit. The plaintiff, notwithstanding, afterwards demanded the vessel back from the defendants ; and on their refusal to deliver her, brought this action of trover against them to recover her.

The learned Judge, in summing up, left three questions to the jury :—First, whether the master, in selling the ship, had acted *bonâ fide*, and with the intention of doing the best for the advantage of the owner and of all parties concerned. The jury found that he had. Secondly, whether there was an actual necessity for the sale. The jury found that there was. Thirdly, whether the plaintiff had, by his subsequent conduct, ratified the acts of the master with knowledge of them. The jury found that he had. The verdict was thereupon, under his Lordship's direction, entered generally for the defendants.

In Hilary Term, 1840, Cresswell obtained a rule nisi for a new trial, on the ground of misdirection. He made the following points :—First, that the master of a vessel has not, under any circumstances, authority to sell her so long as she continues a ship, but can sell a mere wreck only, which it was clear this vessel was not : *Reid v. Darby* (10 East, 143) : secondly, that even if the master had such power of sale, he could not delegate it to the auctioneer : [327] thirdly, that the bill of sale being by deed, and not being executed as the deed of the principal (the master), was therefore void under the Ships' Registry Act, 3 & 4 Will. 4, c. 55 : fourthly, that there was no proof of any ratification, or of any knowledge, by the plaintiff of the form of the sale, although there was of the sale itself : and lastly, that no lien existed in the defendants, and

therefore there was no defence to the action, if the property in the ship was in the plaintiff at the time of the demand and refusal. In Easter Term,

Sir W. W. Follett and R. V. Richards shewed cause against the rule. Upon the evidence and the finding of the jury in this case, the plaintiff clearly was not entitled to recover this vessel in an action of trover against the defendants. It was found by the jury, and it is now to be taken as a fact in the cause, that this ship being wrecked, and lying on the strand of New Brunswick in such a state that it became a matter of necessity to sell her as a stranded vessel and a wreck, the master in so selling her acted with perfect *bonâ fides*, and for the advantage of all parties: and it is further found that every thing which he did, received the sanction and ratification of the plaintiff, with full knowledge of the circumstances. More than this, it appeared that the purchase-money of the wreck was paid to and received by the plaintiff himself; that the defendants were *bonâ fide* purchasers of the vessel, when repaired, with the plaintiff's knowledge and sanction, and that part of her fittings-up and furniture, as she now is, were supplied to the defendants by, and paid for to, the plaintiff himself. It would be a strange state of the law if the plaintiff, under such circumstances, could recover the vessel back in trover from these defendants. But it is said that the sale by the master was void, because the Registry Act has not been complied with. It is submitted, [328] however, in the first place, that that statute does not apply at all to such a case as the present; and next, that if it does, it has been sufficiently complied with.

First, this is a case of necessity, in which the law permits the master to dispose of the vessel as his own, he acting *bonâ fide*. The law on this subject was certainly otherwise at one time; and in *Reid v. Darby* (10 East, 143), a sale by the master, under the order of a Vice Admiralty Court, of a vessel which had been reported by surveyors to be unfit to proceed with her cargo, and that the expense of repairing her would be more than her value when repaired, was held to be void for want of a compliance with the forms prescribed by the Registry Acts. But subsequent cases have clearly established that the master is justified in selling the ship under circumstances like the present, and the objection as to the Registry Act occurs no where but in *Reid v. Darby*: see *Cambridge v. Anderton* (2 B. & Cr. 691; 4 D. & R. 203), *Robertson v. Clark* (1 Bing. 445; 8 Moore, 622), *Hayman v. Moulton* (5 Esp. 65). It is an important question, whether an act of Parliament, passed for public purposes connected with the employment of shipping, is to apply to the case of a sale, under an absolute necessity, of a stranded or wrecked vessel, where she is sold, not by the owners, as a ship for use, but by the master as their agent under the peculiar circumstances. In *Cambridge v. Anderton*, the argument was used that the ship in that case was not a wreck, because she was sold as a ship, with her certificate of registry: upon which Abbott, C. J., observes—"The master had no power to sell the register." In the case of *The Gratitude* (3 Rob. Adm. R. 240), where it was held that the master may, under circumstances of urgent necessity, hypothecate the ship, Lord Stowell, adverting to the paucity of authorities on the subject, says—"The law of cases of necessity [329] is not well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal." Applying that principle here, are you to extend to this case of strict necessity the rules which govern the sale of British ships, as such, for the purpose of being used? It is true, the wreck may, by expending a large sum upon it, be converted again into a vessel fit for sea, and used; but it is not sold as a ship, but as a wreck. By the 8th section of the Registry Act, 3 & 4 Will. 4, c. 55, it is enacted, that if any ship or vessel registered under the authority of the act shall be deemed or declared to be stranded or unseaworthy, and incapable of being recovered, or repaired to the advantage of the owners, and shall for such reasons be sold by order or decree of any competent Court, for the benefit of the owners, the same shall be taken and deemed to be a ship or vessel lost or broken up, within the meaning of the act, and shall never again be entitled to the privileges of a British-built ship, for any purposes of any trade or navigation. It appears somewhat strange that the order or decree of a Court should be required in such a case, since that cannot make the necessity the greater. But this enactment assumes that the provisions of the act are not to be complied with, and yet that the property passes by the sale. How, then, can the original owner resume possession of her after such sale? what can he do with her? She will not be more entitled to the privileges of a British-built ship in the hands of the party who

has thus sold her, than in those of the vendee. But the case of *Reid v. Darby*, on which the plaintiff relies, even supposing it to be maintainable, is distinguishable from the present. In the first place, it arose under the stat. 34 Geo. 3, c. 68, the provisions of which differ materially from those of the 3 & 4 Will. 4, c. 55. In the next place, the facts were very different. There the ship was re-[330]-ported to be unfit to proceed with her cargo, but that she was repairable for that purpose at an expense exceeding her value when repaired. But further, the owner there had done nothing to ratify the sale, still less had he received any part of the proceeds. If, however, the case be quoted as an authority that in all cases of sale by the master of a disabled ship, the forms of the Registry Act must be complied with, it is submitted that to that extent it is not maintainable in point of law; and that if by reason of the necessity the master had a right to sell, he had a right to do all that was necessary towards completing the transfer. [Parke, B., referred to *Barr v. Gibson* (3 M. & W. 390).] That case does not appear to be very applicable to the present. Suppose, in this case, instead of repairing the vessel, Cunard had broken her up, could the plaintiff have recovered the materials in trover? Or suppose the case of a vessel actually sunk, and in that state sold, and afterwards raised up and converted again into a ship, would she be within the provisions of the Registry Act? The question is, what she is at the time of the sale; if then a mere wreck, the subsequent conversion of her into a ship can make no difference.

But, secondly, the Registry Act was in fact complied with here. The 31st section enacts, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry, &c., otherwise such transfer shall not be valid or effectual for any purpose whatever, either at law or in equity. This section does not require a deed; nor is the instrument required to be signed by the vendor [331] or by the owner; it may therefore be executed by an agent: nor are any particular contents required in it, except a recital of the certificate of registry, which the bill of sale in this case did contain. It is said, however, that the master, if any, was the agent of the owner, and not the auctioneer; but the auctioneer acted under a written authority from the master. It is objected, indeed, that the master could not so delegate his authority; or that, at all events, the authority to execute an instrument under seal must itself be under seal. But the seal is not made necessary by the act; and if the auctioneer had authority to execute a written transfer, his putting a seal upon it unnecessarily would not avoid his authority. [Parke, B. According to *Barr v. Gibson*, no action of covenant would have lain on an implied warranty that this was a ship, against any body but the auctioneer.] Where a party authorizes another to execute an instrument for him, if a seal be not necessary it is binding, although a seal be affixed to it. In *White v. Cuyler* (6 T. R. 176), it was held that if a feme covert, without any authority from her husband, contract with a servant by deed, the servant, having performed the services stipulated for, may maintain assumpsit against the husband. In *Brutton v. Burton & Mills* (1 Chitty's Rep. 707), it was held that a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, was a sufficient authority for signing a judgment against both. That proceeded on the ground that the warrant of attorney need not be under seal, for one partner cannot bind the other partners by deed: *Harrison v. Jackson* (7 T. R. 207); and also upon the ground, which is no less applicable to the present case, that after the warrant of attorney was given, the defendant Burton [332] had frequently admitted its validity. That case appears to be directly in point, and it is referred to in Collyer on Partnership, 261, where the reason for the judgment is stated to be, that the warrant of attorney to confess judgment need not be under seal. In Sugden on Powers (vol. 1, p. 260, 6th edition), it is said, "Where a power is given generally, without defining the mode in which it must be executed, it may be exercised either by deed or will;" and the author adds, "nor is it necessary that the power should be executed by deed; a simple note in writing, even unattested, would be a good execution of the power." It might perhaps be said that the owner would not be liable in covenant on the deed; but at all events he was bound by the transfer of the ship, which is not rendered invalid by affixing a seal to it. Suppose the owner of a vessel gives authority in writing to an agent to transfer the vessel, and he sells it, and draws

up the transfer, and afterwards puts his seal to it, can it be said that that would render it void? It is surely valid as a transfer in writing. It may be said that money had and received would lie to recover back the purchase-money, but that is at least doubtful. Where a party keeps a chattel, he cannot rescind the contract. This case is not distinguishable from that of an award, where there is no authority to execute it by an instrument under seal; and it is put by Sir Edward Sugden, in his *Treatise on Powers* (id.), that the arbitrator has power to execute it by an instrument under seal. But, at all events, the subsequent ratification by the plaintiff forms a sufficient answer to the objections, both as to the authority of the auctioneer to sell at all, and as to the form of the transfer. He has adopted and ratified the authority of the auctioneer, by acting under the instrument executed by him, just as much as if he had beforehand ex-[333]-pressly and formally authorized the execution of it under seal: *Maclean v. Dunn* (4 Bing. 722). His acts amount to a complete and binding admission that all the requisites to a good transfer have been complied with. This is, therefore, an instrument in the form required by the statute, executed by an agent whom the plaintiff is precluded from treating as having acted without authority. The stat. 34 Geo. 3, c. 68, required the instrument to be signed by the owner. But, further, even if the instrument be not in itself a valid transfer of the plaintiff's interest in the ship, it may operate as an agreement to give possession, and to execute a valid transfer afterwards; and if possession be given accordingly, the vendor surely cannot recover back the vessel in trover. In *Beed v. Blandford* (2 Y. & J. 278), where the master and part-owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money and received the title-deeds, which he deposited as a security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale, or refund the money: it was held, that an action for money had and received would not lie to recover the purchase-money, as the parties could not be restored to their original situation. That is an authority, that after the intended purchaser has had possession of and used the vessel, and the parties cannot be put into their original situation, the original owner is not entitled to recover. It is submitted, however, that the Registry Act has, in this case, been strictly complied with.

Cresswell and W. H. Watson, contra. The plaintiff is entitled to recover. He was the owner of this vessel, and unless the regulations imposed by the Registry Act have [334] been complied with, it is still his property, and he must be entitled to recover, unless the defendant has some right to retain her on the ground of lien. The facts of the case are, that this ship being stranded in a foreign port, the master, not having express authority to sell her, authorizes the auctioneer to do so, and assumes to give him all the implied authority which he had himself; the auctioneer does accordingly sell her, and executed a bill of sale which, by its very terms, is an instrument under seal: he does affix a seal to it, and introduces into it covenants that he has full power and authority to sell the vessel. *Reil v. Darby* (10 East, 143) is directly in point to shew that the master had no original authority to sell the ship under these circumstances, when she was capable of being repaired, and the voyage continued, as the event shewed; but, supposing he had such authority in a case of necessity, that still the vessel, subsisting as such, and capable of being used for the purposes of navigation, and being so used in fact after repair on the spot, could only be conveyed by the master in the form prescribed by the Registry Act: and the requisites of that act were in no way complied with in the present case. There it was urged in the argument, that the Registry Act did not apply to a sale of necessity: but Lord Ellenborough says—"It is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo;" and Le Blanc, J., says, "While the subject-matter remains in the form of a ship, though wanting repairs, which perhaps it might not be worth the owner's while to make, would not the provisions of the Register Acts continue to apply to it, if it were in a British port?" And Lord Ellenborough adds, "Must we not consider, under the Register Acts, whether the vessel were sold as a ship capable of repair, or as a mere [335] wreck?" Now here this vessel was certainly sold as a ship, and those observations strictly apply to shew that she could not be legally sold as such, without a due compliance with the Registry Act. But it is said, that after the vessel arrived in England, the plaintiff recognised the sale, and sold to and supplied the ship with stores. But circumstances of that nature cannot be an answer to the objection that the express

provisions of an act of Parliament have not been complied with. It is said, indeed, that there was no necessity for any bill of sale under the circumstances of this case. The master, however, has no authority to sell a vessel as long as she continues a ship, under any circumstances. His authority is limited to the command of the ship. When it becomes a wreck, and the boards and planks of the ship are cast afloat, it is admitted that he may sell the materials of which she was composed. *Cambridge v. Anderton* (2 B. & C. 691; 4 D. & R. 203) has no bearing on the present case. It was there held, that on a contract of indemnity on a policy of insurance, where, by means of one of the perils insured against, the ship, the subject of insurance, ceased to retain the character of a ship, and was, properly speaking, a wreck, the assured were entitled to recover as for a total loss. There the ship was abandoned, and there was a total loss, and consequently the owner would be entitled to recover. But those cases of policies have no bearing on the present question. According to the decision in *Barr v. Gibson* (3 M. & W. 390), this vessel did continue to be capable of being transferred as a ship at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. If she so far retained the character of a ship as to be capable of being sold as such, she is within the Ships' Registry Act. The case of *The Gratitu*-[336]-*dine* (3 Rob. Adm. Rep. 240) has been cited, where it was held that a master may hypothecate the ship or cargo for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage: but it has been held that he cannot sell the ship and cargo. If he sells the ship, he destroys the object of the voyage. In *Freeman v. The East India Company* (5 B. & Ald. 617), it was held that the captain of a ship had no right to sell the ship except in the case of an absolute necessity; and, the jury having found that there was no absolute necessity for the sale, that the purchaser acquired no title, and the original owners were entitled to recover its value. There are several authorities to shew that a master cannot sell the ship, though he may hypothecate her, and they do not appear ever to have been overruled:—*Johnson v. Shippen* (2 Ld. Raym. 982), *Hayman v. Moulton*.^(d) Here the defendants have proved this to be a ship, because it was capable of being got off. If the jury have found her to be a ship, the captain had no authority to sell, and the property does not pass; if she was not a ship, then it does. In *Barr v. Gibson*, this Court draws the distinction between what is to be considered as a ship for the purposes of navigation, and what amounts to a total loss. "True, the subject of the transfer had the form of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still a ship, though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such." Then the defendants have proved that this was not only a ship, but capable of being got off and repaired. *Reid v. Darby* shews first that the master has no authority under such circumstances to sell the ship; but, secondly, that if it were a case of necessity, and that he had authority on that ground to sell her, he [337] must do so in the form prescribed by the Registry Act. With respect to the supposed ratification of the contract after the ship's arrival in England, there is no pretence for saying that the plaintiff ever knew of the mode in which she had been transferred. And even if it be assumed that the captain had authority to sell, he could not transfer that authority to the auctioneer. In Roll. Abr. tit. Authority, C., it is said—"An executor having authority to sell cannot sell by attorney. Co. 9, Combe, 77 b." And in 2 Roll. Abr. tit. Feoffment, R. pl. 13,—"An attorney cannot make a letter of attorney to another to make binding." But even supposing that the authority could be delegated to the auctioneer; yet, inasmuch as the act done by him was by a deed under seal, there must have been an authority under seal to enable him to do so. Although a parol authority may be sufficient to authorize the execution of a written instrument, it is not so when the instrument is under seal. In *Harrison v. Jackson* (7 T. R. 207), it was held that one partner cannot bind the other partners by deed. *Horsley v. Rush*,^(b) there cited, was an action of covenant on a charterparty, to which the defendants pleaded the general issue: and it appearing that the deed was executed by "G. Dwyer, by order and for account of Messrs. Rush and Tolson," but that Dwyer had only a verbal authority from the defendants to execute the

^(d) 5 Esp. 65: more fully stated and observed upon in Abbott on Shipping, 8, 9, 10, 3rd ed.

^(b) Guildhall Sittings after Michaelmas Term, 1788.

charterparty, Lord Kenyon held, that the action could not be maintained; for that a deed could not be executed by an agent, so as to bind the principal, unless he were authorized by deed under seal; and that though one partner might bind another by written instruments, he could not do so by deed, without a special power under seal for that purpose. But it is said, that though this contract was executed by an instrument under seal, it was still good as a simple transfer in writing, which [338] need not have had a seal to render it valid. The cases cited for the defendant were cases where the nature of the instrument was not altered by the affixing of a seal. In the case of an award or of a will, it is neither more nor less than an award or a will, because it is under seal; that does not alter the nature of it. Besides, in the case of an award, the action would be on the submission or the agreement to submit. But if I authorize a party to sign an agreement of reference for me, and he executes a deed or a bond, I am not bound by it. Sugden on Powers has been cited, to shew that where a power is given generally, without defining the mode in which it is to be executed, it is not necessary that it should be executed by deed, but that a simple note in writing is sufficient; but what instrument is it that operates in those cases? Clearly, the instrument creating the power, so that it be in writing. There, also, the authority being given by a deed, there is an authority to execute by a deed. Even if the master was here substituted for the owner, and assuming he had by law authority to sell the ship, he had no right to delegate that authority to the auctioneer, to enter into a contract under seal in his own name; and here the auctioneer covenants in his own name. In *Combe's case* (9 Rep. 76 b.), it was resolved, secondly, "That when any one hath authority, as attorney, to do anything, he ought to do it in his name who giveth the authority; for he appointeth the attorney to be in his place and to represent his person, and therefore the attorney cannot do it in his own name, nor as his own act, but in the name and as the act of him who giveth the authority." The same principle is laid in *D'Abridgcourt v. Ashley* (Moor. 818). The decisions on this subject were reviewed and recognised in *Berkeley v. Hardy* (5 B. & Cr. 355; 8 D. & R. 102). There an indenture was made between "A. for and on behalf of B. on the [339] one part, and C. on the other part," A. being thereunto authorized by writing under B.'s hand, but not under seal; and A. executed the deed in his own name; it was held that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B.

Lastly, trover is maintainable in this case. Supposing this to be a contract to sell the mere chattel, but not carried into effect in compliance with the Registry Act, the legal title to it would remain in the original owner, although a Court of Equity would have compelled the transfer. Unless the provisions of the Registry Act are complied with, no property passes by the bill of sale out of the owner. Nor could the defendants acquire any lien for salvage, or for money expended under such circumstances. In *Sutton v. Buck* (2 Taunt. 302), it was held that the lord of a manor is not entitled to salvage, for taking against the consent of the owner, and preserving, parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him. That is also an authority upon the former point. The plaintiff there bought and paid for a ship stranded on the English coast, but the transfer was not regular; he tried to save her, but she went to pieces: the defendant possessed himself of parts of the wreck, which drifted on his farm; and it was held, that the plaintiff's possession enabled him to recover them in trover. This is the case of a ship which was the property of the plaintiff, but which has been sold without his authority; and even if the master had authority under the circumstances to sell her, he could not delegate that authority to another. The plaintiff is therefore entitled to maintain trover to recover her from the defendants.

The judgment of the Court was now delivered by

[340] PARKE, B. Upon the argument of the motion for a new trial in this case, which was an action of trover for the ship "Persian," several points were made, which, on account of their importance, were thought worthy of further consideration; and the judgment of the Court has, accordingly, been delayed for some time.

The facts were, that the ship "Persian" was the property of the plaintiff; she was stranded on the coast of New Brunswick, in the autumn of 1835, and remained on the strand for the whole of the winter. The captain wrote home to his owner, the plaintiff, for instructions, and could get none; and in the month of June 1836 a survey was called, and it was thought best to sell the ship in the state in which she

was. She was accordingly sold by auction to Mr. Cunard; and a bill of sale was signed and sealed by the auctioneer, of which the following is the substance:—[His Lordship then stated the bill of sale, as ante, p. 323.] The only authority which the auctioneer had for that bill of sale, was a letter from the captain. After the sale, the balance of the purchase-money was received by the plaintiff from Cunard's agent in England. Cunard got her off with difficulty; and at a great expense fitted her for sea, and sent her to England. He offered her to the plaintiff for the money she had cost him, but the plaintiff would not give it, saying "that she was not worth so much; that she had been fairly sold and bought; and he was sorry Cunard had made a bad bargain." The plaintiff was afterwards a party to a negotiation for selling her to another person: he told that person, if he bought, he would not interfere: he did buy; and the vessel was finally sold by him to the defendants. The plaintiff afterwards supplied her with stores on the defendants' credit. After that, the plaintiff made his demand upon the defendants, and the defendants refused to deliver her up.

My Brother Gurney left three questions to the jury:—1st, whether the captain acted *bonâ fide*; and whether he [341] did the best for the advantage of the owner. The jury found that he did. Secondly, whether there was a necessity for the sale. The jury found that there was. Thirdly, whether the plaintiff had ratified the sale with knowledge. The jury found that he had; and a verdict was entered for the defendants.

The plaintiff's counsel moved for a new trial: a rule nisi was granted; and, on the argument, they rested his right to recover on these grounds: 1st, that the master of a ship has under no circumstances the power of selling her, if she continue a ship—that he can sell a mere wreck only, which this vessel was not: and that the necessity for the sale, found by the jury, will not justify it. Secondly, that, if the master had power of sale, he could not delegate it to the auctioneer. Thirdly, that the bill of sale by the auctioneer, being by deed, was not executed as the deed of the principal, and was void. Fourthly, that there was no ratification by the principal in this case of the form of the sale, though there was of the sale itself; for there was no proof of any knowledge by the principal, and he could not ratify what he did not know. Fifthly, that a lien in this case on the part of the defendant did not exist, and that there was no defence to the action of trover, if the property was in the plaintiff at the time of the conversion.

The Court have had no difficulty in this case, except that which arises from the form of the bill of sale, that is, its being an instrument under seal.

They intimated in the course of the argument, that there could be no defence on the ground of lien; and that if the property was in the plaintiff when the refusal took place, the plaintiff must recover. The question then is, whether the property did pass by the bill of sale. As to the objection, that the master himself had no authority to sell, it is unnecessary to pronounce any opinion: though the Court do not mean to intimate that the mas[342]-ter has not such a power, in a case of actual necessity, notwithstanding the case of *Reid v. Darby* (10 East, 143), in which the point was judicially decided; for it appears by subsequent authorities, that the master has by virtue of his employment, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit. It is a case of necessity, when nothing better can be done for the benefit of the master's employers; and that necessity is found to have existed in this case. But here, after the sale, the plaintiff not only expressed his approval of it, but actually received the balance of the purchase-money from the agents of Mr. Cunard, the vendee; which is clearly a ratification of the sale, and prevents any question as to the authority of the master to make it. But then it is said, that the plaintiff did not know the mode of sale; neither that it was effected by the captain's substitute, the auctioneer, nor that it was made by an irregular instrument. The jury found that the sale was ratified with knowledge, but perhaps there was not sufficient proof of knowledge of all the particulars of the sale. In our opinion, however, this is not material; for as the plaintiff received the balance of the purchase-money from the vendee's agent without objection, and thereby induced him to suppose the sale to have been regularly made with his consent, and to part with the price, he must be taken either to have known and approved of the mode of sale, or to have waived all objection to it; the

conduct of the plaintiff amounted therefore to a ratification of every thing that could be ratified by parol; and therefore sanctioned the delegation of authority to the auctioneer, and the sale [343] by him; and put the vendee in the same situation as if the plaintiff had expressly directed the sale to be made in the form in which it was made. But neither a parol ratification nor a parol authority could have the effect of giving power to the auctioneer to execute a deed for the plaintiff, or to make the bill of sale his deed: such a power could be given by an instrument under seal only; and must be executed in the name, and as the act and deed of him who gave the power; for a power of attorney transfers no interest: the attorney is merely thereby put in place of the principal, and represents his person, and his own act could convey nothing: *Combe's case* (9 Rep. 75, 77). If one have power by letter of attorney to make leases for years by indenture, the attorney ought to make them in the name and style of his master; Bac. Abr. Leases (J.), s. 10. And this holds in regard to all solemn instruments under seal: and if an instrument under seal were necessary in this case, there was neither the requisite authority nor the proper form of conveyance, to make it a valid act. But the statute 3 & 4 Will. 4, c. 55, s. 31, does not necessarily require a bill of sale—an instrument in writing reciting the certificate of registry, is enough; nor does it require such instrument to bear the signature of the party conveying: and if there had been no seal to this instrument, which does contain such a recital, it would have been sufficient; for when a contract may be made by any species of written instrument, the same strictness is not required as in formal instruments under seal. The sale of merchandize above the value of £10 might be made by an agent, by note in writing, describing him as such, though not signed by the agent for the principal, or even without referring to his character of agent at all; and a ship may be transferred by a document as informal, provided always, in the case of a British ship, that the certificate of regis-[344]-try is duly recited. The instrument, therefore, would have been unquestionably valid, if there had been no seal. The whole difficulty in the case arises from that circumstance. The addition of the seal has the effect of causing the auctioneer to be liable to an action of covenant on his express covenant; and the instrument is unquestionably his deed, and is not the deed of the principal; nor could it ever have been: but it is still a writing: it purports to convey, not any interest from the agent himself, but such as he is empowered to convey; and as we assume it to have been made with the authority of the principal, and by his direction, and to have been so made in this form (in consequence of the subsequent ratification), we think we may, consistently with the established rules of law, give it the effect of a written transfer of the ship by the principal, as well as that of the deed of the agent.

The authorities relied upon by the plaintiff are distinguishable. Moor. 818, was the case of a release, which must be under seal, and unless it be, the release of the principal is void. In *Berkeley v. Hardy*, the point decided was, that where an agent authorized by writing, but not under seal, demised by indenture, the principal, who was no party to the indenture, could not maintain an action upon it: it was not decided that no interest passed to the lessee. On the other hand, there is no case precisely in point in favour of the defendant. In *White v. Cuyler*, the deed of a feme covert had no operation at all as against her; it was merely void, and being adopted by the husband, became his agreement alone. In *Brutton v. Burton & Mills*, a warrant of attorney for two partners, executed by one for both, was held to bind both; one as his deed, and the other by subsequent ratification, not as a deed, but an instrument of consent. In that case the instrument purported to be the act of two partners, and effect was given to it as such, as far as the case permitted. The present case bears some analogy to the last. It is the deed of the auc-[345]-tioneer, but it also may operate, by the consent of the principal, as a written transfer from him, as it certainly would have done if there had been no seal to it; and in order to prevent the instrument from failing in its effect, and ut res magis valeat quam pereat, we do not feel ourselves precluded from holding that it operates to transfer an interest. If the authority had been by deed to convey by deed, the instrument would have been clearly inoperative for that purpose; but the authority is by parol; and must be assumed to have been to convey in the form in which it was conveyed: and this we think may be supported.

Rule discharged.

End of Michaelmas Term.

[346] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, HILARY TERM, 4 VICTORIE.

REGULA GENERALIS.

It is ordered, that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day after the term in which the tenant is required by the notice to appear; and may proceed to compel the plaintiff to reply thereto, or may sign judgment of non-pros., notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration: and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a Judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment should have been obtained.

(Signed by all the Judges.)

[347] GILLETT v. GREEN. Exch. of Pleas. Jan. 12, 1841.—An action on the case for the infringement of a patent, is within the operation of the 3 & 4 Vict. c. 24, s. 2; and notwithstanding the provisions of the stat. 5 & 6 Will. 4, c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs, or treble costs, without a certificate under the former act.—And the Court held, that, after the taxation, the Judge had no power to grant such certificate.

[S. C. 9 Dowl. P. C. 219; 10 L. J. Ex. 124; 5 Jur. 9.]

Whateley moved for a rule, calling upon the defendant to shew cause why the Master should not tax the plaintiff his treble costs, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 3. This was an action on the case for the infringement of a patent; and the affidavit stated, that a prior action had been tried between the same parties, in which the plaintiff obtained a verdict, and the Judge certified under the above statute, that the validity of the patent came in question before him. This certificate was given in evidence for the plaintiff on the trial of the present action, which was tried before Lord Abinger, C. B., on the 13th of July, 1840, when the plaintiff again obtained a verdict for nominal damages. Ten days before the trial (3rd July, 1840), the 3 & 4 Vict. c. 24, came into operation; but no application was made to the Lord Chief Baron at the trial to certify, under that statute, that the action was brought to try a right. The Master refused to tax the plaintiff treble costs under the 5 & 6 Will. 4, c. 83, s. 3, on the ground that the case fell within the provisions of the 3 & 4 Vict. c. 24, s. 2. Whateley now contended that the latter act could not have intended to affect the right to treble costs under the 5 & 6 Will. 4, c. 83; and further, that it did not apply to cases where it appeared by the pleadings in the cause that a bona fide right came in question. At all events, he urged that the Lord Chief Baron might now grant a certificate under the 3 & 4 Will. 4, c. 24. In *Shuttleworth v. Cocker* (9 Dowl. P. C. 76), the Court of Common Pleas held that a Judge might alter his certificate granted under that act, after the trial.

PARKE, B. If we entertained any doubt on this matter, [348] we should think it right to grant a rule to shew cause; but we do not. This is certainly an unfortunate case; but it is clear that it falls within the act of 3 & 4 Vict., which applies to "any action of trespass on the case." Then it is said the Lord Chief Baron has still the power of certifying; but that is not so: the statute expressly directs that the plaintiff shall not recover costs where the damages are under 40s., unless the Judge "shall immediately afterwards certify" that the action was brought to try a right, &c. It may even be a question whether the Judge could grant the certificate after another cause had been called on. (a)

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.
Rule refused.

(a) See, however, *Thompson v. Gibson*, post, vol. 8.

HOLFORD v. DUNNETT. Exch. of Pleas. Jan. 13, 1841.—The first count of a declaration was framed upon an agreement whereby the plaintiff agreed to let, and the defendant agreed to take, certain premises, subject to conditions therein specified, and whereby it was agreed that the defendant should keep the windows and all other parts of the premises, except the roof and main timbers, and the outside in effectual repair: and alleged as a breach, that he permitted them to be out of repair. The second count stated, that in consideration that the defendant had become and was tenant to the plaintiff of a certain other messuage and premises, the defendant promised to use them in a tenant-like and proper manner; and alleged as a breach, that he did not use the said last-mentioned premises in a tenant-like and proper manner, but made holes in the walls, damaged the doors, &c. At the trial, one contract of demise only, applying to one house only, was proved:—Held, that the plaintiff could not recover damages in respect of the breaches alleged in both counts, inasmuch as they must be taken to have reference to different messuages.

[S. C. 10 L. J. Ex. 101.]

Assumpsit. The first count of the declaration stated, that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to let, and the defendant agreed to take, certain premises situate at Rusholme, in the county of Lancaster, known as Heald House, with the garden, orchard, coach-house, and stable thereunto belonging, subject to certain conditions therein specified, as to the pay-[349]-ment of rent, taxes, &c.; that it was agreed that the defendant should forthwith do certain repairs therein also specified, and should keep the windows, and all other parts of the premises, except the roof and main timbers and the outside, in effectual repair. Breach, that the defendant permitted the windows, and all other parts of the said premises, except the roof, &c., to be in want of repair. The second count stated, that in consideration that the defendant had become and then was tenant to the plaintiff of a certain other messuage or dwelling-house, garden, orchard, coach-house, stable, and premises of the plaintiff, he, the defendant, then promised to use the said last-mentioned messuage or dwelling-house, &c., in a tenant-like and proper manner, for and during the continuance of the said last-mentioned tenancy. Breach, that the defendant did not nor would, during the continuance of the said last-mentioned tenancy, use the said last-mentioned messuage, &c., in a tenant-like and proper manner, but on the contrary thereof, wrongfully and unjustly made divers large holes in the walls of the said last-mentioned messuage or dwelling-house, and damaged the doors thereof, took away the turf, and cut down and removed shrubs and flowers therefrom, &c. The third count charged the defendant with removing an iron gate erected by him, and which he had agreed to leave upon the premises.

Pleas, first, non assumpsit; secondly, to the first count, that the plaintiff did not repair the premises pursuant to his agreement: thirdly, to the first count, that the defendant did not allow the windows, &c., to be in want of repair; fourthly, to the 2nd count, that the defendant did use the messuage, &c., therein mentioned, in a tenant-like and proper manner:—on which issues were joined.

At the trial before Rolfe, B., at the last Liverpool assizes, the plaintiff, having proved a written agreement for the demise of the premises in question to the defendant, as set out in the first count, and also a breach of the agreement [350] by the non repair of the windows and other parts of the premises, as stated in that count, was about to give evidence of the breaches charged in the second count; upon which it was objected for the defendant, that inasmuch as one contract of demise only had been proved, applying to one house only, viz. the express written contract stated in the first count, no evidence could be received of breaches assigned under another and different implied contract, on which the second count was framed. The learned Judge overruled the objection, and the plaintiff accordingly proceeded to give evidence of the cutting down and carrying away of fruit trees and flowers, and the taking away of turf, as alleged in the second count; and the jury found a verdict for the plaintiff on the two first issues, damages £10, and for the defendant on the third issue.

In Michaelmas Term, Cresswell obtained a rule nisi for a new trial, on the objection taken at Nisi Prius; against which

Dundas and Cowling now shewed cause. The breaches in both counts are substantially the same. The defendant has entered into a special agreement in writing, which he is bound to keep in its terms; but he is also subject to the more general contract incident thereto, and implied by law from the relation of landlord and tenant, to keep the premises in tenantable repair. These two contracts—one express and the other implied—might well co-exist, unless the latter were expressly excluded by the former; as a tenant under leaseholds also subject to the custom of the country, unless the lease expressly exclude it: *Hutton v. Warren* (1 M. & W. 466). Could not a plaintiff recover for work and labour, when the work contracted for under a written agreement had been performed? [Parke, B. There, there are two [351] contracts made at different times: here, there are two things agreed to be done at the same time, one by an express written contract, the other implied from the relation of landlord and tenant, and imported into it.] The first, the express written contract, was executory, because it was made, so far as appears, before the defendant actually became tenant; the other arose afterwards, when he became tenant by taking possession. In *Powley v. Walker* (5 T. R. 373), the declaration contained three counts; the first alleging that on such a day the defendant became and was tenant to the plaintiff of a farm, in consideration whereof he undertook and promised not to carry away from the farm any straw, &c.; the second count stated, that for the same consideration the defendant undertook and promised to cultivate the land in a good and husbandlike manner, according to the custom of the country; and the third, to manage and cultivate the land according to the course of good husbandry. On motion in arrest of judgment, the Court held that the bare relation of landlord and tenant was a sufficient consideration for the promises laid in the declaration. Therefore, from the moment the defendant became tenant, the contract to keep the premises in tenantable repair was implied by law, whether there was a previous writing or not. In *Hartley v. Harman* (3 P. & D. 567), the declaration contained one count only, stating a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleging that the defendant dismissed the plaintiff without a month's notice, whereby he lost all the wages, &c., he might have acquired from being continued in the service: and it was held, that he was only entitled to recover as damages one month's wages, and that the arrears due to him at the time of his dismissal could only be recovered in indebitatus assumpsit for work and labour. There there was in fact [352] but one contract only, yet it was held that the plaintiff ought to have had a second count in order to recover for the services actually performed.

Cresswell (with whom was Martin) contra. The argument on the other side proceeds upon the fallacy of supposing that there are two contracts, one executory and the other executed. There is but one contract. Every contract whereby the relation of landlord and tenant is created, contains in it, as an implied part of it, an agreement to use the premises in a tenantable manner, unless expressly excluded. The tenancy is created, not by merely taking possession, but by the agreement entered into between the parties. It was competent for the plaintiff, therefore, to have stated in the first count all that the law would imply from the relation of landlord and tenant; but he could not recover damages for breaches alleged in a second count, having reference to another contract, and which were not set out in the first count. [He was then stopped by the Court.]

PARKE, B. The rule must be absolute. The plaintiff has stated two contracts in his declaration, whereas one only was proved. He has alleged, as a second contract, an agreement to use the premises in a tenant-like manner; this he ought not to have done, unless he could prove a second contract in fact, relating to another and different message: as soon as it appears that there is but one contract and one message, he cannot recover on both. Here there is an express written agreement; there is also the additional contract implied by law; but it is all parcel of the original contract, by which the relation of landlord and tenant was created between the parties. That distinguishes this case from *Hartley v. Harman*. There the plaintiff might have recovered, on a declaration properly framed, wages pro ratâ for the time he had actually served: but it was equally clear, if he did not, that he [353] might, afterwards recover them indebitatus assumpsit; because the implied contract arose, not from the original agreement between the parties, but from the performance of it. Here there is one contract only, arising, not from the taking possession of the land, but from the

original agreement whereby the relation of landlord and tenant was created between the parties.

ALDERSON, B. There is in truth but one contract, namely, the written contract, together with an implication of law arising out of it, which latter is stated as a second contract. The defendant takes possession under certain stipulated terms, to which are to be added certain other implied terms.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

HALL AND ANOTHER, Assignees of John Taylor, a Bankrupt v. WALLACE. Exch. of Pleas. Jan. 22, 1841.—Where a trader commits an act of bankruptcy by procuring his goods to be taken into execution with intent to defeat or delay creditors, the execution, although levied *bonâ fide* by the judgment creditor, is not protected by the stat. 2 & 3 Vict. c. 29.

[S. C. 10 L. J. Ex. 133; 5 Jur. 198.]

Trover for cotton and silk goods, furniture, &c. &c. The first count alleged a possession by the bankrupt before his bankruptcy; the second count laid the possession in the assignees. The defendant pleaded, 1st, not guilty; 2ndly, that the plaintiffs were not nor are assignees of the estate and effects of the said John Taylor. Then followed six other special pleas, the substance of which was, that the defendant, having obtained two judgments against the bankrupt, issued writs of *fi. fa.* thereon, under which the sheriff of Lancashire, before the date and issuing of the fiat, and before the defendant had any notice of the act of bankruptcy, seized the goods in question: that the [354] said execution was *bonâ fide* levied and executed before the date and issuing of the fiat, and before the defendant had notice of any prior or of any act of bankruptcy by the said John Taylor committed. The defendant pleaded, 9thly, that the goods and chattels mentioned in the declaration were not the property of the plaintiffs as assignees; and 10thly, that the plaintiffs, as assignees, were not lawfully possessed of the said goods and chattels. On these several pleas issues were taken and joined. The defendant also gave notice of his intention to dispute the trading, the petitioning creditor's debt, and the act of bankruptcy.

At the trial before Rolfe, B., at the last Liverpool Assizes, the following facts appeared:—The bankrupt, Taylor, in March 1837, commenced business as a draper at Sunderland, with a sum of £600 advanced to him by the defendant, who was his father in law, and to whom, in the November following, he gave a warrant of attorney to secure that amount. About the same time, and in the following year, the defendant advanced him more money, and became surety for him to other creditors. Judgment was entered upon the warrant of attorney in March 1839. In May following, the bankrupt gave the defendant another warrant of attorney for £1000, upon which also judgment was forthwith entered up. In December 1839, Taylor's affairs having become irretrievably embarrassed, and an execution being out against his goods at the suit of another creditor, it was arranged between him and one Phillips, his brother in law, that Phillips should go over to Durham to the defendant, and give him information of it, in order to induce the defendant to issue executions upon his judgments. Phillips informed the defendant accordingly, and the defendant in consequence, on the 6th of December, issued two writs of *fi. fa.* against Taylor's goods, under which the sheriff took possession of all his stock in trade and effects, the whole of [355] which were sold on the 19th, and the net proceeds, amounting to £1190, were paid over to the defendant. Notice was given to the defendant and to the sheriff, while the latter was in possession, that a fiat would be issued against Taylor; and on the 14th of January, 1840, a fiat was issued accordingly, the act of bankruptcy on which it was founded being the procuring his goods to be taken in execution at the suit of the defendant. On the 9th of March, the plaintiffs were appointed his assignees, and they brought this action for the value of the goods so taken in execution.

It was contended for the defendant, that the executions were rendered valid by the operation of the stat. 2 & 3 Vict. c. 29, provided the jury should find that they were levied by the defendant *bonâ fide*, and without knowledge of the intention of

the bankrupt to give him a preference. For the plaintiff it was answered, that that statute did not apply to the case, inasmuch as it had reference only to executions *bonâ fide* levied after a prior act of bankruptcy, whereas here the execution itself was a part of the transaction which constituted the act of bankruptcy. The learned Judge left it to the jury to say, first, whether the seizure in execution was by the procurement of the bankrupt; secondly, whether, if such procurement existed, the defendant was cognizant of it. The jury found that the bankrupt had fraudulently procured his goods to be taken in execution; but that the defendant had acted *bonâ fide*, and without any knowledge of the fraudulent intention of the bankrupt. The learned Judge directed that the verdict should be entered for the plaintiff, damages £1190, but gave leave to the defendant to move to enter a nonsuit, or a verdict for him upon such of the issues as the Court should think fit.

Wightman, in last Michaelmas term, obtained a rule nisi [356] pursuant to the leave reserved, or for a new trial; against which

Cresswell and Hoggins now shewed cause. The stat. 2 & 3 Viet. c. 29, has no application to this case. That statute gives validity to executions *bonâ fide* executed and levied before the date and issuing of a fiat, notwithstanding any prior act of bankruptcy, provided the party at whose suit the execution is levied had not, at the time of executing or levying such execution, notice of any prior act of bankruptcy. But it was never intended by the legislature to give validity to an execution which was itself an act of bankruptcy. This was a transaction altogether void, as being a fraudulent preference, and therefore wholly inoperative for the purpose of vesting any property in the person intended to be benefited; and could not prevent the title of the assignees, which commenced by relation from the time of the fraudulent procurement by the bankrupt: *Doc d. Lloyd v. Powell* (5 B. & C. 308; 8 D. & R. 35). Such a procurement does not the less operate as an act of bankruptcy, because the creditor is ignorant of the intention, or of the bankrupt's insolvency. And there is nothing in the recent statute to enable the creditor to obtain a property in the goods by means of a transaction which in itself is an act of bankruptcy. [Parke, B. The effect of the act is to prevent the relation back of the title of the assignees to the act of bankruptcy, as against *bonâ fide* executions.] The reference in it to the stat. 6 Geo. 4, c. 16, s. 82, clearly shews that to be its meaning.

Hindmarsh (Wightman with him), *contrâ*. It is said that the act of Parliament applies only to executions, not contemporaneous with, but subsequent to, the act of bankruptcy, because of the use of the words "prior act of bank-[357]-ruptcy;" but such a construction leads to this absurd consequence, that, whether the levy be before or after the act of bankruptcy, in either case it is good; if it be at the same time, it is bad. [Alderson, B. So far as a prior act of bankruptcy would make the levy invalid, the act applies, and no further.] Here, however, the act of bankruptcy was not complete until after the execution had been levied, because it consists of both the procurement and the levy; as the act of bankruptcy, by lying twenty-one days in prison, does not relate back to the time of the arrest, but is complete only at the expiration of the twenty-one days: *Higgins v. M'Adam* (3 Y. & J. 1). [Parke, B. The moment the sheriff laid his hands upon the goods to take them in execution, they became the goods of the assignees; then the subsequent sale of them was a conversion.] The intention of the legislature, in the recent statute, was that the execution creditor should be protected in all cases where the levy was antecedent to the fiat: *Nelstrop v. Scarisbrick* (6 M. & W. 684).

PARKE, B. I entertain no doubt in this case that the true meaning of the act of Parliament is as is contended for by the plaintiffs. The object of the statute 2 & 3 Viet. c. 29, as appears by the recital, was similar in principle to that contemplated by the stat. 6 Geo. 4, c. 16, s. 81. By the act of Geo. 4, all transactions entered into with the bankrupt more than two months before the issuing of the fiat, were declared to be valid, notwithstanding any prior act of bankruptcy committed, provided the person so dealing with the bankrupt had not notice of the bankruptcy. The effect of the stat. 2 & 3 Viet. c. 29, is to destroy the relation of the title of the assignees to the act of bankruptcy, not only in cases where the transaction was more than two months before the fiat, but as to all *bonâ* [358] *fide* transactions prior to the fiat. But it is obvious, that all the legislature meant to do was to prevent transactions which otherwise were valid from being invalidated by a prior act of bankruptcy. Here the transaction is invalid in itself, and therefore void. It is a parallel case to the delivery of

goods by way of fraudulent preference, in contemplation of bankruptcy, which is invalid as against the assignees, although the party receiving them may not be cognizant of the dishonest intention of the bankrupt. Indeed, it may be doubted whether this is a case which comes within the meaning of the words "bonâ fide executed and levied," which may reasonably be construed to mean where there is bona fides in both parties: but however this be, it is clear that the statute only meant to protect valid transactions, and to prevent them from being affected by a prior act of bankruptcy: here the execution itself is the act of bankruptcy. No doubt, there must be a conversion after the title of the assignees has accrued; that is, after the act of bankruptcy; and if that be complete only upon the seizure, there was a sufficient proof of a conversion by the subsequent sale. As soon as the goods were in the hands of the sheriff, they became the property of the assignees, and they were converted by the subsequent sale. The rule must therefore be discharged.

ALDERSON, B. I entirely agree. The statute meant, that those acts which before required to be invalidated by proof of a prior act of bankruptcy, should no longer be rendered invalid even by that proof, provided the party to be affected by them were ignorant, at the time of the transaction, of the existence of any prior act of bankruptcy. But acts which are invalid in themselves do not require invalidating; and here the execution itself is invalid, being in the nature of a fraudulent preference.

ROLFE, B., concurred.

Rule discharged.

[359] WHEELER v. WRIGHT. Exch. of Pleas. Jan. 18, 1841.—Declaration in assumpsit stated, that the plaintiff put up certain leasehold premises to auction, subject to conditions that the purchaser should complete the purchase by a certain day, and that the plaintiff should deduce a good title to the premises, commencing with the lease under which they were then held: and assigned as a breach, that although the plaintiff did deduce a good title commencing with the lease, the defendant did not complete the purchase according to the contract. The defendant pleaded, that the premises were, on &c., demised by T. L. to W. B. for a term still subsisting, subject to a covenant by W. B. to keep the premises in repair, and for re-entry by T. L. in default thereof: that the interest of W. B. vested by assignment in the plaintiff, and that the plaintiff, after the assignment, suffered the premises to be out of repair, and that they continued so up to the time of sale, so that the term might, at the option of T. L., be determined; and that the plaintiff, by reason of the premises, had not, at the time of the sale or afterwards, any valid title to the premises. The defendant pleaded also, that the plaintiff had not, at the time of the sale or at any time afterwards, any good and valid title to the premises, and did not deduce or make a good title to the defendant. On special demurrer to these pleas, the former was held bad, as being an argumentative denial of the allegation in the declaration, that the plaintiff made a good title; and the latter, on the ground that, if the defendant meant to object to the validity of the lease, he ought to have confessed the allegation of title in the declaration as it stood, and then to have pointed the plea specifically to the objection that the lessor had no title.

[S. C. 9 Dowl. P. C. 729; 10 L. J. Ex. 130.]

Assumpsit. The declaration stated, that the plaintiff put up to sale by auction certain premises, subject to the conditions, amongst others, that the purchaser should complete the purchase on or before the 25th day of March then next, and that the plaintiff should deduce and make a good title to the premises, commencing with the lease under which they were then held; that the defendant became the purchaser thereof; and that, although the plaintiff did deduce and make a good title to the said premises, commencing with the lease under which they were then held, yet the defendant did not, on or before the said 25th day of March, or at any other time, complete the said purchase.

Third plea, that the said premises were, to wit, on &c., demised by one Thomas Lowe to one William Barnett, his executors, administrators, and assigns, for a certain term of years still subsisting, subject to a covenant by the said William Barnett, his heirs, executors, and administrators, to keep the said premises in good repair, and, in

the event of their not being in repair, that the said Thomas Lowe might and should enter upon and re-possess the same; that the right and interest of the said William Barnett vested by assignment in the plaintiff, and that the plaintiff, [360] after the said assignment, suffered and permitted the said premises to be out of repair; and that they continued and were so out of repair at the time of the said sale, and of the commencement of this suit, so that the said term might, at the option of the said Thomas Lowe, be determined; and that the plaintiff, by reason of the premises, had not, at the time of the said sale, or at any time afterwards, any valid title to the said premises. Verification.

Fourth plea, that the plaintiff had not, at the time of the said sale of the said premises, or at any time after the said sale, any good and valid title to the said premises; and that he did not deduce or make a good title thereof to the defendant. Verification.

The plaintiff demurred specially to these pleas, assigning as grounds of objection to the former, that it did not sufficiently confess and avoid, or traverse, the cause of action alleged in the declaration; that it was but an argumentative denial of the allegation that the plaintiff deduced a good title, and ought to have concluded to the country, and not with a verification; and that the plea was a mere statement of evidence, as to which no certain issue could be taken. The causes of demurrer to the fourth plea were, that it alleged generally that the plaintiff did not make a good title to the defendant, whereas, under the conditions of sale, the plaintiff was only bound to make a good title commencing with the lease under which the premises were held; that if the plea meant that the plaintiff had not deduced a good title commencing as aforesaid, then it did not sufficiently traverse, nor confess and avoid, the declaration, and imperfectly concluded with a verification. Joinder in demurrer.

Gale, in support of the demurrer, was stopped by the Court.

Erle, *contra*. The third plea sufficiently confesses and [361] avoids the allegations of the declaration. [Lord Abinger, C. B. It appears to be merely an argumentative denial that the plaintiff made a good title: if it be such a denial, it ought to have concluded to the country.] It admits a good *primâ facie* case on the part of the plaintiff, but sets up as an answer to it that the title is defeasible. There may be an apparent good title deduced commencing with the lease, and there may be an extrinsic fact, such as a forfeiture, which invalidates it. The plaintiff, on the other hand, may shew, by way of replication, that the landlord has released the covenant, or accepted rent. This is within the cases in which a party may either rely on a general traverse, or plead the facts specially, so as to give the opposite party a knowledge of the question he intends to try. [Parke, B. The question is, in what sense the words of the contract are to be understood. If it means that the lease is to be shewn to be a valid lease, then a traverse would have answered the defendant's purpose; if only that the plaintiff is to prove the several steps of the transfer of the lease to himself, perhaps the plea may be good. You say that the latter is the sense in which the words are to be understood.] It may be admitted that the defendant might have raised the question in dispute by a traverse of the allegation, but he might also put upon the record facts amounting to matter of law, shewing that the title is defeasible. It is on this principle that infaney, coverture, &c., were pleadable specially. In such cases the plea assumes that the facts stated by the plaintiff *primâ facie* shew that the promises were made by the defendant, but answers them by adding other facts, which, taken altogether, shew the *primâ facie* cause of action to be destroyed by matter of law. *Bac. Abr. Pleader* (b. 3). *Carr v. Hincliffe* (4 B. & C. 547; 7 D. & R. 42), *Hussey v. Jacob* (1 Ld. Raym. 87), *Maggs v. Ames* (4 Bing. 470; 1 M. & P. 294). [Alderson, B. If the averment in [362] the declaration means that the plaintiff had a good title against all the world, the plea has not answered it.] The plaintiff may in reply take the same course, and say, "True it is the plea *primâ facie* constitutes a defence; but that is only because you, the defendant, have omitted certain facts, which I supply, and shew that *primâ facie* defence not to be maintainable." The plea admits only that the plaintiff deduced an apparent good title commencing with the lease, and shews aliunde, in answer to the plaintiff's claim, that the lease is, *primâ facie*, invalid.

Next, as to the fourth plea. In *Spratt v. Jeffery* (10 B. & C. 249; 5 Man. & R. 188), the Court of King's Bench held, that when on a sale of leasehold premises the purchaser agreed to accept an assignment, without requiring the lessor's title, he could not raise any objection to that title: but in *Shepherd v. Keatley* (1 C. M. & R.

117), this Court, upon a clause in nearly the same terms, ("that the vendor should not be obliged to produce the lessor's title"), came to a contrary conclusion; and held that the purchaser was nevertheless entitled to insist on defects in the lessor's title which he had discovered aliunde. So here, the defendant admits that all the plaintiff was bound to do was to deduce a good title commencing with the lease; but if he finds aliunde that the lessor had no title, he contends that he is at liberty to shew it: he therefore says, that the plaintiff had not any good or valid title. It is part of the consideration for which the defendant pays his money, that these are leasehold premises held for a certain term; and he has a right to shew that that consideration has failed. The only difference is, that the onus probandi is changed, and it is thrown on the defendant to shew it, instead of its being imposed as a condition precedent on the plaintiff. [Parke, B. The proper form of plea, as it strikes me, would have been to have confessed the allegation as it stands, in the sense in which it is used in the [363] declaration, and then to have pointed the plea specifically to the objection, that the lessor had no title. Lord Abinger, C. B. I think we must interpret the plea, as it stands, to mean that the title is bad for matter posterior to the lease.]

LORD ABINGER, C. B. The Court are inclined to think that both pleas are bad on special demurrer. The third plea amounts only to an argumentative denial of the plaintiff's being able to make a good title, instead of containing a distinct traverse. And as to the fourth, if the defendant intended to rely on any objection to the title of the lessor, he ought to have confessed the allegation in the declaration, and have set forth the defect of title more particularly in his plea.

PARKE, B. I am of the same opinion. The third plea is merely an argumentative denial of the allegation of title in the declaration. The cases which have been referred to by Mr. Erle apply to an avoidance of the contract declared on; as where the defendant admits a cause of action at common law, and avoids it by statute; or admits a *prima facie* cause of action, and avoids it by coverture: but this is a denial only of an averment in the declaration. I agree that the fourth plea is bad, for the reasons already given.

ALDERSON, B., and GURNEY, B., concurred.

Leave to the defendant to amend on payment of costs; otherwise Judgment for the plaintiff.

[364] BARNETT v. WHEELER. Exch. of Pleas. Jan. 18, 1841.—The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, amongst others, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned as a breach, that the defendant did not deduce a good title commencing with the lease.—Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff for the residue of the term, and that they were put up to sale under a power of sale in the mortgage: that before and at the time of the mortgage, the plaintiff held the premises under a lease from T. L., subject to a covenant by the plaintiff for repair, and a proviso for re-entry, or the cesser of the term, at the option of T. L., on breach of such covenant: that the plaintiff, before and at the time of the sale, had full knowledge of all the premises: that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge: that they were, at the time of the sale, in as good repair as at the time of the mortgage; and that T. L. had not re-entered or claimed to re-enter, or in any way avoided the lease:—Held bad on general demurrer.

[S. C. 10 L. J. Ex. 102. Referred to, *In re Highett and Bird's Contract*, [1902] 2 Ch. 219: affirmed, [1903] 1 Ch. 287.]

Assumpsit. The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for a residue of a certain term of years then unexpired therein, upon the condition, amongst others, that the defendant should deduce and make, or cause to be deduced and made, a good title thereto, commencing with the lease of the said premises, under which they were then held. Breach, that the defen-

dant did not deduce or make, or cause to be deduced or made, to the plaintiff, a good title to the said premises, commencing with the said lease.

Plea, that the said premises so put up to sale by auction were premises whereof the defendant was then possessed for a certain term of years then to come and unexpired, by virtue of an indenture of mortgage theretofore made, whereby the same premises were assigned by the plaintiff to the defendant, for such residue of the said term, by way of mortgage, and for the purpose of securing the payment by the plaintiff to the defendant of a certain sum of money in the said indenture mentioned; and that the said premises were so put up and exposed for sale, and so agreed to be sold by the defendant, as in the first count mentioned, under and by virtue of a certain power of sale contained in the said indenture, whereby the plaintiff granted to the defendant a full power to sell the same, upon the non-payment of the said sum of money: that before and at the time of the making of the said assignment, the plaintiff held the said premises as tenant there-[365]-of to one Thomas Lowe, by virtue of a certain indenture of lease, bearing date, &c., and subject to a certain covenant in the said indenture of lease contained on the part of the plaintiff to be performed, for the repairing and keeping in tenantable repair the said premises, and subject to a certain proviso for the re-entry of the said Thomas Lowe into the said premises, and for the eesser and determination of the said term, at the option of the said Thomas Lowe, upon breach (amongst other things) of the said covenant: that the plaintiff, before and at the time of the said sale, and of the making of the said agreement, and during all the time in the said first count mentioned, had full knowledge and notice of all the premises hereinbefore-mentioned; and that the defendant did, before and at the time appointed for the completion of the said purchase, make and deduce to the plaintiff a good title to the said tenements and premises, commencing with the lease under which the said premises were held at the time of the said contract of sale, (being the same lease in this plea before-mentioned), in all respects excepting this, to wit, that the said premises were, at the time of the said contract of sale, and at the same time so appointed for the completion of the said contract, out of repair: that the plaintiff, before and at the time of the said sale, and during all the time in the said first count mentioned, had full knowledge and notice that the said premises were out of repair as aforesaid: that at the time of the said sale, and during all the time in the said first count mentioned, the said premises were in as good a state of repair as the same were in at the time of the said assignment thereof by the plaintiff to the defendant as aforesaid; and that the said Thomas Lowe had not, before or during any part of the time in the first count mentioned, re-entered or claimed to re-enter upon the said premises, or any part thereof, for the breach of the said covenant, or otherwise; nor had he or any other person in any way avoided the said lease, but the [366] same was, during all the time in the said first count mentioned, wholly subsisting and undetermined. Verification.

Replication, de injuriâ. Special demurrer, and joinder.

Gale appeared in support of the demurrer, but was called upon to support the plea. The plaintiff, by assigning the premises by way of mortgage to the defendant, warranted the goodness of the title. His acts amount in effect to a covenant for title. He is therefore estopped from now saying that the title is bad, and that the premises are out of repair. [Parke, B. In *Deering v. Farrington* (3 Keb. 304), Lord Hale lays it down that the words "assign, transfer, and set over," do not amount to a covenant against an eign title. But, besides, there is no estoppel against the plaintiff to prevent him from saying that the premises are out of repair. If he has contracted that they are in repair, and they are not, he is liable to an action for the breach of that contract.] It is evident that the plaintiff must have contemplated a purchase of the property subject to this defect in the title, of which he was aware; he cannot, therefore, take advantage of it to avoid the contract of purchase.

Erle appeared for the plaintiff, but was not called upon.

PARKE, B. I am of opinion that this plea is bad in substance, and affords no answer to the declaration. The defendant has entered into an express contract to deduce a good title to the premises by a specified day: and it affords no reason for his not performing that contract, that the plaintiff, at the time of the sale, was aware of the defect of title by the breach of the covenant to repair. The defendant might have known that the lessor had waived the forfeiture by a subsequent receipt of rent; or he may have [367] entered into the contract upon the understanding that he could

make a good title, by inducing the lessor to receive rent or sign a release, or in some other manner waive the forfeiture. The judgment must be for the plaintiff.

ALDERSON, B. I am of the same opinion. Although both parties may have been cognizant, at the time of the sale, that the title was defective by reason of the dilapidated state of the premises, there is nothing to shew that the defendant might not have contracted upon the understanding that he should remove that defect by the day named, by some of the means within his power. If a bill had been filed for a specific performance of the contract of sale, it would have been matter for the consideration of the Court of Equity, whether it ought or ought not to order the defendant to obtain a release from the landlord.

The rest of the Court concurred.

Judgment for the plaintiff.

THOMPSON v. IRVING. Exch. of Pleas. Jan. 18, 1841.—The Navigation Act, 3 & 4 Will. 4, c. 54, does not prohibit the importation for home consumption (except in British vessels, &c.), of any goods the produce of Europe, excepting those specifically enumerated in the 2nd section.

[S. C. 10 L. J. Ex. 98; 5 Jur. 109.]

Assumpsit on a policy of insurance. The declaration stated, that the plaintiff caused to be made a certain policy of insurance with the Alliance Marine Assurance Company, upon a certain ship or vessel called the "Gustaf," on a voyage from Dantzic to Hull; that the said ship and the goods on board the same, for so much as concerned the assured, should be valued at £650 on bristles, and £30 on beer; and that the goods were shipped on board the said ship at Dantzic, to be carried and conveyed therein on the said voyage. The declaration then averred a loss [368] of the ship and goods by perils of the seas, and alleged as a breach the non-payment by the defendant of the sums of money insured thereon as aforesaid.

Plea, that the said goods so shipped on board the said vessel as in the declaration mentioned, were certain goods manufactured within the kingdom of Prussia, in Europe, and were so shipped on board the said vessel at Dantzic, within the said kingdom of Prussia, to be imported from thence into the United Kingdom of Great Britain and Ireland, that is to say, into the port of Hull aforesaid, for the purpose of being used within the said United Kingdom: and the defendant further saith, that the said vessel, upon which the said goods were so shipped on board as aforesaid, was not, at the time the said goods were so shipped on board thereof, a British ship, or a ship of the country in which the said goods were so manufactured as aforesaid, or a ship of the country from which the said goods were so imported; but on the contrary thereof, the said ship was, at the time the said goods were shipped on board the same and imported as aforesaid, a Swedish ship; of all which said premises the plaintiff, before and at the time of making the said policy of insurance in the first count mentioned, had notice, and whereby the said voyage became and was wholly illegal, and contrary to the form of the statute in that case made and provided. Verification.

Special demurrer, assigning for causes, that the said goods, that is to say, the said bristles and beer, insured by the said policy, were not prohibited by law from being imported into the United Kingdom to be used therein, by such a ship as in the plea mentioned; and also, that the mere shipping of the goods in the plea mentioned, was not such an illegal act as to avoid or defeat the contract of insurance. Joinder in demurrer.

Martin, in support of the demurrer. The question in [369] this case arises on the construction of the Navigation Act, 3 & 4 Will. 4, c. 54, the second section of which enacts, that the several sorts of goods thereafter enumerated, being the produce of Europe, that is to say, masts, timber, boards, &c., [but not including bristles or beer,] shall not be imported into the United Kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported. That prohibition applies only to the enumerated articles. Besides, all that is prohibited is the importation for use: even the goods enumerated may be imported for re-exportation; s. 21. The plea, therefore, is clearly bad.

The Court then called on

W. J. Alexander, in support of the plea. It is alleged in the plea that these goods were imported to be used in the United Kingdom; the 21st section, therefore, does not apply. As to the other point, if the Court consider it clear that the goods prohibited by the 2nd section are only the goods enumerated therein, and not goods the produce of the foreign country generally, the plea is certainly insufficient; but it is to be observed that the latter part of the section has the words—"of which the goods"—not "such goods"—"are the produce." Again, if only the articles actually mentioned in sect. 2 are prohibited, what necessity was there for the fifth section, which enacts that all manufactured goods shall be deemed to be the produce of the country of which they are the manufacture? [Parke, B. To avoid the necessity of using the word "manufacture" as well as "produce."]

LORD ABINGER, C. B. It is clear that the 2nd section of the act prohibits the importation of no other goods than those mentioned in it. The plea is therefore clearly bad.

[370] PARKE, B. There is no prohibition at all except in the 2nd section, and that clearly applies only to the articles there enumerated. The words "the goods" must be interpreted to mean "such goods." Then the legislature having in the second and two following sections used the word "produce," the 5th section is introduced to explain that that word is intended to mean not only the natural productions of the country, but also goods the manufacture of that country.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

HUMPHREYS v. O'CONNELL. Exch. of Pleas. Jan. 20, 1841.—To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof:—Replication, de injuriâ:—Held, good on special demurrer.

[S. C. 9 Dowl. P. C. 213; 10 L. J. Ex. 139; 5 Jur. 271.]

Assumpsit by indorsee against acceptor of a bill of exchange for £500, drawn by H. Barnett, payable six months after date, and indorsed by Barnett to Moss and Humphreys, and by them to the plaintiff.

Plea, first, that long before the drawing or accepting of the bill of exchange in the declaration mentioned, to wit, on the 1st day of February, 1839, and on divers other days and times afterwards, and before the 22nd day of April, 1839, the said H. Barnett did knowingly lend to the defendant, and the defendant did borrow of him, divers sums of money, amounting, to wit, to £650, for the purpose of enabling the defendant illegally to game and play therewith at a certain illegal game, played with dice, called or known by the name of French Hazard, contrary to the form of the statute, &c.; and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid; and that, for securing the payment of the said [371] sums so lent as aforesaid, the defendant afterwards, to wit, on the 22nd April, 1839, accepted three several bills of exchange, drawn by the said H. Barnett upon and directed to the defendant, and payable to the said H. Barnett, [describing them]: and the defendant says, that long before the drawing or acceptance of the said bill in the declaration mentioned, to wit, on the 26th day of May, 1839, and on divers other days and times afterwards, and before the 29th day of August, 1839, the said H. Barnett did knowingly lend to the defendant, and the defendant did borrow of him, divers other sums of money, amounting, to wit, to £565, for the purpose of enabling the defendant to game and play therewith at a certain illegal game, &c., contrary to the form of the statute, &c.: and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid: that the said several bills, so payable as aforesaid, being due and unpaid, and the said sum of £565 being also unpaid to the said H. Barnett, he the defendant, in consideration thereof, and for and on account of the said bills, and as a security for the payment of the same, and also of the said sum of £565, accepted the said bill in the declaration mentioned, and also a certain other bill drawn by the said H. Barnett, and directed to the defendant, for the payment of the sum of £515 to the said H. Barnett, or order, eight months after the date thereof: and the said H. Barnett drew the said bills for and

upon that consideration, and on that account: and the defendant further says, that the said Moss and Humphreys, and the plaintiff respectively, before the said indorsements to them respectively, had full knowledge and notice of the premises aforesaid. Verification.

The second plea was in similar terms, except that it alleged the monies not to have been lent by Barnett to the defendant, but to have been won of the defendant by Barnett and others, at hazard.

[372] The third and fourth pleas were the same as the first and third respectively, except that they averred want of consideration, instead of notice.

Replication, *de injuriâ*. Special demurrer, assigning for causes, that the matters of defence alleged in the pleas do not amount to an excuse for the non-performance by the defendant of his promise, but shew that he never was liable to perform that promise, and that it was totally void, and by the illegality thereof the defendant was wholly discharged by law from performing the same, and the defendant never was liable to pay the said bill to the plaintiff, under the facts stated in the pleas. Joinder in demurrer.

Willis, in support of the demurrer. The question is, whether these pleas amount to matter of excuse only; if so, according to the rule laid down in *Crogate's case* (8 Rep. 67 a.), and now extended to actions *ex contractu*, the replication *de injuriâ* is no doubt admissible. If the pleas pointed to facts occurring after the breach of the promise alleged in the declaration, that would be matter in discharge, not in excuse, and the replication *de injuriâ* would be bad. If, on the other hand, they alleged matter which happened between the contract and the breach, then the replication would be good: *Jones v. Senior* (4 M. & W. 123). But this is a third case in which the defence is founded upon matter existing at the time of the contract, and which goes to the avoidance of the contract itself, by shewing that it ought never to be performed, and that the plaintiff has in law no right to sue upon it. The pleas in effect amount to this, that the contract upon which the plaintiff sues—viz. the indorsement to him, was illegal and void. This point arose in the case of *Parker v. Riley* (3 M. & W. 230), but was not expressly decided: but Parke, B., said of the plea in that case—"It either amounts to the general issue, or is [373] in avoidance of the contract itself: on the first supposition, it is clear that the replication is bad; on the other, we are strongly inclined to think it so." *Isaac v. Farrar* (1 M. & W. 65) will be relied upon for the plaintiff; but it is distinguishable from the present case, because there the allegation of fraud was immaterial to the question which arose on the plea. [Lord Abinger, C. B. Was the plaintiff in this case affected by the original fraud, or only by notice of it? Certainly, only by notice. One of the grounds of the judgment in *Isaac v. Farrar*, the inconvenience of not allowing this general replication, because otherwise the proof of value would in such cases be thrown upon the indorsee, appears to be removed by the case of *Edmunds v. Groves* (2 M. & W. 642). There, in answer to a plea similar to the present, the plaintiff replied that the note in question was indorsed to him without notice of the illegality, and for good value and consideration; and it was held, that although the illegal gaming was thus admitted on the record, it was not so admitted as that the jury could infer it as a fact against the plaintiff, and that he could be compelled to begin at the trial. [Parke, B. It is very difficult to distinguish this case from *Isaac v. Farrar*; because this is not a question between the drawer and acceptor; if it were, there would be great reason for saying the contract itself was avoided; but there is a new contract by the indorsement: then the question is, whether the plea does not consist of mere matter of excuse for the non-performance of the *primâ facie* contract by indorsement. In *Isaac v. Farrar*, the contract was void between the original parties, as here.] The plea, alleging notice, shews that it was illegal in the plaintiff, with such notice, to take the bill: the contract of indorsement arises out of his own illegal act. [Parke, B. He takes it with his eyes open, that is all; and therefore he cannot consider it unjust if [374] the objection is taken against him.] He has no claim except out of a contract which he knew to be illegal. [Parke, B. In *Noel v. Rich* (2 C. M. & R. 360), the Court held the replication good, although the plea sought to avoid the contract on the ground of fraud.] That was on general demurrer. But it may be doubted whether a bill given for a gaming transaction is not still void in the hands of an indorsee. It clearly was so before the stat. 5 & 6 Will. 4, c. 41; *Bowyer v. Bampton* (2 Stra. 1155), *Edwards v. Dick* (4 B. & Ald. 212): and Lord Abinger, C. B., in

Edmunds v. Groves, express a doubt whether that statute had the effect intended. [Rolfe, B. All former acts making the instrument void are repealed by it.]

J. Henderson, contra, was stopped by the Court.

LORD ABINGER, C. B. We think that this case is governed by *Isaac v. Farrar*. The plea consists entirely of matter of excuse by this defendant as against this plaintiff. The plaintiff, being a holder for value, is *prima facie* entitled to recover upon the bill, even where there has been want of consideration, or illegality, between the original parties to it.

PARKE, B. I am also of opinion that this case is governed by *Isaac v. Farrar*. As between these parties, the bill is not void for the illegality, but the defence amounts to mere matter of excuse for the non-performance of the contract by indorsement, to pay it to this plaintiff.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

[375] WINDSOR v. HERBERT. Exch. of Pleas. Jan. 20, 1841.—It is not necessary that an attorney plaintiff should deliver a signed bill of costs a month before action brought, where the defendant has been admitted an attorney after the bill became due, but before the commencement of the action.

[S. C. 9 Dowl. P. C. 237; 10 L. J. Ex. 132; 5 Jur. 73.]

Assumpsit for work and labour as an attorney and solicitor.

Plea, that the plaintiff, before and at the time of the accruing of the causes of action in the declaration mentioned, was an attorney of the said Court here, and that the said sum of money, &c. is claimed by the plaintiff to be due for work, and materials for the same provided, and for fees in respect thereof, and for money theretofore paid by the plaintiff, as the attorney of and for the defendant, in and about certain proceedings at law, to wit, in the said Court here, which had been commenced and prosecuted against the defendant, and wherein the plaintiff acted as the attorney of and for the defendant: And the defendant further says, that although the plaintiff did, before the commencement of this suit, to wit, on the 1st day of June, 1840, deliver to the defendant a bill of the plaintiff's fees, charges, and disbursements for and in respect of the said work and materials, fees, and money, so done, provided, and paid as aforesaid, subscribed with the proper hand of the plaintiff, according to the statute in such case made and provided, yet a month from such delivery had not before the commencement of this suit expired; and the defendant further says, that the plaintiff did not at any other time before the commencement of this suit, deliver unto the defendant, or leave for him at his dwelling-house or last place of abode, any other bill of the plaintiff's fees, charges, and disbursements, &c., or any of them, or any part of them, subscribed with the proper hand of the plaintiff, according to the statute, &c. Verification.

Replication, that after the accruing of the said causes of action, and before the commencement of this suit, to wit, on &c., the defendant was duly admitted and inrolled an attorney of the Court of our Lady the Queen before the [376] Queen herself, and that the defendant, before and at the time of the commencement of this suit, was, and still is, such attorney. Verification.

Special demurrer, assigning for causes, that the averment in the replication is immaterial and impertinent, and does not amount to an avoidance of the matter alleged in the plea, and admitted by the replication: that the replication does not aver, that at the time of the accruing of the said causes of action to which the plea is pleaded, the defendant had been duly admitted and inrolled an attorney of any court: that it does not shew that the business done by the plaintiff for the defendant was agency business by the plaintiff as an attorney, and that the defendant was then an attorney: and that it does not aver that a month from the delivery of the bill mentioned in the plea, had expired before the defendant was admitted and inrolled an attorney as in the said replication mentioned, &c. Joinder in demurrer.

W. H. Watson, in support of the demurrer. The stat. 2 Geo. 2, c. 23, s. 23, is general in its terms, and applies to all persons to be charged by the bill, whether attorneys or not. Then the stat. 12 Geo. 2, c. 13, s. 6, limits it to some extent; providing that the former statute shall not extend "to any bill of fees, charges, and

disbursements due from any attorney or solicitor to any other attorney or solicitor; but every such attorney, &c. may use such remedies for the recovery of his fees, &c. against such other attorney or solicitor, as he might have done before the passing of the said act." The object of this enactment clearly was to protect non-professional persons, who were so when the bill was contracted; supposing an attorney to be sufficiently cognizant of the course of business to protect himself. But is it not preposterous to say, that because the party is admitted an attorney after he has become indebted for fees, but within the month after the delivery [377] of the bill, he is not to be allowed to have the bill taxed? If so, the only mode of trying the charges will be before the jury. The Court have no authority to direct the taxation of an agency bill: *Waymouth v. Knipe* (3 Bing. N. C. 387; 3 Scott, 764). Where the party is an attorney at the time the business is done, the legislature supposes him cognizant of the terms on which it is done, so that there is no dispute about them: but that does not apply to a party who afterwards becomes an attorney. [Rolfe, B. When the action is brought, the defendant does understand the terms.] The case of *Ford v. Maxwell* (2 H. Bl. 589) is undoubtedly a decision against the defendant, but it may be doubted whether it was well decided, and it does not appear to be warranted by the terms of the statute. [Parke, B. As soon as the defendant was made an attorney, the bill became due from one attorney to another.]

Lush, contra, was stopped by the Court.

LORD ABINGER, C. B. I think the case is within the words of the statute. The Court of Common Pleas have already construed it so, and I see no reason why we should construe it differently.

PARKE, B. It is enough to say that the point has been already considered, and that the statute has been construed to apply to the case of a person who becomes an attorney after the business is done. The defendant knows well enough what he has to pay upon the bill: it is not the case of an inexperienced person.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

[378] PARBERRY v. NEWNHAM. NEWNHAM v. PARBERRY. Exch. of Pleas. Jan. 20, 1841.—The Court has power, under the stat. 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so.

[S. C. 9 Dowl. P. C. 288; 10 L. J. Ex. 169; 5 Jur. 175.]

These causes were referred to arbitration under an order of Tindal, C. J., (which was afterwards made a rule of Court), "so as the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or any or either of them, if they should require the same, on or before the 27th day of May, 1840, or on or before such further or ulterior day as the arbitrator should from time to time appoint, and signify in writing under his hand on the said order." The arbitrator proceeded with the reference, and held several meetings; but before the cases were brought to a conclusion, the time limited in the order of reference had expired, without the arbitrator's having made any indorsement on the order enlarging it. No application was made to him by either of the parties to enlarge the time; but when he was about to make his award, the plaintiff objected that his authority was at an end. It appeared also, that, after the time had expired, the defendant's attorney informed the plaintiff's attorney of the circumstance, when the latter answered—"Very well, I suppose the time can be enlarged by a Judge's order:" and both parties afterwards attended meetings before the arbitrator.

In Michaelmas Term, Gaselee, Serjt., obtained a rule to shew cause why the time for making the award should not be enlarged until the first day of Hilary Term. In the same term,

Sir F. Pollock and Macaulay shewed cause. The question is, whether under the circumstances of this case the Court have power to enlarge the time for making the award, under the stat. 3 & 4 Will. 4, c. 42, s. 39, which enacts, "that the power and authority of any arbitrator [379] or umpire appointed by or in pursuance of any rule of Court or Judge's order, or order of Nisi Prius, in any action now brought or which

shall hereafter be brought, &c., shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge: and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award." That enactment appears to give the Court power only in cases where there has been an attempt to revoke the submission. Its object was, that if the arbitrator were disposed to assist either party by not making his award, he should not have power to do so, but should be compellable to proceed. The words "such arbitrator" mean the arbitrator who has been required to proceed with the reference notwithstanding the revocation. In *Burley v. Stephens* (1 M. & W. 156), this Court intimated an opinion that the statute was not so restricted, but extended to all cases of arbitration falling within the commencing words of the clause: but the observation of the Court in that respect was not necessary to the decision of the case. In a subsequent case of *Doe d. Jones v. Powell* (7 Dowl. P. C. 539), Patteson, J., expressed a contrary opinion. His Lordship, referring to the clause which gives the Court power to enlarge the time, says, "That means rather that the Court may enlarge the time, where no power is given to the arbitrator to do so; if there is such a power, it is for him to do it; but I doubt if the Court would do it in a case where the parties, or the arbitrator, will not consent to proceed with the reference." [Parke, B. He does not express any opinion that the clause is [380] not general, or that it is confined to cases in which the parties have attempted to revoke the submission.] The learned Judge thought that where power is given to the arbitrator to enlarge the time, and he fails to do so, the Court had no power to do it in his stead. In *Potter v. Newman* (2 C. M. & R. 742), it was undoubtedly decided that the clause was not so limited as has been suggested. But this case goes much further: because here the time is already extinct; and it is a misapplication of language to speak of enlarging it. If the Court should now interfere, it is granting a new term: they cannot enlarge that which is altogether gone. This is in effect asking the Court to make a new submission.

Cresswell and Gaselee, Serjts., contra. The Court have now power, under the statute, to enlarge the time for making the award. It is conceded that they would have authority to do so, if there had been an attempt at revocation by one party; and there is no reason why an equal power should not exist, when both parties have been willing to proceed. *Burley v. Stephens* and *Potter v. Newman* are sufficient authorities to shew that the clause in question applies to all cases where the parties have agreed to submit themselves to the Court. But it is said the authority of the Court cannot be applied, where the time originally limited has already expired. But an order of reference does not become a nullity by the time limited for making the award having been allowed to expire: *Hall v. Rouse* (4 M. & W. 24). There, by an order of Nisi Prius, a verdict was entered for the plaintiff, subject to a reference. The plaintiff's attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired, and on the parties afterwards meeting before the arbitrator, the defendant refused to proceed [381] with the reference: whereupon the plaintiff, without making any application to the Court, took the cause down again to trial, and again obtained a verdict. The Court held, that this latter trial and verdict were irregular, the first verdict not having been in any way got rid of. In that case Parke, B., says—"Now, although the time have expired, it may be enlarged on application to the Court under the 3 & 4 Will. 4, c. 42, s. 39; and if you can go on with the reference, it is difficult to see how the verdict can be got rid of unless by the plaintiff's consent, or by some waiver." If any other construction were adopted, the statute would virtually be rendered nugatory. It was the manifest intention of the legislature that the reference should not be rendered unavailable by any such accidental omission as this. The word "enlarge" may well be construed "extend." Besides, the Court have power "from time to time" to enlarge the term: that cannot, in strictness, apply to an enlargement of the original term only. The time for a sheriff's returning a writ is often enlarged, after the original time has expired. [Parke, B. It would be seldom that a case could be made out for enlargement, if it must be done before the time has expired: it is not until it is just expiring that you can see symptoms of its not being about to be enlarged by the arbitrator; and you

may not be able, at all events, to get the rule absolute in time.] Nor, indeed, can the parties know that the arbitrator has not enlarged it. [Parke, B. You have still to contend with the judgment of my Brother Patteson, that the act does not apply to cases where the arbitrator has power to enlarge the time if he thinks fit.] Surely the purpose of the act is to compel the arbitrator to go on; and to put the Court, whenever it becomes necessary, in the same situation as the parties themselves intended to put the arbitrator.

But further, the facts, as disclosed on the affidavits, amounted in effect to a consent to enlarge the time. The [382] plaintiff's attorney, when made aware of the difficulty, said, that an application might be made to the Court; and he went on subsequently with the reference. There was, in substance, an enlargement of the time by consent of the parties: *Hallett v. Hallett* (5 M. & W. 25).

Cur. adv. vult.

The judgment of the Court was now (Jan. 20) delivered by

LORD ABINGER, C. B., who said:—The Court have considered this case, and have come to the conclusion that they have still the power, under the act of Parliament, to enlarge the time for making the award; and we have accordingly given directions to the officer that a rule shall be drawn up for enlarging the time until the first day of Easter Term; the time mentioned in this rule having expired while the case has been under the consideration of the Court.

Rule accordingly.

DOE D. RICHARD ROBERTS v. JOHN ROBERTS AND OTHERS. Exch. of Pleas. Jan. 20, 1841.—A testator, after directing that all his debts and funeral expenses should be paid by his executors thereafter named, devised to A. a particular farm, without words of limitation, and other farms to B., C., and D., respectively, in the same terms; and appointed A. and B. joint executors and residuary legatees of his will:—Held, that A. took a life estate only in the farm devised to her.

[S. C. 10 L. J. Ex. 140.]

This was an action of ejectment, brought to recover the possession of a farm called Tyddynsion, in the parish of Abereirch, in the county of Carnarvon; and issue having been joined, by the consent of the attorneys and parties on both sides, and by a Judge's order, the following case was stated for the opinion of this Court:—

[383] Robert Roberts, the testator hereinafter named, being seised in fee of the hereditaments and premises hereinbefore mentioned, on the 23rd day of September, 1805, duly made and published his last will and testament in writing, executed and attested so as to pass real estates, as follows:—

"In the name of God, amen. I, Robert Roberts of &c., do make, publish, and declare this as and for my last will and testament, in manner following, that is to say: In the first place, I will and direct that all my just debts and funeral expenses be fully paid by my executors hereinafter named. [The will then bequeathed several pecuniary and specific legacies, and proceeded thus.] I give, devise, and bequeath to my son Morris Roberts, the farm commonly called and known by the name of New York, in the parish of Llangian, and also the sum of £30, and also four ounces (a) of the sloop or vessel called the 'Cambria,' whereof John Roberts is the captain. I give, devise, and bequeath to my son Robert Roberts, the farm commonly called or known by the name of Tyn-y-flynnon, in the parish of Llangian, and also the sum of £30, and also four ounces of the said sloop or vessel called the 'Cambria.' I give, devise, and bequeath to my son William Roberts, the farm commonly called and known by the name of Dyufre, in the parish of Aberdaron. I give, devise, and bequeath to my daughter Elizabeth Roberts, the farm commonly called and known by the name of Tyddynsion, in the parish of Abereirch [The will then contained further bequests of pecuniary legacies, and concluded thus:] And I do hereby nominate, constitute, and appoint my son William Roberts, and my daughter Elizabeth Roberts, joint executors and residuary legatees of this my last will and testament," &c.

The testator's said daughter Elizabeth Roberts, to [384] whom the said tenement

(a) That is, $\frac{1}{16}$ th shares.

called Tyddynsion was devised in the manner in the said will mentioned, died in January, 1834, leaving a husband and several children her surviving, and having received the rents and profits of the said premises, under the said devise, until her death. The lessor of the plaintiff is the eldest son and heir-at-law of the said Robert Roberts the testator. The defendants are the occupying tenants of the said premises.

The question for the opinion of the Court is, whether the said testator, by his will, disposed of the fee-simple and inheritance in the said tenement called Tyddynsion, or of an estate for life only, to his daughter the said Elizabeth Roberts. If the Court shall be of opinion that the fee-simple estate of the testator passed either by the specific devise to his daughter, the said Elizabeth Roberts, or by the residuary clause, coupled with the charge on the executors to pay the testator's debts, or otherwise by the said will, judgment of *nolle prosequi* shall be entered against the plaintiff: but if the Court shall be of opinion that the reversion of and in the said tenement called Tyddynsion, expectant on the decease of the said Elizabeth Roberts, was undisposed of by the said will, then judgment shall be entered against the defendants by confession, for 1s. damages.

R. V. Richards, for the lessor of the plaintiff. The question is, whether Elizabeth Roberts, under this will, took an estate in fee, or for life only, in the farm called Tyddynsion. There are no words in the will to pass the estate in fee. It is clear that it did not pass by the specific devise, which has no words of limitation. The direction to the executors to pay debts and funeral expenses, being no more than the law itself would imply, will not enlarge the estate into a fee. If, indeed, the devise had been to Elizabeth Roberts, "she paying the debts and funeral expenses," so that they were a charge on her [385] as devisee, the case would be different. And the clause whereby she is appointed an executor and residuary legatee, carries the case no further. The last words are fully satisfied by applying them to personal property, of which it appears by the will that the testator died possessed.

Welsby, for the defendants. It must be admitted, that by the devise of Tyddynsion itself a life estate only would pass, the word "farm" being obviously descriptive only of the local character of the property. But it is submitted that the charge on the executors, coupled with the residuary clause, sufficiently shew, that in order to effectuate the general intention of the testator, a fee must be held to have passed to Elizabeth Roberts. In the construction of wills, the precise order of the clauses will be disregarded, in order to give effect to the intention pervading the whole. Here it seems clear that the testator meant to dispose of all his property, as well real as personal. The will may therefore be read as if it ran thus:—"I appoint William Roberts and Elizabeth Roberts my executors and residuary legatees; and direct that all my debts and funeral expenses be paid by them." That is equivalent to a charge on them in their joint character of executors and residuary legatees. The word "legatee" will be applied, where it is necessary to the reasonable construction of the will, to mean a devisee of real estate.^(a) There are several cases like the present, although not express authorities for the defendants. In *Doe d. Willey v. Holmes* (8 T. R. 1), the testator devised his house and furniture to A., whom he made executrix, she paying all his debts and legacies: and it was held that A. took a fee in the realty. In *Pitman v. Stevens* (15 East, 505), the words of the will were—"I give and be-[386]-queath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I appoint P. my residuary legatee and executor." The will expressed also the testator's desire that P., "his legatee and executor," should be kind to another relation, and do something handsome for him at his death. It was held that P. took an estate in fee in the real estate of the testator. In *Doe d. Penwarden v. Gilbert* (3 Brod. & B. 85), the will commenced thus:—"As for my temporal estate and effects, I give and dispose of the same in manner following." The will then bequeathed a pecuniary legacy, and devised a particular estate to J. G., without words of limitation; and then proceeded—"and all the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to the said J. G., whom I make sole executor of this my will." It was held that, by force of the latter clause, J. G. took a fee in the estate specifically devised to him. *Doe d. Knott v. Lawton* (4 Bing. N. C. 455; 6 Scott, 303) was also cited.

Richards, in reply, distinguished the cases cited, on the ground that in *Doe v.*

(a) *Hardacre v. Nash*, 5 T. R. 715; *Pitman v. Stevens*, 15 East, 505.

Holmes there was an express charge on the devisee as such; and that in *Pitman v. Stevens* and *Doe v. Gilbert*, the testator in terms expressed his intention of disposing of all his estate, both real and personal. *Doe v. Lawton* proceeded on the effect of the word estate. Here there was no charge on the devisee in that capacity, and nothing to shew that the testator meant the residuary clause to be applicable to real estate.

LORD ABINGER, C. B. I have little doubt that the testator thought he had given a fee by each of the several devises contained in his will: if so, he could not intend to [387] give the fee by the residuary clause. And upon the whole will taken together, I do not think we can infer that he intended to devise the fee by the residuary clause. The cases cited for the defendants have been sufficiently distinguished by Mr. Richards. There is another case, of *Doe d. Ashby v. Baines* (2 C. M. & R. 23), which has not been cited, that is very like the present, and bears strongly in favour of the lessor of the plaintiff. I am of opinion, therefore, that the plaintiff is entitled to our judgment.

PARKE, B. Unless we can see, upon a reasonable construction of the words of the will, enough to take away the estate from the heir at law, it must remain in him. It is very properly conceded, on the part of the defendants, that the devising clause itself is not sufficient to pass the fee; but reliance is placed, first, upon the charge of debts and funeral expenses; but that is only what the law would imply without any such words. Then the only other words relied upon are the concluding words of the will, by which the testator appoints William and Elizabeth Roberts joint executors and residuary legatees of his will. These are words confessedly applying, in their ordinary sense, to personalty only; and I think there is nothing in this will to apply them more largely. In *Pitman v. Stevens*, the words were much stronger: the will began by expressing the testator's intention to dispose of "all that he should die possessed of, real and personal, of what nature and kind soever," and those words were immediately followed by the appointment of Captain Preston as residuary legatee and executor. The whole will, taken together, clearly shewed that the testator meant him to be residuary devisee of all he died possessed of. In *Doe v. Gilbert*, again, the testator first disposed of "all his temporal estate and effects," and then appointed the defend[388]-ant sole executor and residuary legatee. The words "temporal estate," being sufficient to include his real estate, were coupled with the residuary clause, and clearly evinced his intention to make the defendant residuary legatee of all his real estate. The case last cited, *Doe d. Knott v. Lawton*, is no authority for the defendants. On the whole, I am of opinion that the residuary clause applies to personalty only, and that the heir at law is not disinherited.

ROLFE, B. I am of the same opinion. No doubt the real intention of the testator was that which has been suggested by my Lord. But as the words of the devise themselves do not carry more than a life estate, the question is, are there any other words in the will which have that effect? Now the first clause, directing the payment by the executors of debts and funeral expenses, is nothing more than the law would imply: they are not charges of that description which have been held to give a fee, on the ground that otherwise the executors would be unable to pay them. And I think it is equally clear that the concluding clause is not sufficient to give an estate in fee to Elizabeth Roberts. The testator never could intend to give separate life-estates to his two children, and then to make them joint residuary legatees of his estates in fee.

Judgment for the plaintiff.

[389] SCHLETTER v. COHEN. Exch. of Pleas. Jan. 20, 1841.—Where an order is obtained for a *capias* under the 1 & 2 Vict. c. 110, s. 3, before the suing out of the writ of summons, the affidavit on which it is applied for need not be entitled in the cause.

[S. C. 9 Dowl. P. C. 277; 10 L. J. Ex. 99; 5 Jur. 74.]

Ogle moved for a rule to shew cause why an order of Rolfe, B., for the issuing of a *capias* against the defendant, under the 1 & 2 Vict. c. 110, s. 3, should not be rescinded. One of his objections was, that the affidavit on which the order was obtained, (which was sworn before the suing out of the writ of summons), was not

entitled in the cause: and he stated that it had been ruled by several of the Judges at chambers that this was an irregularity.

LORD ABINGER, C. B. That is no objection. There was some little doubt on the matter at first, because of the word "plaintiff" in the statute; but the point came under the consideration of the Judges, and they came to the conclusion that it ought to have the same meaning as in the stat. 12 Geo. 1, c. 29, where the same word is used to signify a party who intends to become plaintiff, and with that view makes an affidavit to hold to bail.

PARKE, B. If this objection be a good one, I have made hundreds of orders that are erroneous. It is otherwise where a writ has been issued, because then there is a cause in Court; but when no writ has yet been sued out, the affidavit need not be entitled in the cause; and it is quite clear that an affidavit to hold to bail under the statute may be made before a writ is sued out. The contrary doctrine would be attended with much inconvenience: parties residing at a distance could hardly ever arrest the defendant, because they must first send up to London to sue out the writ, and then entitle and swear the affidavit.

GURNEY, B., concurred.

Rule refused.

[390] IN THE MATTER OF THE ESTATE AND EFFECTS OF PHILIP COALES, Deceased. Exch. of Pleas. Jan. 22, 1841.—A., a British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate; and appointed an English executor. The executor executed a power of attorney to S. in India, who thereupon obtained letters of administration with the will annexed in India, under which he received the amount of the notes, and remitted to the executor in England, who paid it over to the legatees:—Held, that legacy duty was payable thereon.

[S. C. 10 L. J. Ex. 207.]

In this case the usual order had been obtained under the stat. 42 Geo. 3, c. 99, s. 2, calling upon the executors of John Dyneley, deceased, who was the surviving executor of Philip Coales, deceased, to shew cause why they should not deliver an account of the legacies and property of the said Philip Coales, and pay the legacy duties.

Affidavits were filed in opposition to the rule, which stated, that the said Philip Coales, at the time of his decease, was possessed of certain notes called government notes of the East India Company, issued by the directors at their public treasury at Fort William, in Bengal, which were purchased by him while resident in the East Indies; that these notes were not redeemable or payable by the East India Company until in or after the year 1836; and that the amount of them, when so payable, could not have been received by the said John Dyneley, as executor of the said Philip Coales, under the probate granted by the Prerogative Court of Canterbury, nor without his going himself to India, and procuring a probate to be granted by the Supreme Court of Judicature at Fort William, or without letters of administration with the will annexed being granted by that Court. That in the year 1836, letters of administration within the province and jurisdiction of the Supreme Court, to be administered with the will of the said Philip Coales annexed, were granted by the Supreme Court to William Speir, of Fort William, merchant, (acting under a power of attorney from Mr. Dyneley); and he, under and by virtue of such letters of administration, received the proceeds of the said government notes at Fort William; and that, excepting the money so received by him as such administrator, the account already delivered [391] by the executor contained a full and true account of all the legacies and property to be administered under the will. The affidavit stated also, that an account had subsequently been delivered by the executors to the commissioners, under protest, of all the property of the deceased received from India (the produce of the notes), and that no other personal estate was outstanding; but that they had declined paying legacy duty thereon, being advised that it was not legally chargeable. The deponent also stated, that he had been informed and verily believed that the said Philip Coales

was not a native of Great Britain, nor of any place within the dominions of the British crown.

R. V. Richards shewed cause. The question is, whether under the circumstances disclosed in these affidavits, that part of the estate of Mr. Coales, which was at the time of his death in India, and was not recoverable under a probate from the Prerogative Court here, is liable to legacy duty. This application is made under the stat. 36 Geo. 3, c. 32, the second section of which imposes the duty on "every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, out of the personal estate of the person so dying," &c. Then the 7th section defines what shall be deemed a legacy, viz.:—"every gift by any will or testamentary instrument, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, shall be deemed and taken to be a legacy within the meaning of this act, whether the same shall be given by way of annuity or in any other form," &c. &c. This act, has of late years received a more restricted construction than formerly, but among [392] the decided cases on this subject, there is none which directly bears upon the facts now before the Court. This is the case of a testator who was not a native of Great Britain, or of any place within the British dominions. [Gurney, B. I presume he was domiciled in England.] No doubt he died in England; and it must be assumed, although that does not expressly appear upon the affidavits, that though not a native of this country, he was domiciled here. But although that was so, this property was so situated that the executor in England had no power or control over it in his character of executor; and although Mr. Spier, having received it as administrator in India, remitted it to the executor here, that was altogether unnecessary; he had entire control and dominion over the property, and might have remitted it directly to the legatees: and the mere circumstance of the money having been remitted through the executor here, as the channel of communication, can have no effect on the liability to legacy duty.

In the case of the *Attorney-General v. Cockerell* (1 Price, 165), legacies bequeathed by a British subject, resident in the East Indies, out of his personal estate, to persons living in England, were held to be liable to duty, if the executor proved the will in England and paid the legacies here, notwithstanding the testator resided and possessed his property in India, resided there, made his will there, and died there; and although the executors were in India at the time of their appointment, and the will was originally proved there. That case, however, with others of the same class, (b) has been overruled; and it is now clear that in the case of a testator dying under the circumstances mentioned in the *Attorney-General v. Cockerell*, although the will be afterwards proved in England, legacy duty is not [393] payable: *Attorney-General v. Jackson* (2 C. & J. 101; 8 Bligh, 15), *Arnold v. Arnold* (2 Myl. & Cr. 256). In that case the Lord Chancellor says—"The fact relied upon as subjecting the legacies to the duty, is that the property was remitted from India to England, and administered by the executors in this country. This was an unnecessary proceeding; it may be said, indeed, to be by mere accident that such a course was adopted, for it is obvious that, the executors in India having paid all the debts in India, and the executors in England having paid all the debts in this country, the former might, according to all the authorities, have avoided the question by remitting the legacies direct to each legatee; or, instead of allowing them to pass through the hands of the personal representatives in this country, might have remitted them to an agent of their own, with directions to pay over the money to the person entitled." The same observations apply to the present case. [Parke, B. Here Mr. Spier was acting under a power of attorney from Mr. Dyneley, and was merely his agent.] There was nothing to have compelled the Court to grant the administration to the party named by the executor; but they having so granted it, he has all the duties of a regular administrator personally imposed upon him. It is an absolute, not a qualified, grant of administration to Mr. Spier. The judgment of the Court in *Arnold v. Arnold* proceeds upon the ground, not that the testator had been domiciled in India, but that the property was in India, and was not tangible by the executor here as an executor, but that there was another party in India who had the absolute control over the property there, and over whom the ecclesiastical

(b) *Attorney-General v. Beatson*, 7 Price, 560; *Logan v. Fairlie*, 2 Sim. & Stu. 284.

Courts here could have no jurisdiction. His Lordship says:—"When the act speaks of 'any will of any person,' and of the legacies being payable out of the personal estate, it must, I think, [394] be considered as speaking of persons, and wills, and personal estates in this country, that being the limit of the sphere of the enactment. It is clearly not applicable to the East Indies: it is applicable to this country. If there had been no property in this country, it would not have been necessary to prove the will here, quoad the property in India." In that case the testator certainly died in India; in the present case, not being a native of this country, he died here: but the judgment of the Lord Chancellor appears to proceed independently of any distinction in that respect, and upon the ground that this is property over which the executor in England had no control. In the case *In re Ewin* (1 Cr. & J. 151; 1 Tyr. 92), where a testator, domiciled in England, died possessed of property in foreign funds payable abroad, but it appeared that the stock had been transferred into the name of the executor in England, and he had dealt with and transferred the dividends to the legatees, the duty was held to be payable. But there the executor in England received the property without proving the will abroad, and had the means of controlling the property in his character of executor here. Here there was an absence of all power in the executor in England to deal with this property, which was altogether under the control of the administrator in India. Upon the whole, therefore, it is submitted that legacy duty is not payable upon the proceeds of these notes, and that a sufficient account has been delivered by the executors.

The Attorney-General and Waddington, contra, were stopped by the Court.

PARKE, B. It seems to me, that upon the authority of the very case upon which Mr. Richards relies, Mr. Dyneley, as the executor, was liable to pay his legacy duty: because [395] this is a case, not merely of the payment of the legacy by an English executor in England, which, according to the case of the *Attorney-General v. Bealson*, would have been sufficient to make the legacy duty payable. That authority cannot certainly be considered as any longer binding, after what was decided by the Lord Chancellor in *Arnold v. Arnold*; but in *Arnold v. Arnold* it appears clearly to have been the Lord Chancellor's opinion, that if the testator had been such a person as is described in the act of Parliament, the duty would have been payable; and the ground upon which it was held not to be payable in that case was, that the testator was not domiciled in England, but in India; and that the will of the testator was made in India. But in this case, not only is the legacy payable in England by Mr. Dyneley, but the will is the will of a British subject; at least, if that be material, we ought to assume it to be so, inasmuch as the contrary has not been proved: at all events, it is the will of a person domiciled in England; and according to the case of *In re Ewin*, a person so domiciled fills the character of "a person" described in the act of Parliament. Therefore we have in this case all that the Lord Chancellor, in the case of *Arnold v. Arnold*, seems to think necessary in order to make the duty payable. We have first the fact that the testator was a British subject, or a person domiciled in England; and next, that the will was made in England, and administered in England by an English executor. It seems to me, therefore, that there is no doubt, even according to the authority of the case which was relied upon by Mr. Richards as overruling former decisions of this Court, that the legacy duty is payable in this case.

ALDERSON, B. I am of the same opinion. In the case of *Arnold v. Arnold*, the Lord Chancellor puts his judgment upon the ground, that when the act speaks of "any will of any person," it must mean the will of a testator in [396] this country, and a will in this country. In this case the existence of a will in this country is proved, and the money has been remitted to the executor under the will, in this country, to be paid by him to the legatees under the will. It seems to me that the case falls within the authority of *Arnold v. Arnold*.

GURNEY, B. I cannot see that the circumstance of Mr. Speir being employed to remit the funds from India makes any difference in the case: he acted under a power from the executor Mr. Dyneley; he was his agent, receiving authority from him, and transmitting the funds to him as the executor in this country.

ROLFE, B. I am quite of the same opinion. I think, so far from the funds being received by Mr. Speir as executor, that Mr. Dyneley was not compelled to send out a power of attorney to him to administer the assets, although he would have been compelled to send out such a power as would have enabled his agent to remit the funds. There may be cases of difficulty which may sometimes arise, of a foreigner abroad

having property here : but this is a case which appears to me to be free from any doubt whatever.

Rule absolute.

WESTON v. WRIGHT. Exch. of Pleas. Jan. 22, 1841.—Where A. the charterer of a vessel, by the charterparty, agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner ; and, on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash :—Held, that although it was not shewn that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty.

[S. C. 10 L. J. Ex. 329 ; 5 Jur. 197.]

Assumpsit for goods sold and delivered, money lent, money paid, and on an account stated. Plea, non assump[397]-sit. At the trial before Rolfe, B., at the Middlesex Sittings in this term, it appeared that the plaintiff had chartered a vessel belonging to the defendant, bound for the African coast, and the charterparty contained an express stipulation, that on the arrival of the ship at Sierra Leone, the plaintiff would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the defendant. On the arrival of the ship at that port, in August 1839, the plaintiff's agent there supplied her with goods, and also paid certain demands made upon the master in respect of the vessel by persons resident there ; but he did not advance any actual cash. There was no evidence to shew whether any bill had been drawn by the master for the amount. It was objected for the defendant, that the plaintiff ought to have sued upon the special agreement contained in the charterparty, and could not recover in this general form of action. The learned Judge reserved the point, and a verdict passed for the plaintiff, damages 218l. 10s.

Jervis now moved to enter a nonsuit, pursuant to leave reserved at the trial. The plaintiff ought to have sued on the special contract. It is clear this was not a case of goods sold and delivered, to be paid for on request ; nor was it a case of money paid or money lent. The contract was to supply cash, to be repaid in a particular manner, by bills at a certain date. It is perfectly consistent with the evidence, that a bill was drawn by the master in respect of this transaction, and remitted to and accepted by the defendant. If the plaintiff had produced the bill, and shewn that the time for which it was drawn had expired, or that it had not been honoured, the case would be different. But further, there was no advance in cash at all, and the plaintiff, therefore, did not come within the terms of the agreement. [Parke, B. The plaintiff's title to recover for goods sold depends upon the general authority of the [398] master to contract for necessaries for the ship.] That would apply, if there had been no special provision to the contrary ; but as there was, the defendant can only be sued in the terms of the engagement contained in the charterparty, for cash advanced thereon.

PARKE, B. I think there should be no rule. With respect to the money demands in the declaration, it appears, that although, according to the agreement, the money was to be paid by bills to be drawn by the captain upon the owner, yet no time was specified for which credit was to be given. It must, however, have meant bills payable at sight, or at all events within a reasonable time : at the expiration of that time, the defendant becomes indebted in so much money payable on request. Then as to the count for goods sold, the defendant stands in the same position as an ordinary merchant, to whom goods have been bonâ fide supplied for the service of his ship, and for which the plaintiff may recover, unless he has restrained himself by the charterparty from so doing : and I am clearly of opinion that he has not. It contains an affirmative provision, by which the plaintiff is bound to supply money to the

master, but that is perfectly consistent with the general authority of the master to pledge the credit of his owner for necessities to the ship.

ALDERSON, B. By the agreement contained in the charterparty, the plaintiff has undertaken that the master shall have money in hand if he require it, and the right himself to go into the market and get goods, should they be needed. But that engagement is perfectly consistent with the general right which the master has by law, of pledging the credit of his owner for necessities supplied to the ship, and both may well stand together. As to the money advanced to others, for the protection of the ship, it must be considered as advanced to the owner; [399] or if not, it may be considered as a necessary supplied to the master; and we have recently decided, that when so advanced, it may be recovered against the owner, in the same manner as in the case of a supply of goods.(a)

GURNEY, B., and ROLFE, B., concurred.
Rule refused.

ROBERTS v. HUGHES. Exch. of Pleas. Jan. 25th, 1841.—Affidavits of jurors as to what took place in open court on the delivery of their verdict, are receivable.

[S. C. 10 L. J. Ex. 337.]

This was an action tried before the under-sheriff of Merionethshire, in which the plaintiff had a verdict for 15l. 6s. Jarvis had obtained a rule nisi to enter a verdict for the defendant, or for a new trial, on the ground that the verdict had been entered for the plaintiff by a mistake of the under-sheriff.

R. F. Richards, in shewing cause, proposed to read an affidavit of one of the jurors, as to what had passed on the delivery of their verdict.

Jervis objected: but

Per Curiam. The rule does not exclude jurymen from swearing to what took place in open Court, but only as to what took place in their private room, or the grounds on which they found their verdict.

The affidavit was accordingly read: and ultimately the rule was made absolute for a new trial.

[400] MORGAN v. THORNE. Exch. of Pleas. Jan. 12th, 1841.—On the 27th of June, 1840, a plaintiff in trespass obtained a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. The Judge, on being applied to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, declined doing so until the motion for a nonsuit should have been disposed of. On the 3rd of July following, the statute 3 & 4 Viet. c. 24, came into operation. No motion for a nonsuit having been made, the Judge, on the 9th of November, granted the certificate:—Held, that the certificate was null and void.—The wife of a minor having committed adultery whilst her husband was abroad in the East Indies, the father procured himself to be appointed prochein amy, and commenced an action for crim. con. in his son's name, without his knowledge or authority, and recovered a verdict. On motion to set aside the proceedings, on the ground of there being no authority from the son to bring the action:—Held, first, that as the defendant had reason to believe long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, and that the application was now too late. Secondly, that no authority from the son was necessary to enable the father to sue as prochein amy; and there being nothing to shew that he was not properly appointed prochein amy, that it must be assumed to have been properly done, and that the son would be bound by the judgment in this action.

[S. C. 9 Dowl. P. C. 226; 10 L. J. Ex. 125. 5 Jur. 8, 294. Followed, *Butcher v. Henderson*, 1868, L. R. 3 Q. B. 335.]

This was an action of trespass brought by the plaintiff, as prochein amy, against the defendant, for criminal conversation with his son's wife. The cause was tried

(a) *Arthur v. Barton*, 6 M. & W. 138.

before Lord Abinger, C. B., on the 27th of June last, at the Middlesex Sittings after Trinity Term, when the plaintiff recovered a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. Upon the verdict being returned, the Lord Chief Baron was applied to to certify to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2, but he declined to do so until the motion for a nonsuit had been disposed of. On the 3rd of July following, the statute 3 & 4 Vict. c. 24, came into operation. That statute, after reciting the 43 Eliz. c. 6, and 22 & 23 Car. 2, by sect. 1 enacts, "that the said recited act of the 43rd of Elizabeth, so far as it relates to costs in actions of trespass and trespass on the case, and so much of the 22 & 23 Car. 2 as relates to costs in personal actions, be and the same are hereby repealed." And it enacts by sect. 2, "that if the plaintiff, in any action of trespass or of trespass on the case, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any [401] costs whatever, whether it should be given upon any issue or issues tried, or judgment shall have passed by default, unless the Judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious." No motion for a nonsuit having been made, his Lordship, on the 9th of November, granted the certificate prayed for. In Michaelmas Term, Bayley obtained a rule calling upon the defendant to shew cause why the Master should not tax the plaintiff his costs, notwithstanding the certificate: against which

C. C. Jones now shewed cause. The stat. 3 & 4 Vict. c. 24, did not come into operation until after the cause was tried and the certificate was applied for; and therefore the stat. 43 Eliz. c. 6, was still in force. The certificate, when granted, must have a retrospective operation, and must be considered as granted at the time of the trial, and it is therefore effectual for the purpose of depriving the plaintiff of costs. [Parke, B. If the certificate were granted at any time before the costs were allowed by the Court, it would be sufficient under the statute of Elizabeth.]

Bayley, in support of the rule. The certificate was not granted until after the statute of Elizabeth had been repealed, and therefore the power given by that statute to deprive the plaintiff of costs did not exist after the statute 3 & 4 Vict. c. 24, came into operation. The effect of a repealing statute is correctly stated by Tindal, C. J., in *Kay v. Godwin* (6 Bing. 576; 4 M. & P. 341). His Lordship there says, "I take the [402] effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." This action was clearly not concluded whilst the 2nd section of the 43 Eliz. c. 6, was an existing law, as no judgment has yet been signed. [Parke, B. The case of *Charrington v. Meatheringham* (2 M. & W. 228) is an authority in point. There the plaintiff sued parish officers for an act done under 13 Geo. 3, c. 78 (which gave treble costs on a nonsuit, to parties sued for anything done in pursuance of that act), and was nonsuited at a trial which took place before the 5 & 6 Will 4, c. 50, which repealed the former statute, came into operation, but judgment was not signed until after; and this Court held that the defendants were not entitled to treble costs.]

Jones then applied for leave to move to enter a nonsuit, upon an affidavit stating that the defendant had abstained from doing so in the belief that the certificate would be granted if no motion were made. He contended, that if the certificate turned out to be of no avail, the defendant ought to be placed in the same situation as he would have been if the certificate had not been granted.

LORD ABINGER, C. B. If the certificate had been granted during the sittings, it would probably have been good, notwithstanding the 2nd section of the statute 43 Eliz. c. 6, has been repealed; because I should have thought the sittings might, for this purpose, be considered as one day. But the effect of this statute being entirely to repeal the 43 Eliz., and to take away every power which the Judges had under it, this certificate is void, and cannot operate to deprive the plaintiff of costs.

[403] PARKE, B. The former act having been repealed, the certificate is null and void.

The rest of the Court concurred.

Rule absolute.

On a subsequent day, a rule was obtained by Kelly, calling upon the plaintiff to shew cause why the proceedings in the action should not be set aside with costs, on the ground that the action had been brought by the father of the minor, as his prochein amy, without his consent or knowledge. It appeared, that at the time he was appointed prochein amy, the son was in India, and could know nothing of the proceedings instituted by his father.

Jan. 30.—Thesiger and Bayley shewed cause. First, this application was too late. The defendant had no right to wait until step after step had been taken in the cause, and the cause tried, and then seek to set the proceedings aside because the action was not authorized by the plaintiff. He ought to have applied to the Court within a reasonable time after he knew that the plaintiff was in India, and could have given no authority to bring the action: he was cognisant of that fact on the 29th of May last, and ought then to have applied to a Judge to stay or set aside the proceedings, and not to have allowed the plaintiff to go on and incur further expense. The application was therefore out of time. But, secondly, the objection on which the rule was granted cannot be sustained. There are a variety of cases in which an action may be brought by a father in the name of his child, without his consent, where from his tender age he is not competent to give authority for that purpose. Suppose the case of a personal injury [404] to a child, the action must of necessity be brought by the father or other next friend or relative of his own authority, otherwise the remedy would be wholly lost. For instance, if after such a marriage the son became a lunatic, and the wife committed adultery, and had a son by the adulterer, would not the father be entitled to interpose for the purpose of preventing the illegitimate issue from inheriting his estate? A prochein amy is liable for all the costs, he is not a competent witness for the plaintiff, his declarations are evidence for the defendant, and he is in almost all respects the real plaintiff on the record. In *Andrews v. Cradock* (1 Eq. Ca. Abr. 72), it is said—"Any one may bring a bill as prochein amy to an infant without his consent, because it is at his peril that he brings it to be answerable for the event; but none can bring a bill in the name of a feme covert as her prochein amy, without her consent; and if such a bill be brought, upon her affidavit of the matter it will be dismissed." There is no case where a prochein amy having been regularly appointed by the Court, the proceedings have been set aside because the son had given no authority to bring the action. But, at all events, if previous consent were necessary, a subsequent ratification of his father's act is equivalent to it, and would render his act valid; and there has been such a ratification in the present case. On the 1st of September, 1840, the son, being still in the East Indies, by deed, reciting that certain proceedings had been already had and taken on his behalf, ratified and confirmed the same, and appointed his father his proxy to appear to a suit in the Ecclesiastical Court. That was a sufficient acquiescence, if any were necessary. But the defendant should have objected to the appointment of the father as prochein amy by moving to set it aside, at least as soon as he knew, from his being at the [405] time in the East Indies, that the son's express authority could not have been obtained.

Kelly, in support of the rule. The legal principle on which the defendant has a right to call upon the Court to set aside the proceedings, has been lost sight of in the argument on the other side. That principle is, that if the action has been commenced in the name of a party, but without his authority or consent, although judgment be obtained by the plaintiff on the record, the party really entitled is not bound thereby, and may at any time bring a fresh action. [Parke, B. Have you any authority for that position, where a prochein amy has been appointed by the Court?] Perhaps not; but if the plaintiff came to England, there would be nothing to prevent him from bringing an action for crim. con., since the defendant could not set up the recovery in this action as a defence, as it was brought without the plaintiff's authority. [Alderson, B. Is it not clear that the appointment of a prochein amy is in the discretion of the Court, in the same way as the appointment of a guardian by the Court of Chancery? By the stat. Westm. 2, c. 15, "In every case in which persons within age may sue, it is ordered that if such minors be eloiigned, so that they are

less able to sue personally, their next friend shall be admitted to sue for them.”] If the prochein amy had been appointed by the Court with a full knowledge of the circumstances, the case might have been different. This is very different from the case put of a personal injury to a child; for if an infant be incapable of exercising any judgment or discretion in the matter, the Court would appoint a prochein amy for him, to prevent the remedy from being lost: but this action, from its very nature, implies an injury to the mind of the plaintiff, and shews that he is a person capable of exercising a judgment and discretion; and when he returns to this country, he may disavow the act of his father, and commence a fresh action. [406] [Alderson, B. In Fitzh. N. B. 27, (J.), it is said, “A man shall not answer as guardian unto an infant who is plaintiff or defendant without a warrant, but as prochein amy to an infant he shall sue an action without warrant.” And it is added, “The infant shall not remove his guardian, nor disavow an action sued for him by prochein amy.” Parke, B. That authority shews, that if a second action were brought, the appointment of a prochein amy, and the recovery in the former action, would be an answer to the second, as long, at all events, as the appointment of prochein amy remains unrevoked. Whether the case is that of a guardian or prochein amy, the principle is the same when once they are admitted by the Court: *Simpson v. Jackson* (Cro. Jac. 640). Alderson, B. In 2 Inst. 261, Lord Coke, in his commentary on the stat. of Westminster the 1st, says, “The names of guardian and prochein amy are sometimes taken the one for the other; because the guardian and prochein amy are oftentimes all one, as the guardian in socage is also prochein amy, &c. And now as well the guardian as the prochein amy are allowed by the Judges to be some of the officers of the Court, and both in respect of their place and skill, are in truth the best prochein amys for the good and furtherance of the infant's cause.”] The question whether the appointment be valid or not, depends upon the circumstances under which the order has been made; and if it turns out that it has been made upon a suggestion of that which is false, or upon a suppression of the truth, the Court will set it aside. It is true this is not an application on behalf of the infant; but he may apply immediately on his return, and if the Court did set aside the appointment, then there would be nothing to prevent him from bringing a fresh action. If the proceedings are in such a state that the plaintiff may put himself in a situation to commence another ac-[407]-tion, it is within the principle of the case of *Robson v. Eaton* (1 T. R. 62). There it was held, that where a party paid a debt to the attorney of a person suing in the name of the creditor, but without the creditor's authority, the debtor was compellable to pay the creditor again. That case is like the present, as the same thing might happen here; the only difference is, that here the plaintiff, instead of suing by attorney, is suing by prochein amy. [Parke, B. That makes all the difference: an attorney is appointed by the party; but a prochein amy is appointed by the Court.] This order should not have been made without a petition on the part of the infant; and if it was, then he is not bound by it, and is remitted to his original rights. As to the delay, if the defendant is entitled to set aside the proceedings, his coming too late can only be a question of costs. But there has been no improper delay in this case; for the fact stated in the affidavit, that the defendant knew the plaintiff was in India, was consistent with a belief on his part that the father had written to his son and obtained his authority: and the affidavits in answer state that the defendant did not know, until very recently, that the action was brought without the son's authority.

PARKE, B. I am of opinion that this rule ought to be discharged. If, in order to give the defendant in this case a valid discharge from the payment of the sum recovered, it were necessary to prove this action either to have been commenced with the authority of the plaintiff, or to have received a subsequent ratification by him, no such authority or ratification has been shewn in this case, nor has it been shewn that he knew of the action at all. But still there would be great weight in the argument, that this objection, taken as it is in this stage of the cause, comes too late; for it appears that, on the 29th of May, the de-[408]-fendant had intimation of the above facts, which was sufficient to have put him on inquiring whether an authority had been given or not; and comparing the time when the adultery was charged to have been committed with the fact that the plaintiff was at that time in the East Indies, he might have had reason to suspect that no such authority had been given. But it seems to me, that the prochein amy in this case did not stand in need of any authority from the infant to sue in his name; nor can I distinguish it from any other case in which

this mode of suing is adopted. The actual form of the application made by the plaintiff to sue by his prochein amy has not been brought before us, but we must presume it to have been in the ordinary form; for if there had been either fraud or mistake in the transaction, the fact should have been made to appear by affidavit. Assuming, therefore, every thing to have been regularly done, then comes the objection made by Mr. Kelly, that if the defendant had paid the damages awarded by the jury, he might, on the plaintiff's coming of age, be compelled to pay them over again, on the ground that the discharge of the prochein amy was the discharge of a person who had no authority to give one; which is an objection applicable to every case where an infant sues by his prochein amy. The law knows of no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of attaining his majority. It appears perfectly clear that every prochein amy is to be considered as an officer of the Court, specially appointed by them to look after the interests of the infant, on whom the judgment in the action is consequently binding, and who cannot be allowed, on attaining his age, to commence fresh proceedings founded on the same cause of action; so that the defendant, in this and all similar cases, is perfectly safe in paying the damages recovered. Supposing there to have been [409] either fraud, or anything special in the case, to make it the ground of application to the Court, we will only say, that when the parties come forward to protect their own rights, we will deal with the case brought before us; but in a common and ordinary case like the present, there is no ground to call for our interference.

ALDERSON, B. I am of the same opinion. We have nothing to do at present with the question, whether the infant has appointed his prochein amy or not; nor is that a matter with which the defendant has anything to do; if he had, the same arguments might be urged in any case of an action brought in the name of a child of three years old, on whom an attack has been made, and on whom personal injury has been inflicted; such a child, it is manifest, cannot so much as know what an action is, much less give authority to institute one. The truth is, that cases of this nature fall within the equity of the statute of Westminster 1st, 3 Ed. 1, c. 48, which gives an infant the right to sue by his prochein amy against his guardian in chivalry, who shall have aliened any portion of the inheritance of the infant. By analogy to this, in all cases where a party cannot sue for himself, the Court employs a prochein amy as its officer to conduct the suit for him, and no appointment or subsequent confirmation by the party is requisite. It is, in fact, almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act on behalf of the infant. But even if it were requisite for the prochein amy to be appointed by the infant, it is clear that the objection to the want of such authority comes too late.

GURNEY, B., concurred.

ROLFE, B. If Mr. Kelly had succeeded in making out his proposition, then the recovery in this action would not [410] be a bar to another at the suit of the son. But he has not shewn that the father was not properly appointed prochein amy. He has likened the case to that of a party suing by attorney in the ordinary mode, and has referred to an authority to shew, that where an action is commenced against a debtor in the name of a creditor, without the authority of the latter, the debtor may be compelled to pay the money again. But the judgment in that case proceeded on the ground that the person represented on the record as the attorney of the creditor, had never in fact been appointed attorney: but here it is not shewn that the plaintiff has not been duly appointed prochein amy. If that had appeared, the cases would have been parallel.

Rule discharged.

JARVIS v. WILKINS. Exch. of Pleas. Jan. 12, 1841.—An instrument was in the following terms—"I undertake to pay to R. I. the sum of 6l. 4s. for a suit of, ordered by D. P.:"—Held, that it was not a promissory note; but good as a guarantee, as the consideration could be collected by necessary inference from the instrument itself.

[S. C. 10 L. J. Ex. 104; 5 Jur. 9.]

Assumpsit on a guarantee, with counts for goods sold and delivered, and on an

account stated. At the trial before the under-sheriff of Middlesex, the following document was proved by the plaintiff:—

“September 11th, 1839. I undertake to pay to Mr. Robert Jarvis the sum of 6l. 4s., for a suit of, ordered by Daniel Page. “S. W. WILKINS.”

It appeared that the goods in question were a suit of clothes, which had been furnished to Page subsequently to the giving of the above undertaking. The plaintiff obtained a verdict for 6l. 4s., leave being reserved to the defendant to move to enter a nonsuit, in case the Court should be of opinion that the instrument was not a guarantee, but a promissory note which required a stamp. [411] A rule was accordingly obtained in Michaelmas Term last, against which

C. C. Jones appeared to shew cause, but the Court called upon

Thomas to support the rule. The instrument in question is a promissory note, and not a guarantee; but even if it be a guarantee, it states no consideration on the face of it, and is therefore invalid. It is, however, a promissory note. It is not necessary to state when it is payable; because, if no period be stated, it is payable on demand. In *Ellis v. Manson* (7 Dowl. 598) an instrument in the following form was held to be a promissory note:—“John Mason, 14th of February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment, of which I am truly thankful for.” In *Brooks v. Elkins* (2 M. & W. 74), this Court said, that to constitute a promissory note no particular form of words was requisite. [Lord Abinger, C. B. This is a memorandum, that if the plaintiff will sell Page clothes, he, the defendant, will pay for them. If it had been that he would pay for clothes before supplied, it might have been different. It is only a conditional promise.] Thomas also cited *Wheatley v. Williams* (1 M. & W. 533), and contended that if the instrument was not a promissory note, it was void as a guarantee, no consideration being expressed on the face of it.

LORD ABINGER, C. B. I am of opinion that there is nothing in this objection. The cases which have been cited were all of them cases where the consideration was executed, and therefore the written promise to pay the debt amounted to a promissory note; but in this case it appears [412] from the instrument itself, that the promise was made in contemplation of a sale of goods to be afterwards made; and it is a written undertaking, that if the plaintiff will supply the goods “ordered,” the defendant will pay for them. It is a memorandum of guarantee for the sale of goods, not a promissory note, and requires no stamp.

PARKE, B. I am of the same opinion. If the memorandum contained only a promise to pay 6l. 4s. for goods already supplied, it would be a promissory note, and would require a stamp; but the introduction of the word “ordered” makes all the difference, as it shews that it is a promise to pay for goods if supplied, but which were not then delivered. We are therefore enabled to collect from the instrument itself, that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered. No objection has been made that the contract varies from that declared upon; and the only questions are, first, is this a promissory note?—I think it is not, for the reasons I have already stated: and secondly, if not a promissory note, is it a binding guarantee? The rule is now perfectly settled, that the consideration must appear upon the face of the instrument itself, either in express terms, or by necessary implication. I think in this case the consideration may be collected by necessary inference, and therefore that the instrument is a binding guarantee.

The other Barons concurred.

Rule discharged.

[413] SLATER v. HAMES. Exch. of Pleas. Jan. 12, 1841.—A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 55; and although he be put to extra trouble and expense in making the levy, he cannot claim more.

[S. C. 9 Dowl. P. C. 221; 10 L. J. Ex. 100; 5 Jur. 43.]

This was a rule calling upon one J. White, an officer of the sheriff of Lincolnshire, to shew cause why he should not refund the residue of the proceeds of certain goods

seized under a writ of *fi. fa.* issued at the suit of the plaintiff, after deducting the amount indorsed on the writ and all legal charges and expenses, and why an attachment should not issue against him for taking and demanding greater fees than those allowed by law, or by the table of fees framed under the stat. 7 Will. 4 & 1 Vict. c. 55; and why he should not pay the costs of the application.

It appeared from the affidavits on which the rule had been obtained, that the defendant's goods had been seized by an officer of the sheriff of Lincolnshire, under a writ of *fi. fa.* issued at the suit of the plaintiff, and indorsed to levy 33l. 17s. The goods were afterwards sold by public auction, except one chair, which was sold by private contract for 3s. A pig of the value of 1l. 5s. was lost or strayed from the possession of the sheriff. The proceeds of the sale, including the chair, amounted to 44l. 13s. 7d., being 10l. 16s. 7d. more than the sum indorsed on the writ. That money was retained by the sheriff's officer, and a statement was made by him that he was short of his levy £5; he also refused to account for the pig which had been lost.

It appeared from the affidavit in answer, made by the sheriff's officer, that he claimed 1s. interest on the levy for fourteen days, £1 for the writ, and 2l. 0s. 10d. for sheriff's poundage and warrant, making together, with the levy, 36l. 18s. 10d., to which sum no objection was made. The residue was claimed for sundry incidental expenses, not allowed by the schedule of fees, some of which were occasioned by precautions taken to prevent a resale, others by the employment of carpenters in the removal of the [414] goods for sale, and for travelling expenses, commission on sale by auction, &c.

Humfrey now shewed cause. This is an application made under the recent act 7 Will. 4 & 1 Vict. c. 55, which enacts by sect. 2, that from and after the passing of that act, "it shall be lawful for sheriffs or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several Courts of law at Westminster, charged with the duty of taxing costs, under the sanction and authority of the Judges of the said Courts respectively." And by s. 3 it is provided, that any sheriff or officer taking more than is allowed by the Court, shall be adjudged guilty of a contempt of Court. But that statute does not apply to the present case; because the charges which are here complained of as being excessive were occasioned by the great trouble the officer had in levying the execution, which necessarily created an increase of fees, and occasioned by circumstances over which the officer had no control, but resulting from the violent conduct of the defendant himself, which rendered it necessary to employ an extra number of men for several nights, in order to keep the goods in safe custody. [Parke, B. Those are expenses which are not allowed in the table of fees made in pursuance of the recent act. There is nothing in the act relating to any such expenses; nor is there any provision allowing any other expenses than those mentioned in the schedule.] It is apprehended that these are such expenses as the Master ought to allow on taxation. [Parke, B. The Master is only to allow what the sheriff is entitled to under the stat. 29 Eliz., c. 4, and the fees mentioned in the schedule of fees allowed by the Judges under the recent statute. What is the sheriff to do for his poundage? He is not to receive it for doing nothing. He is [415] sufficiently paid by it to enable him to meet the ordinary incidental expenses, and he must take the risk of that.] It will be a hardship on the sheriff if no charges are allowed except those mentioned in the schedule, as he has been put to great expense in obeying the process of the Court.

Whitehurst, *contra*, was stopped by the Court.

LORD ABINGER, C. B. The proceeds of the property which was lost, and not sold, cannot be refunded; but if not accounted for, the defendant may bring his action against the sheriff. I think the money allowed for poundage, and the costs allowed by the schedule, sufficient. The officer must refund the money improperly charged, and pay the costs of this application.

The rest of the Court concurred.

Rule absolute to refund 7l. 15s. 9d., with costs.

KENRICK v. PHILLIPS. Exch. of Pleas. Jan. 14, 1841.—A cause was referred at *Nisi Prius*, and a verdict entered for the plaintiff by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand.

The arbitrator awarded that the verdict should stand at the amount for which it was entered:—Semble, that the particulars of demand were not necessarily before the arbitrator; and that if the defendant intended to limit the plaintiff's demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator.

[S. C. 9 Dowl. P. C. 308; 10 L. J. Ex. 226.]

This cause was referred to arbitration at the last Ruthin Spring Assizes, and a verdict was entered for the plaintiff by consent for £500, the damages laid in the declaration. The plaintiff, in his particulars of demand, claimed 421l. 6s., and interest from the 1st day of July, 1838. The submission to arbitration contained a power for the arbitrator to proceed *ex parte*, in case either party did not attend; and the defendant not having attended any of the meetings, the arbitrator accordingly proceeded [416] *ex parte*, and awarded that the verdict should stand at the amount for which it was entered.

Jervis now moved for a rule to shew cause why the award should not be set aside. The arbitrator has exceeded his authority, in awarding to the plaintiff a greater sum than he claimed by his particulars of demand. There are several authorities to shew, that if the arbitrator awards more than the amount of the verdict, the award is bad altogether: *Bonner v. Charlton* (5 East, 139), *Pearse v. Cameron* (1 Mau. & Selw. 675). The plaintiff is bound by his particulars of demand, which ought to be annexed to the record by him. If they were not so annexed, he ought not to be allowed to take advantage of that, which was his own wrong. [Alderson, B. Your argument proceeds on the supposition that the *Nisi Prius* record is always before the arbitrator; whereas the practice is for the officer of the Court to keep it, and to enter the verdict finally according to the arbitrator's award.] By rule 6 of T. T. 1 Will. 4, the plaintiff's attorney is required to have the particulars annexed to the record at the time it is entered with the Judge's marshal, and it must be assumed that the arbitrator had the record before him. [Lord Abinger, C. B. Suppose it should turn out that the arbitrator never had the particulars before him? I do not see how we can interfere unless they were before the arbitrator.] It has been held that the defendant may be allowed to use the particulars without putting them in, and that his so using them does not give the reply. [Lord Abinger, C. B. If the defendant wished to limit the plaintiff's demand to the amount of the particulars, he should have brought the particulars before the arbitrator. Parke, B. No doubt the plaintiff is bound by his particulars of demand, and that may be a good ground for a motion to reduce the ver-[417]-dict to the amount claimed by the particulars; but there has been no exercise of excessive authority, and no fault in the arbitrator.]

The Court ultimately granted a rule *nisi* to set aside the award, unless the plaintiff would consent to reduce the verdict to the amount of the particulars of demand; which was discharged on the merits.

SNEEZUM v. MARSHALL. Exch. of Pleas. Jan. 14, 1841.—An agreement for the sale of a house stated that the sale was subject to the covenants set forth “in a draft lease delivered this day:”—Held, that in calculating the number of words with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and, the agreement containing less than 1080 words, and being stamped with a £1 stamp, that the stamp was sufficient.

[S. C. 9 Dowl. P. C. 267; 10 L. J. Ex. 193.]

This was an action for a breach of contract in not making out a good title to a public-house, agreed to be sold by the defendant to the plaintiff. On the trial before Lord Abinger, C. B., at the Middlesex Sittings after last term, it appeared that the premises were part of considerable property held under one lease granted by the late Lord Somers, and that the property so leased had been subdivided and underlet. The covenants in the original lease extended over all the property, and the original lease contained a proviso for re-entry on breach of any of the covenants therein contained. The under-leases were subject to the covenants and provisoes in the original lease. The agreement on which the action was brought was stamped with a £1 stamp, and

it stated, that the sale was subject to the covenants set forth "in a draft of a lease delivered this day." If the words of the covenants, so referred to, were not to be reckoned in calculating the amount of stamp duty, the £1 stamp would be sufficient; but if otherwise, a higher stamp would be requisite, as the agreement and covenants together exceeded 1080 words. It was objected by the defendant's counsel, that the covenants referred to must be considered as embodied in the agreement, and therefore that the stamp was insufficient. The Lord Chief Baron, however, received the agreement [418] in evidence, but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that it was inadmissible. A verdict having been found for the plaintiff,

Kelly now moved accordingly. The stamp was insufficient, because the covenants in the lease referred to must be considered as part of the agreement. [Parke, B. The words of the Stamp Act, 55 Geo. 3, c. 184, schedule, part 1, "Agreement," are "together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto." In *Attwood v. Small* (7 B. & C. 390; 1 M. & R. 246), where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein, it was held that the clause referred to could not be considered as "annexed to" the new agreement, so as to make an additional stamp necessary.] That is distinguishable from the present case. It is admitted that the covenants in the draft lease referred to do not come within the meaning of the words—"schedule, receipt, or other matter put or indorsed thereon or annexed thereto;" but they form part of the agreement itself, and it is the same as if all had been written on one sheet of paper. It might have been otherwise if it had said, "the covenants in a certain indenture of lease contained," but this is—"in a draft of a lease delivered this day." The question cannot depend upon the fact of there being one continuous writing, nor can be altered by the use of several sheets of paper referring each to the other. It never could with reason be held, that the application of the additional duty should be prevented by the latter circumstance. The mere fact of the words not being in the instrument itself, cannot exclude them from computation.

LORD ABINGER, C. B. I still entertain the opinion [419] which I expressed at the trial, that the act applies only to the instrument itself, and to the schedules, receipts, and other matters which are indorsed thereon or annexed thereto; and that matters which are merely referred to, cannot be taken into account in computing the words contained in the agreement. According to Mr. Kelly's argument, if an agreement referred to any number of deeds, a reference to which was necessary in order to understand the agreement, it would be necessary to stamp the instrument with reference to the number of words contained in every deed. No principle of construction would warrant us in extending the provisions of the Stamp Act so far as that.

PARKE, B. The act is to be construed strictly. In *Attwood v. Small*, Lord Tenderden's judgment proceeded on the ground, that "the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto." Applying that principle to the present case, it is clear that no increase of stamp was necessary; and therefore the agreement was properly received in evidence.

ALDERSON, B. Nothing is to be taken into account in stamping the instrument, except what is written on the paper itself or is annexed thereto.

GURNEY, B. The words which impose the duty specify certain classes of cases, and, in my opinion, this case is not within them.

Rule refused.

[420] MACKAY v. WOOD AND ANOTHER. Exch. of Pleas. Jan. 16, 1841.—To an action by indorsee against the acceptor of a bill of exchange, a plea that the drawer had been twice bankrupt, and that his estate had not paid 15s. in the pound under the second fiat, whereby the property in the bill vested in the assignee under the second fiat, and the drawer could make no title by indorsement, is an issuable plea.

[S. C. 9 Dowl. P. C. 278; 10 L. J. Ex. 176; 5 Jur. 73.]

Assumpsit by the indorsee against the acceptors of a bill of exchange. The defendants, who were under terms of pleading issuably, applied to Gurney, B., at

chambers, for leave to plead (in addition to a denial of the acceptance and indorsement), that before the making of the bill in question, the drawer had been twice bankrupt, and that his estate had not paid 15s. in the pound under the second commission, by reason whereof the property in the accepted bill vested in the assignee under the second commission, and the drawer could make no title by indorsement. The learned Baron had refused to allow the latter plea, on the ground that it was not an issuable plea. Butt had obtained a rule to shew cause why the defendants should not be at liberty to plead the above plea, citing *Elston v. Braddick* (2 C. & M. 435).

Crompton now shewed cause. The plea in question is not an issuable plea, because it does not go to the merits. In *Wettenhall v. Graham* (4 Bing. N. C. 714; 6 Scott, 603), it was held that a defendant who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the Insolvent Debtors' Act, and that the cause of action has passed to his assignees. This defence is in substance the same. Besides, the plea is idle and frivolous; for the maker of a promissory note cannot set up as a defence, that the payee has become bankrupt, whereby his indorsement was void, and gave the indorsee no right to sue: *Drayton v. Dale* (2 B. & C. 293; 3 D. & R. 534).

Butt, contra, referred to *Willis v. Hallett* (5 Bing. N. C. 465; 7 Scott, 474), where the [421] bankruptcy of a plaintiff after the cause of action had accrued, but before the action was brought, was held to be an issuable plea.

PARKE, B. The question is, whether this is an issuable plea or not, because if it is, the defendants are entitled to plead it *ex debito justitiæ*. If it were clear that the plea would be bad on demurrer, I agree that it could not be considered an issuable plea; but I incline at present to think that the plea is good. It amounts in substance to this, that, by the act of acceptance, the defendants created a property in the plaintiff, which immediately vested in a third person. In *Kitchen v. Bartsch* (7 East, 53), which was an action by the payee against the maker of a promissory note, it was held a good plea, that the note was made payable to the plaintiff after his bankruptcy, and that the assignees had required the defendant to pay them the money claimed by the plaintiff. That is to be considered an issuable plea, upon which a decision on demurrer, or by a jury, would determine the action on the merits.

ALDERSON, B. Any plea must be considered an issuable plea, which, being determined in favour of the defendant, shews that the plaintiff has no right of action. The rule to be collected from the decision of this Court in *Humphreys v. The Earl of Waldegrave* (6 M. & W. 622), is, that a plea is an issuable plea which tenders some matter, upon which, if issue be taken, the case would be decided upon the merits. The plea, therefore, must be allowed.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[422] ATTORNEY-GENERAL v. DONALDSON AND OTHERS. Exch. of Pleas. Jan. 16, 1841.—The stat. 4 & 5 Anne, c. 16, s. 4, does not extend to the case of the Crown, and therefore the Court has no authority to give a defendant leave to plead several matters, in an information of intrusion filed by the Attorney-General.

[S. C. 9 Dowl. P. C. 319; 5 Jur. 56: on another point, 10 M. & W. 117.]

This was an information of intrusion, filed by the Attorney-General against the defendants, who were commissioners of sewers, and who had as such commissioners rated the palace of Kensington, and levied the rate by distress in a house alleged to be part of the palace.

Ogle moved, under 4 & 5 Anne, c. 16, s. 4, for leave to plead several matters; first, not guilty; secondly, that the house was not part of the Royal Palace; thirdly, that the trespass was committed by the defendants under the authority of the statutes relating to sewers. In *The Attorney-General v. Snow* (Bumh. 96), the defendant, who was surety for a clerk of the cashier of excise, on being sued by information of debt upon his bond, was allowed to plead double, viz. non est factum, and performance of the conditions. So, in the case of *Rex v. Huggins* (Com. Rep. 422), which was an action for an escape for the debt of the King against the Warden of the Fleet, the defendant was allowed to plead double. It was there said by the counsel on moving,

and agreed by the Court, that this statute "extends to the King's suit as well as to that of the subject."

PARKE, B. The case of *The Attorney-General v. Allgood* (Parker, 15) is an authority directly in point against this application. There Parker, C. J., states, that since the delivery of the opinion of the Court in that case, (that double pleading ought not to be allowed in the case of informations of intrusion), the case of *Rex v. Huggins* had been printed in Comyn's Reports, but was misreported; and he goes on to observe, that in *The Attorney-General v. Snow*, (which also had been since printed in Bunbury), the reporter had added a quære, whether the statute extends to the Crown. [423] He then states, that, notwithstanding that case, he sees no reason to depart from the opinion of the Court in *Rex v. Allgood*, especially as it was confirmed in the case of *Rex v. Sir C. W. Phillips* (Hil. Term, 20 Geo. 2), and the practice had been accordingly ever since. We therefore think that the cases in Bunbury and Comyns must be taken to have been overruled, and that the authority of the Court under the statute 4 & 5 Anne, c. 16, to allow double pleading, does not extend to this case.

The rest of the Court concurred.

Rule refused.

JONES v. LITTLER. Exch. of Pleas. Jan. 16, 1841.—Slander for speaking of the plaintiff the following words: "I will bet £5 to £1 that Mr. J. (the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who looked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that Mr. J., brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade:—Held, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer.—Semble, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit.

[S. C. 10 L. J. Ex. 171.]

Slander. The declaration stated, that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer, the false, scandalous, malicious, and defamatory words following:—"I'll (meaning that he, the defendant would) bet £5 to £1, that Mr. Jones (meaning the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who looked him up; the man told me so himself:" whereupon the said Henry Pye then asked the defendant, "Do you mean to say, that Mr. Jones, brewer, of Rose Hill, (meaning and describing the plaintiff), has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The cause was tried before Rolfe, B., at the last Hil-[424]-verpool Assizes, when, no special damage having been proved, it was objected, on the authority of *Ayre v. Craven* (2 Ad. & Ell. 2; 4 N. & M. 220), that the words could not be considered as spoken of the plaintiff in the way of his trade, and therefore that he ought to be nonsuited. The learned Judge refused to nonsuit, and the jury returned a verdict for the plaintiff.

Kelly, in Michaelmas Term last, applied for a rule to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested. The Court refused a rule on either of those grounds, but granted a rule to shew cause why there should not be a new trial, on a suggestion that the learned Judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not.

Cresswell and Wightman now shewed cause. The jury have found that the words were spoken of the plaintiff in the way of his trade, and in so doing they have come to a right conclusion. The words alleged to have been spoken amount to an allegation that the plaintiff was insolvent, and if so, it must apply to him in the way of his trade as a brewer. The case of *Ayre v. Craven* was a different case altogether. If the words there laid had been alleged to have been, that in the plaintiff's character of

physician he had been incontinent, they would have been actionable in themselves, as necessarily affecting him in his professional character. That case was decided on the authority of *Lumby v. Allday* (1 Cr. & J. 305), where it was held that the words charged as slanderous must shew the want of some general requisite, as honesty, capacity, fidelity, &c., or connect the imputation with the plaintiff's office, trade, or business. [Parke, B. The case of *Stanton v. Smith* (2 Lord Raym. 1480) is directly in point. [425] It was there held, that it was actionable to say of a tradesman, "He is a sorry pitiful fellow, and a rogue; he compounded his debts at 5s. in the pound;" though there was no colloquium of his trade: but if the question was put to the jury, and they found it to have been spoken of the plaintiff in his trade, there is an end of the matter.] Insolvency is necessarily connected with trade. If a man cannot pay his debts, he cannot pay his mercantile debts. The damage is the same, whether the defendant happens to be speaking of him in his trade of a brewer, or not. [Alderson, B. *Doyley v. Roberts* (3 Bing. N. C. 835; 5 Scott, 40) seems to be an authority to the contrary. There the following words were spoken of an attorney—"He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" and it was held that they were not actionable, unless they were spoken of him in his profession.] The words, to be actionable, must either necessarily affect the plaintiff in his trade, must be spoken of him in his trade, or must be shewn to have affected him injuriously. In *Doyley v. Roberts*, and *Ayre v. Craven*, the words did not necessarily affect the party in his trade. In Com. Dig., Action upon the case for Defamation (D. 22), the following is put as an instance of words which are actionable:—"If he say of a counsellor, 'Thou art no lawyer; canst not make a lease; they are fools that come to thee for law.'"

Alexander, in support of the rule. There was no evidence to shew that the words were spoken of the plaintiff in the way of his trade, and that question was not properly left to the jury. [Rolfe, B. I am sure I put the question to the jury, whether the words were spoken of the plaintiff in his trade, and they found that they were.] The rule was granted on that ground.

PARKE, B. It is quite clear that this rule ought to be [426] discharged for the only ground on which it was granted has failed, inasmuch as the learned Judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact, that in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith* is an authority to shew that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre v. Craven* and *Doyley v. Roberts*. In the latter of those cases, the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician: and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *Doyley v. Roberts*.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

[427] TODD AND ANOTHER v. EMLY AND ANOTHER. Exch. of Pleas. Jan. 19, 1841.—A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures were

countersigned by the secretary:—Held, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club.

[S. C. 10 L. J. Ex. 161. See further, 8 M. & W. 505; 9 M. & W. 606.]

Assumpsit for goods sold and delivered. Plea, non assumpsit.

The cause was tried before Lord Abinger, C. B., at the last Summer Assizes at Guildford, when it appeared that the action was brought to recover from the defendants, who had been members of the committee of the late Alliance Club, the amount of a bill for wine supplied for the use of the club, under the following circumstances:—The members of the Alliance Club, which was formed in the year 1836, were the proprietors of the club and the renters of the house. They paid entrance-money and an annual subscription, cash being paid for all provisions consumed in the club-house. The funds were deposited at a banker's appointed by the members of the club, and were drawn out by cheques signed by three of the committee, and countersigned by the secretary. The rules of the club were not in evidence at the trial. The wine in question had been supplied by the plaintiffs to the order of the steward of the club, given in the presence of a committeeman, and the steward had on several occasions given similar orders, but always, as he stated, first applying to some member of the committee. It did not appear that either of the defendants had signed any cheques, or had individually authorized any orders for wine.

There was some evidence of the defendants having attended meetings held by the members of the club after it had ceased to exist, at which the affairs of the club were discussed with a view to an arrangement with the creditors, and evidence was offered of a conversation, in which it was said that the defendants had admitted their liability; but the Lord Chief Baron ex-[428]-pressed an opinion, that it was merely an attempt as men of honour to save the creditors harmless, and did not make the defendants liable; and the case was not left to the jury, the counsel for the defendant submitting to a verdict for the plaintiffs, upon leave being reserved to him to move to enter a nonsuit. Thesiger having, in Michaelmas Term, obtained a rule accordingly,

Cresswell and Platt now shewed cause. The question in this case is, whether there was evidence to be left to the jury, that these defendants authorized the contract declared on to be made with the plaintiffs on their behalf. In the case of a partnership, each member of the firm gives to the others an authority to contract in his name; but it is not necessary to contend for the existence of a partnership in this case, for there may be a similar authority given without any partnership; and if persons for their mutual convenience, or other object, give to a party authority to contract in their name, they are responsible. Now there was abundant evidence to go to the jury in this case, that Chapman, who was the steward of the club, and who ordered the wine in question, was authorized by the defendants to make the purchase on their credit,—it matters not here whether as individuals only, or in common with the rest of the committee or the whole club. If so, the verdict was right, and ought not to be disturbed. The Alliance Club was not, as in the case of White's or Crockford's, under the management of the steward or proprietors of the house; but the members were themselves the proprietors of the establishment, as in the case of the United Service Club, and the committee was a body delegated by them to conduct the affairs of the club, over which they were to exercise an absolute control. The committee, therefore, would exercise a control over the orders for goods, as well as over the payments. The orders for wine were invariably directed by the commit-[429]-tee, and whatever portion of them might be there to act, it was the act of the committee. [Parke, B. It is only the act of those committeemen who were present.] There was a general authority given to the steward to order wine from the plaintiffs, and in that view, as members of the club, the defendants are liable. Supplies of this kind are absolutely necessary to the existence of a club, and are notorious to all the members. Then upon whose credit were they furnished? It cannot be said on the credit of Chapman, for he was a mere servant. It is clear that the credit was given to the members of the club, for whose use the goods were supplied, and it follows that all of

them are liable. There is abundant evidence of knowledge on the part of the members, that such orders were given from time to time, and they are responsible for those orders. When persons combine together, and undertake to carry out one common object, every person who interferes becomes responsible; that the orders are given by different parties makes no difference, all are equally liable. The case of *Horsley v. Bell* (Ambler, 770; 1 Bro. C. C. 101) is a distinct authority for the plaintiffs. There, an act of Parliament having been passed to make a certain brook navigable, the defendants and others were named commissioners to carry the act into execution, by which tolls were to be taken, and the commissioners were empowered to borrow money thereon. A treasurer and surveyor were appointed, and the work was commenced. The defendants were all acting commissioners, by whom the plaintiff was employed to do certain work in prosecution of the scheme, and to whom they gave orders from time to time. These orders were given at different meetings by such of the defendants as were present, but none of them were present at all the meetings at which the orders were given; so that the defendants did not join in all the orders, but every one of them joined in making [430] some one of the orders: and they were all held liable. The acting commissioners in that case are analogous to the committeemen in the present, who take upon themselves the management of the club, as the commissioners did the carrying out of the objects of the act of Parliament. [Parke, B. The orders there were to make one entire thing.] Yes; but that was to be done by performing different acts. Here there was equally one entire thing, viz. the carrying on the business of the club. Every individual act that is done is part of the general management. [Lord Abinger, C. B. In the case of *Fleming v. Hector* (2 M. & W. 172), in this Court, the rules of the club were produced in evidence, and one was that cash should be paid, and no credit given. Alderson, B. The question is, whether there was evidence for the jury that the committee undertook generally to manage the affairs of the club on their credit.] There was abundant evidence of that; and if so, they were liable. [Parke, B. There is no doubt in this case, that the steward who gives the order is *primâ facie* liable, unless he can make out that he received an order from some one else, and then he is not personally liable. Then who gave the orders to the steward? Not the defendants; then you must go further, and satisfy the jury that the order was given by some person having power to bind them; the question then is, have you given reasonable evidence of that?] The steward gave the order on behalf of the club, or committee, from whom he had a general authority, and was not therefore personally liable. There is nothing to shew that the committee repudiated what had been done by Chapman, on the authority under which the contract was made. Then with respect to what took place after the dissolution of the club, at the meeting of the members, that was evidence for the jury, and had the case gone to them, must have been left as a question for them [431] to decide. [Lord Abinger, C. B. Nothing went to the jury. What took place at that meeting I considered only an attempt, as men of honour, to save the creditors harmless.]

Thesiger, in support of the rule. This was treated at the trial entirely as a question of law, and there is no ground for saying that any legal liability attached to the defendants. The extent of the authority of the committee did not fully appear, but it appeared that they had control over the funds of the club for certain purposes. Those funds could only be obtained by means of the signature of three of the committee; but the cheques so signed were to be countersigned by the secretary. The committee were therefore trustees of the fund, and that was the whole extent of the evidence as to their power. Assuming that the whole body of the committee are the agents of the club, still it is clear that no single member of the committee can act as such agent. In the case of *Fleming v. Hector*, it was held that the committee at large were not agents for the club, to bind the members in respect of contracts entered into by them, for that the committee had no right to pledge the personal credit of the members. But then it is said that the members of the committee have power to bind one another. But the steward, although he had a general authority, never acted on that, but invariably applied to some member of the committee, and with respect to the wine in question, one of the committee was present when the order for it was given. It is true that the defendants were aware of the fact that the plaintiffs supplied the wines to the club; but that, in *Fleming v. Hector*, was not considered as a circumstance which affected the liability of the members. These defendants had no further knowledge of this matter than other members of the club. In *Horsley v. Bell*, all the

acting commissioners were attending from time to time, and taking part in, and giving orders for, the prosecution [432] of the works, whereas in the present case there was no evidence to shew that the defendants ever gave a single order. In *Thomas v. Edwards* (2 M. & W. 215), which was an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, it was held that the plaintiff must prove that the party ordering them was employed by the defendant alone, or by the defendant and others, to do so, and that the defendant was not acting merely as agent for some other person. The credit is not given, in cases of this sort, to the members of the club, or to any particular individuals in it, but to the establishment generally, to the respectability of which the tradesman trusts for payment.

LORD ABINGER, C. B. It strikes me, after considering this question very much, that those gentlemen who are members of the committee are not in the nature of agents, to bind the club by their contracts; but that they are trustees, having the management and the administration of the funds of the club. It does not appear upon the evidence, that they were authorized by any members of the club to deal on credit, but only to expend the funds which they had in their possession as trustees. To be sure they cannot authorize the paying away of those funds, except by the agreement of the other members of the club. It must be assumed here, that the members of the club generally did agree that three particular trustees should dispose of the funds by drawing cheques; but one trustee cannot bind another by his act, nor can one of these gentlemen constitute himself agent of another. If it were provided by the rules and orders of the club, that the committee, conducting the affairs of the club, should have authority to make contracts for the club, then they might make contracts for each other; but in the absence of any evidence [433] of that kind, what is it more than the ease of a set of gentlemen being named as trustees to manage a fund? The fund is placed in the banker's hands, and there it is to remain to answer the demands of the club; but it does not appear that the committee authorized each other to pledge each other's credit, or that the club, as a body, authorized the committee to pledge their credit; nor were they bound or authorized to contract upon credit. That is the principle laid down in *Fleming v. Hector*; and it appears to me to be applicable to this case, unless it can be shewn, that by the rules and orders of the club the committee were authorized to contract upon credit, or that in any other way the whole club agreed that the committee should make such contracts. Suppose a man appoints by deed trustees to manage a particular fund, is one of those persons liable for the acts of the other? It seems to me that he is not; one cannot make himself the agent for another; each is liable for his own acts only. To make each other liable, they must meet together, and concur in any act that may be done by them as trustees. Here the evidence does not fix the two defendants as having authority to pay for the wine or to give orders.

PARKE, B. It is difficult to say that there was not some evidence to go to the jury; because the defendants' acts, in attending meetings, and offering sums of money by way of compromise to the creditors, are undoubtedly evidence to go to the jury. I do not say that it is evidence to which one ought to attach much weight: but if I were asked the question, whether there was or not some evidence to go to the jury, I should certainly hesitate before I said there was not. It is the jury who are to put a construction on those acts. I think, however, that the construction put by my Lord upon one of those acts is that which the jury ought to put upon it, namely, an attempt as men of honour to get up a subscription among themselves, in order to let [434] the tradesmen go harmless; but I think it cannot be considered as an admission of liability. If it is contended, that that attempt at a settlement was an admission that the committee were authorized to enter into the contracts, it is a question for the jury. Then we come to the other, which is the main point of the case, and upon which it may be urged, that where parties enter into one common purpose of acting together, each of them has authority to bind the others to the extent of attaining that common purpose. But the defect in the plaintiffs' case is, that there is no common purpose shewn, of dealing on credit for such articles as were supplied in this case. The evidence shews that a fund was subscribed, which fund was to be administered by a committee. The committee can only be supposed to have agreed to do that which the subscribers to the club had power themselves to do, that is, to administer that fund so far as it went. They were not expected to deal on credit, except for

such articles as it might be immediately necessary for them to have dealt for on credit. The making purchases of what was necessary would be only what they ought to do according to the trust reposed in them, and these must be taken to be purchases for ready money, unless distinct evidence was given that they were authorized to enter into contracts on the part of the general body for the common purpose, and to deal on credit, so as to make one the agent for another. It might be different, perhaps, in the case of hiring the servants of the establishment, where there must necessarily be credit for a certain period, because you cannot pay wages down; but as to butcher's meat, wine, furniture, and almost anything else, those may be ready money transactions. Unless there is some evidence to the contrary, each member of the committee must be considered as exercising only a concurrent authority with the others in the due administration of the fund, and obtaining credit for such matters only as cannot be the subject of ready [435] money transactions. My impression, therefore is, that although there might be some evidence on the latter part of the case to go to the jury, though very slight, yet that on the former part of the case the plaintiffs have failed, that is, they have not shewn, with sufficient clearness, any privity on the part of the defendants to the contract, or any knowledge that any committeeman was authorized to deal upon credit for the others.

ALDERSON, B. I entirely concur in the view of the case taken by my Brother Parke, and think that as the members of a club generally, (as was held in the case of *Fleming v. Hector*,) are to be considered as not having authorized anybody to deal for them upon credit, so here the committee were authorized only to deal, as a body, for ready money. But at the same time, if any of the members of the committee choose to contract not for ready money, those members of the committee who have so contracted are liable upon their own contract, and the members who have not concurred in it are not liable, unless that be the common purpose for which the committee was appointed. I think the plaintiffs have failed as to the common purpose. Granting Mr. Cresswell's argument to be as he puts it, still they fail; for they do not shew that this contract was within the common purpose. I think, therefore, that there should be a new trial, as there may be evidence to alter the case in that respect.

Rule absolute.

[436] SHELTON AND OTHERS v. BRAITHWAITE. Exch. of Pleas. Jan. 19, 1841.—A bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one W. The bill having been dishonoured when due, W. gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—"Dear Sir,—To my surprise, I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same:"—Held, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to shew its uncertainty.—Held also, that the letter was a good notice of dishonour.

[S. C. 10 L. J. Ex. 218. See further, 8 M. & W. 252.]

Assumpsit by the indorsee against the drawer of a bill of exchange. Plea, that the defendant had not received due notice of dishonour. At the trial before Rolfe, B., at the Middlesex Sittings in this term, it appeared that the bill was drawn by the defendant upon and accepted by one A. B., and that it had been indorsed by the defendant to the plaintiffs, who indorsed it over to the Birmingham and Midland Counties' Bank, who indorsed it to one Williams. The bill became due on the 17th of August, when it was presented for payment and dishonoured. Williams then gave notice to the bank, who gave notice to the plaintiffs, who wrote to the defendant as follows:—"Dear Sir,—To my surprise I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same." There was no proof of the existence of any other bill to which the letter could apply, and the plaintiffs had a verdict, leave being reserved to move to enter a nonsuit.

Gurney now moved accordingly. A notice of dishonour must contain, either

expressly or by necessary inference, all the knowledge relative to the bill which the defendant is entitled to have. This notice is not a sufficient description of the bill. It says only, "your draft on A. B.," which was insufficient. No date is given, nor does it even appear that the bill had been accepted. It is not even called a bill of exchange, and the words used would rather refer to a cheque. There is no case where such a notice has been held sufficient. [Alderson, B. Still the Court must take into consideration the circumstances of the case, and the knowledge which the defendant has of those circumstances; and no other bill is shewn to exist.] If there [437] was but one bill, it was for the plaintiffs to have established that fact, and it is not to be presumed in their favour. Until the plaintiffs shew that there was but one bill, the notice is insufficient, without giving the date, or shewing that it had been accepted, and by whom, so as to identify it. Besides, it does not sufficiently appear from this letter that the plaintiffs intended to look to the defendant for payment. It has been held that the party must shew by his notice that he looks to the defendant as liable to him on the bill. The notice is a substitute for the protest which was formerly made, and which contained an exact description of the bill.

LORD ABINGER, C. B. I think the notice was sufficient. If there were other bills or drafts to which the notice could apply, it was for the defendant to shew that. As he has not done so, the maxim "*de non apparentibus et de non existentibus eadem est ratio*" must apply. If it does not appear that there were other bills or drafts, we cannot presume that there were any such.

PARKE, B. It seems to me that the notice was quite sufficient. If there was another bill answering the same description, the defendant might have proved that fact, and then the notice would have been uncertain; but as there is no such proof, I think the notice is a sufficient description of the bill on which the action is brought. Then as to the other point: the word "dishonour" is a technical word, which intimates that the bill has been presented and refused payment; and then the concluding part of the notice clearly shews that the plaintiffs meant to hold the defendant, and all other collateral parties, liable for the default of the acceptor. The Birmingham and Midland Counties' Bank must be assumed to be the plaintiffs' agents for the purpose of obtaining payment of the bill. That being so, all the essentials that are required to charge the [438] drawer occur in this case, which comes within the principles laid down in *Solarte v. Palmer* (1 Bing. N. C. 194; 1 Scott, 1), and other cases on this subject.

ALDERSON, B. I am of the same opinion. It seems to me that the notice is sufficient, taking into consideration what must, in the opinion of the Court, be the facts on which their judgment is to be founded; that is to say, the knowledge of the party to whom the notice is given, of the circumstances under which it was given. If he who has peculiarly the means of knowing whether there are more bills than one, does not shew to the Court that there are more, the reasonable inference is that there is but one. Then, if the party by whom a bill of exchange has been drawn on A. B. (there being but one bill of exchange drawn by him on A. B.) receives a notice that his draft on A. B. has been dishonoured, that, as it seems to me, clearly refers to the bill of exchange which he has drawn on A. B. The defendant has therefore notice that the particular bill on which the action is brought has been dishonoured. Now the term "dishonoured" is a technical word which, as my brother Parke has said, imports that the bill has been presented for payment, and has not been paid by the acceptor. So far, then, it appears that the bill of exchange has been presented to the acceptor, and has not been paid when due. Then the remaining question is, does the party who gives the notice intimate with sufficient clearness his intention to hold the defendant liable? He informs him that he has requested the Birmingham and Midland Bank (who are the persons whom he in the same notice states to have presented the bill ineffectually) to proceed on the same; which means, to proceed on the same against all those who are liable, and if against all, of course the defendant is included. That fulfils all the requisites of a notice of dishonour. The [439] notice must be construed with reference to the defendant's means of knowledge, and I think there is enough here to shew that he must have felt in his own mind that this was a perfect notice of dishonour of the bill in question.

GURNEY, B., concurred.

Rule refused.

DOE D. LOWNDES v. ROE. Exch. of Pleas. Jan. 21, 1841.—Service of a declaration was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service:—Held sufficient.

[S. C. 10 L. J. Ex. 142.]

Hayes moved for judgment against the casual ejector. The affidavit on which he moved stated, that the service was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the tenant being at the time in the house, but refusing to open the door, or listen to the explanation which was attempted to be given of the object and notice of the service.

Per Curiam. If you had reason to believe that the party was in the house and aware of what you were doing, it was sufficient service.

Rule granted.

DERIEMER v. FENNA. Exch. of Pleas. Jan. 21, 1841.—A declaration in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at his request." The defendant having demurred specially to this declaration, on the ground of its being ambiguous, the Court set the demurrer aside as frivolous.

[S. C. 10 L. J. Ex. 194.]

A declaration in debt stated, "that the defendant was indebted to the plaintiff in the sum of &c., for goods sold and delivered to the defendant by the plaintiff at his request." To this there was a special demurrer, on the ground that the count was ambiguous. Miller had ob-[440]-tained a rule to shew cause why the demurrer should not be set aside as frivolous.

Cole now shewed cause. The declaration is not in accordance with the form given in the schedule to the rule of Trinity Term 1 Will. 4. Its meaning is at least doubtful, and it is laid down as a rule in Stephen on Pleading (4th ed. 421), that "Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading." According to the grammatical construction, the pronoun "his" refers to the last antecedent, and if it is so taken here, the declaration will be for goods sold and delivered to the defendant at the plaintiff's request.

LORD ABINGER, C. B. If you judge by the context, it clearly is meant to be, at the defendant's request. In the English language, the meaning of particular words or phrases very frequently depends upon the context. In *Spyer v. Thelwell* (2 C. M. & R. 692), Parke, B., says, "With regard to the objection to the first count, although certainly, *prima facie*, the word 'his' would refer to the last antecedent, viz. the defendant; yet if we call in aid a little common sense, we see plainly that it does not and cannot refer to him, but to the drawer." That is an authority expressly in point.

PARKE, B. It has been held to be sufficient if a declaration is certain to a common intent in general; and this is so. The rule, therefore, must be absolute.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[441] TAPSELL v. CROSSKEY. SAME v. VERNHAM. Exch. of Pleas. Jan. 21, 1841.—The words "inclosed lands," in the 97th and 98th sections of the Turnpike Act, 3 Geo. 4, c. 126, mean lands which are actually inclosed and surrounded with fences; and therefore where lands situate on the Downs were not fenced off, although private property:—Held, that a surveyor appointed by the commissioners might take materials for the repairs of a turnpike road, without the order of justices mentioned in the 98th section, such lands not being within the meaning of the words "inclosed lands" contained in that section. But it is otherwise where the land is surrounded by a fence, though it be out of repair.

[S. C. 10 L. J. Ex. 188.]

Trespass for breaking and entering the plaintiff's close. Plea, not guilty (by statute). At the trial before Lord Abinger, C. B., at the last Summer Assizes at Lewes,

it appeared that these actions were brought for the purpose of trying the right of the surveyor of the commissioners of the Hickstead Turnpike Road to dig and carry away flints &c., from a place called the Holt Hill, which formed part of the Newtimber Holt Sheep Down, in the county of Sussex. The locus in quo was bounded partly by a hedge and ditch, partly by banks or ridges, and partly by doles, (a provincial term, signifying a conical lump of earth about two feet high, raised to denote the boundaries of parishes, &c. on downs), and a portion of it (where the ground was steep) was without any visible boundary. The Holt Sheep Down was not subject to any rights of common. The flints were dug and carried away for the repair of the Hickstead road, by the direction of the surveyor; but no notice was given to the plaintiff of the surveyor's intention to take materials from the Holt Hill, nor had any order of justices been obtained authorising him to do so. It was admitted that the plaintiff was the sole owner and occupier of the locus in quo; and the only question in dispute was, whether, under the provisions of the Turnpike Act, 3 Geo. 4, c. 126, the surveyor had a right to take the materials without the order of justices required by the 98th section. His lordship directed a verdict for the plaintiff, subject to a motion to enter a nonsuit, it being agreed between the parties that the actual damage sustained should be settled by the justices under the act of Parliament.

Platt, in Michaelmas Term, obtained a rule accordingly.

[442] Thesiger, Attree, and Peacock now shewed cause. It is not disputed that the locus in quo is the private property of the plaintiff; but the question for the Court is, whether such lands are "inclosed lands," within the meaning of the 97th and 98th sections of the General Turnpike Act, 3 Geo. 4, c. 126. It is submitted that they are; and if so, the acts complained of could only be justified as being done under an order of justices, as required by the 98th section; and as no such order was obtained, the plaintiff is entitled to maintain the action. By sect. 97, surveyors are empowered to take materials "out of any common river or brook," or from "any waste or common," and may convey such materials over "any waste or common land," without being liable to any compensation for any injury thereby done to such land; but if they convey such materials over "any inclosed lands of grounds," they are to make compensation for any damage done to those lands. Again, in the same section, after giving a general power to take materials from "the land of any person or persons," the surveyors are empowered to land or carry such materials on or over "any inclosed lands or grounds," (with certain exceptions), "or on or over any open land or common." The words "inclosed lands" are therefore used in direct opposition to "open or common lands," and can only mean private lands. In the case of inclosed land, the damage done is to be paid for, which shews that the intention was to protect private interests; but in the case of open land no compensation is provided by the act. The marginal note to the 98th section is in accordance with this view of the case; for there the word "private" is used in reference to "inclosed lands." The 97th section has reference to three distinct classes of property; viz. lands from which the surveyor is empowered to take materials absolutely; lands in respect of which compensation is to be made; and lands which are protected under any circumstances. The first are open or common [443] lands, and those terms are here used synonymously, as denoting public lands. The land in question is clearly not within that class. The second description is "inclosed land," which it is submitted comprehends land upon the Downs, like the locus in quo; because, not being waste or common, if it is held not to be inclosed land, there is no power to carry over it at all, where the materials are procured from common land. [Lord Abinger, C. B. Therefore you infer that the term "common" is used in contradistinction to "inclosed"?] Yes; because the power given in the middle of the 97th section to carry over the "land of any person or persons," is confined to materials got from such land, viz. the land of some person, or private land. The words are, "that it shall be lawful for the surveyor &c. to search for, dig, get, gather, take, and carry away any such materials in or out of the land of any person or persons where the same may be had or found &c., making or tendering such satisfaction for such materials, (viz. materials got out of the land of any person or persons), and for the damage done to the owners or occupiers of the lands where and from whence the same shall be dug, gathered, and carried away, or over which the same shall be carried, as the said trustees or commissioners shall think reasonable." The word "same" there refers to materials obtained from lands not falling within the description of waste or common lands. Suppose the case of a brook bounded by

private land not (in the popular sense of the word) inclosed, the surveyor would have no right whatever of transit or deposit for materials got from the brook, unless such land is included in the terms inclosed lands. If it could be considered as open land, in that case there would be no compensation for injury to private rights.

But further, the locus in quo is inclosed, in the popular sense of the word. [Parke, B. A fence sufficient to turn cattle or keep them from straying, is an inclosure.] Land [444] may be inclosed without any actual fence; a ditch, for instance, has been held a sufficient division to constitute an inclosure: *Ellis v. Arnison* (1 B. & C. 70; 2 D. & R. 161). By the 13 Edw. 1, c. 46, a dyke or ditch is pointed out as being a means of inclosing land. [Lord Abinger, C. B. A ditch may or may not be a proper fence.] The meaning of the word "inclose," as given in Todd's Johnson's Dictionary, is "to part from things or grounds common by a fence." The land in question was partly fenced by a hedge and ditch, which shewed that the intention was to inclose the land.

Platt and Tyndale, in support of the rule. This statute was passed with a view to the public benefit, and therefore it must be liberally construed. The second branch of the 97th section includes all private lands, whether inclosed or uninclosed. Therefore, in order to give a certain protection to inclosed lands, the 98th section provided that the sanction of the justices should be first obtained with respect to them. In the 13th Geo. 3, s. 78, the words "several" and "inclosed" are used; but in the present statute, the word "several" is dropped, which shews that the intention of the legislature was to give to the trustees of the roads more extensive powers. The word "open" does not mean waste or common: it cannot be considered synonymous with them; for common lands may, and frequently are, inclosed, to keep the cattle from straying. [They were then stopped by the Court.]

LORD ABINGER, C. B. It is with great reluctance that I come to the opinion I have formed, because I foresee the consequences of our decision; but I hope it may induce the legislature to make some alteration in the law, and to bring it back to what it was under the old highway act, viz., that if the surveyor took material from any private lands, it should be under the authority of the magistrates: we must, however, construe the act as we find it. I was much [445] struck with Mr. Peacock's argument as to that part of the clause to which he referred; and I certainly find this difficulty, that unless we consider the general words in the middle of the section to give a right to take materials from every description of lands, the question would turn upon the first part of the section, and there would be considerable doubt whether the surveyors would not be trespassers, for carrying the stones over the locus in quo, that is, over lands not therein mentioned. However, the act cannot be made consistent in all its parts. It has been justly remarked that the former act of Parliament, the 13 Geo. 3, c. 78, used the words "several" and "inclosed;" whereas this statute, although it uses words of the same nature, and indeed nearly the same words, yet omits the word "several." If it allowed surveyors to take materials from the beds of rivers, and any common or waste lands, and to carry them away, directing compensation to be made for going over several lands, then there could be no question that they might take from any lands except inclosed lands. But, looking to the 97th and 98th sections together, the only words which qualify the authority to go into any lands, not being common or waste lands, are those in the 98th section, which requires the sanction of two justices before materials are taken from inclosed lands. That this word is not used as synonymous with private lands, is clear from other clauses of the act. The 83rd section empowers the commissioners, for the purpose of improving the roads, to divert them over any commons or waste grounds, or uncultivated lands, without making any satisfaction, and also through private lands, making satisfaction for the damage: while the 96th section provides that they shall not deviate more than 100 yards over inclosed lands, without the consent in writing of the owner. That is a clear distinction made by the act itself between private and inclosed lands. The rule to enter a nonsuit must therefore be absolute.

[446] PARKE, B. I am of the same opinion. The question turns on the meaning of the 97th and 98th sections of the 3 Geo. 4, c. 126. It appears in this case, that the defendant entered the plaintiff's land, and took materials from it and carried them over the same, without having obtained the previous sanction of the magistrates; and that brings us to the question, what is the meaning of "inclosed lands" in the 97th section; and it seems to me that their meaning is, lands inclosed

in a fence, so as to be completely enjoyed in severalty. In the former statute, 13 Geo. 3, c. 78, s. 29, the words "several and inclosed" are used in conjunction; but in these two sections the word several is dropped. It is clear, comparing the two statutes together, that more extensive powers are given by the 3 Geo. 4, than were given by the previous act. Taking refuse stones, and entering common lands, were the only powers given in the first instance to surveyors, except some which it is unnecessary to call attention to. Under the 97th section of this act, where there is a power given to enter inclosed lands, the word several is dropped, and a power is introduced for surveyors to obtain materials from any land whatever. That section is sufficiently clear. It embraces four distinct descriptions of property. In the first place, it applies to all "gardens, yards, parks, paddocks, planted walks, or avenues to any house, or any piece of ground planted and set apart as a nursery for trees," which are made sacred, and cannot be touched under any circumstances whatever. In the next place, it applies to descriptions of land from which materials may be obtained without any previous sanction or payment of compensation, that is, commons or waste lands, from which materials may be carried away without paying anything for them, and without its being deemed a trespass. The third description of property is inclosed lands, from which nothing can be taken without previous notice to the owner and occupier; and the fourth is land generally, by which I understand land not falling under any of the former categories. It seems to embrace all [447] descriptions of property except gardens, yards, parks, paddocks, &c. If that be the construction of this clause of the act, it seems to be pretty clear in the present case, that the land in question does not fall under the description of waste or common. It is not waste, but is land employed for feeding sheep: it is not common, for there are no rights of common on it, and it is held in severalty by the plaintiff. It does not fall under the description of inclosed lands, which, for the reasons I have given, seems to apply only to lands inclosed by fences; but it falls under the description of the word land, in the middle of the clause, from which materials may be taken on payment for the injury done to the land. A difficulty was suggested in the argument, which may be obviated by the clause being read in a different way from that in which Mr. Peacock read it. There is a provision, in case materials are taken from open or common lands, but carried over inclosed lands, that payment is to be made according to the discretion of the trustees. But Mr. Peacock suggests that no compensation could be applied for, unless the word "inclosed" is read as being synonymous with the word "private." That depends on the construction of the middle part of the clause, and it seems to me that it may be read so as to obviate that difficulty. All the difficulty arises from the use of the word such. The words are—"Then it shall be lawful for the said surveyor or surveyors, or such person or persons as he or they shall appoint, to search for, dig, get, gather, take, and carry away any such materials in or out of the land of any person or persons where the same may be had or found, in any parish, hamlet, or place, in which any part of such road shall lie or be situate, or in any adjoining parish, hamlet, or place (not being a garden, yard, park, paddock, planted walk, or avenue to any house or any piece of ground, planted and set apart as a nursery for trees), making or tendering such satisfaction for such materials, and for the damage done to the owners or occupiers of the land where and from [448] whence the same shall be dug, gathered, and carried away, or over which the same shall be carried, as the said trustees or commissioners shall judge reasonable." Mr. Peacock contends that these words must be limited to the case of materials got on grounds over which they are carried. That depends on the construction of the words same and such. If those words are taken to refer to the first description of materials, viz., materials for the repair of the turnpike road, (as it seems to me they may), all the difficulty suggested in the argument is got rid of, and the result will be that materials got from commons and public places may be carried over any other common or open ground, without paying anything for them, but if carried over private lands, whether open or inclosed, compensation must be made by the trustees, the amount to be settled by magistrates in case of dispute. Then if that be the result, and it seems to me tolerably clear that it is, this defendant has not been guilty of a trespass. The word "inclosed" is to be taken as meaning inclosed by a proper fence: if the fence were out of repair, that would make no difference. If there be only a very small part that is inclosed with fences, it seems to me that on such lands the surveyor may enter and take

materials, but that he is bound to pay for them, and for any injury done to the land by carrying them away, that being provided by the 97th section.

GURNEY, B. I confess that in an earlier part of the case I felt great difficulty in reconciling myself to the conclusion come to by my Lord Chief Baron and my Brother Parke; but when I come to compare the act of Parliament of the 13 Geo. 3 with the present act, and find that the words in the former act were, "several and inclosed," while the word several is dropped in this act of Parliament, that removes the difficulty which I felt before. Whether this word has been dropped by accident or design it is impossible for us to say with certainty; but we must assume, not finding it there, that it [449] was the intention of the legislature to omit it in this act of Parliament.

ROLFE, B. I am entirely of the same opinion. The only difficulty arises from the uncertainty which prevails whether it was by design that the legislature used a word of very varying import. The legal construction of words is sometimes very different from their popular use. In this case it is said we must construe the words in their legal, and not in their popular sense; but I cannot arrive at that conclusion. There is a sort of scale introduced into the act, as to the mode in which private property may be dealt with. A certain description of private property is rendered sacred: gardens, paddocks, and so forth. Then the next species of property over which it was necessary that protection should be thrown, was inclosed grounds; distinguished from which there is another sort of several property, not inclosed, but lying open, not strictly, perhaps, to be called private property. The question is, to what must we suppose the legislature to have directed their attention, when they used the words inclosed lands? In one sense all lands are inclosed in the eye of the law, and, in another and more popular sense, only inclosed by fences. I think the act clearly refers to the latter; for it makes a distinction between inclosed lands and private lands, in the 83rd and 96th sections; by the former of which, general powers are given to the surveyors to take all private lands for the purpose of improvement in roads, while the latter contains a proviso that in inclosed lands they shall not take more than within a given distance. On these grounds, I think our judgment ought to be for the defendant.

Rule absolute to enter a nonsuit.(a)

[450] JOULE v. JACKSON. Exch. of Pleas. Jan. 21, 1841.—Brewer's casks sent to a public-house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house.

[S. C. 10 L. J. Ex. 142.]

Trover for brewer's casks. Plea, not guilty (by statute).

At the trial before Rolfe, B., at the last Summer Assizes at Liverpool, it appeared that the action was brought to recover the value of four half-barrels, sold under a distress for the rent of a public-house, where they had been deposited by the plaintiff, a brewer at Salford, until the beer which they contained should have been consumed. At the time they were distrained three of them were empty and one full; all of them being marked "Benjamin Joule, Salford." It was proved to be a custom in the trade, that whenever beer is purchased by a publican, the barrels are supplied without any charge being made for them by the brewer, on whom devolves all liability arising from any defect in the casks; and that it was usual to call for the empty casks at certain periods, which were always returned to the brewery. According to the evidence of several witnesses who were well acquainted with the trade, it would be very injurious, both to the brewing and retail business, if publicans were obliged to furnish their own casks, or to purchase them from the brewer. The jury found, that if the distress were allowed, the trade of a brewer could not be carried on; and under the direction of the learned Judge, the plaintiff had a verdict with 40s. damages, leave

(a) See now the stat. 4 & 5 Vict. c. 51, whereby it is enacted, that all lands and grounds in the exclusive occupation of one or more persons for agricultural purposes, shall be deemed inclosed lands or grounds within the meaning of the 3 Geo. 4, c. 126, although not separated from any adjoining lands, or from any highway, by any fence or other inclosure.

being reserved to move to enter a nonsuit. Wightman having, in Michaelmas Term last, obtained a rule accordingly,

Cresswell, Cowling, and Hoggins now shewed cause. This case is within the principle of the authorities in which it has been held that the goods were exempted for the benefit of trade. That principle is, that where the goods are delivered to a person in the way of his trade, such delivery [451] being necessary, they are exempted from distress, such exemption being for the public good. This case is distinguishable from *Muspratt v. Gregory* (1 M. & W. 633; S. C. in error, 3 M. & W. 677), because in that case there was no delivery to the trader, and no necessity that there should be any. The exemption does not depend on the question whether the tradesman obtains a lien on the goods or not. In Co. Litt. 47 a. it is said—"Valuable things shall not be distrained for rent for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for rent issuing out of the shop, nor the horse, &c., in the histry, nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a tailor's shop, nor sacks of corn or meal in a mill, nor in a market, nor anything distrained for damage feasant, for it is in the custody of the law, and the like." Amongst the exemptions there mentioned, are not merely goods delivered to a tradesman to be wrought, who would have a lien upon them, but goods in a market-place, where there would be no lien. In *Adams v. Grane* (1 C. & M. 380), goods sent to an auctioneer to be sold on premises occupied by him, were held to be privileged from distress. In that case, Bayley, B., in answer to the argument that the exemption applied only to cases where the party had a lien, says (page 384)—"Suppose I send corn to a mill to be ground on a special contract for payment at the end of six months, could that be distrained? There would be no lien there." If the only objection were that the tradesman had a lien, the party might pay the charge, and take the goods under the distress. The real ground and basis of the exemption is, that it is for the benefit of trade, and for the public convenience. It is so put in Co. Litt., & Gilb. on Distresses, 36. The same principle is laid down in 3 Blac. Comm. 7. And [452] Bayley, J., in *Adams v. Grane* (page 387), says,—“Lord Coke treats of it as being well known; and the principle of exemption, according to him, is, that it is for the benefit of trade. Among other instances put by him, is the instance of ‘goods going to a fair or market.’ Now, why should they be privileged? They are privileged because interest reipublicæ that buyer and seller should be brought together, that a man should have an opportunity of going to some particular place, to which goods might be brought for the purpose of sale.” The present case comes within, and is consistent with, that rule. Here the jury have found that the trade of a brewer could not be carried on without using the casks supplied by the brewer. [Parke, B. Surely the publican could send his own casks.] In the instance of corn sent to a mill to be ground, the miller has nothing to do with the sacks, and they might as well, therefore, be taken back; and yet they are held to be privileged. [Parke, B. All the cases which have been cited are where the person to whom goods are sent has the exemption for his own benefit; but here it is not so. It is the brewer's trade that cannot be carried on.] No; it was proved that neither could be carried on. [Parke, B. The benefit of trade of the person sending the article is immaterial: it is the benefit of the trade of the person to whom it is sent, which is to be considered.] In Com. Dig., Distress (C.), it is said of things which are not distrainable—"Nor any goods delivered to any person in the way of his trade;" for which 1 Salk. 250, is cited. That was the case of *Gisbourn v. Hurst*, where the Court extended the exemption to goods delivered to a person carrying on the business of a carrier to be carried for hire; and the Court said—"for the law has given the exemption in favour of the trader, and not in respect of the carrier." The Court there say, that goods delivered to any person exercising a public trade or employment, to be [453] carried, wrought, or managed in the way of his trade or employment, are for the time under a legal protection, and privileged from distress for rent. The phrase, "to be wrought or managed," is used for the first time in that case; but it was not necessary for the Court to give such a definition. Those words are again used in *Simpson v. Hartopp* (Willes, 514); but the only question there was, whether implements of trade, which are in actual use at the time, were privileged, and the definition was not necessary to the decision. [Parke, B. I believe *Gisbourn v. Hurst* will be found to be the only case where goods are said to be privileged on the ground of benefit to the trade of the

person sending them.] The general principle is, that it is for the benefit of trade in general; but in the instance of the horse sent to the smith's shop, it cannot be said to be for the benefit of all persons, but only of those who keep horses. So in the case of agistment, the grazier only has the benefit. Here there is a direct benefit both to the publican and the brewer. Lord C. B. Comyns draws the conclusion, that the privilege is to extend to "any goods delivered to any person in the way of his trade;" and there is no authority against it. *Francis v. Wyatt* (3 Burr. 1498; 1 Sir W. Bl. 483) may be cited on the other side; but if that case be looked at, it in truth decides nothing at all. The facts do not appear from the pleadings; but it is clear that it was not the ordinary case of sending a carriage to livery, but that of a person taking premises for a year; as was said by Bayley, B., in *Adams v. Grane* (1 C. & M. 381). *Wood v. Clarke* (1 Cr. & J. 484) is also clearly distinguishable from the present case, because there it was not found that the exemption was necessary for the protection of the trade. Here the barrels were delivered to be used by the publican in the way of his trade; it was for the benefit of both parties, and so for the benefit of the trade in general: and the jury have found [454] that it was necessary that such a privilege should exist. In *Muspratt v. Gregory*, the boat being sent to the premises to be loaded with salt, was left there for the owner's convenience, and was not delivered into the custody of the tenant of the premises; and the decision in that case is quite consistent with what has been urged in the present case. [Parke, B. The Judges there said, that they would not extend the principle beyond the cases already decided.] The right of the landlord to distrain the goods of his tenant is an artificial, not a natural right: if the right was originally granted for the public convenience, it ought also to be limited for the protection of trade. In *Gilman v. Elton* (3 B. & B. 84), Richardson, J., in answer to the argument that the goods ought to undergo some alteration in the hands of the trader, says (*ibid.*)—"It is not necessarily so, for a carrier does not operate upon goods, except to carry them; and the very words of the decision in *Gisbourn v. Hurst* include carrying or managing. The advancement of trade equally requires that the goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage:" and he adds, "it would be highly injurious if goods so sent for sale were liable to be distrained for the private debt of the factor." If the trade of a brewer cannot be carried on without sending out his casks to the publican's house, neither can the trade of the publican; it is equally essential to the business of both; it is, therefore, for the convenience of the public weal, and if that is to be protected, this exemption from distress ought to be allowed.

LORD ABINGER, C. B. It is too late at this day to enter into the principles of the law as to the landlord's power to distrain, where the case does not fall within any of the decisions on the subject; it having been determined by the majority of this Court, and afterwards by a Court of error, that the principle of those decisions ought not to be ex-[455]-tended. If a cooper had had the casks in his possession, for the purpose of repairing them in the way of his trade, they would have been exempted from distress. All the cases are analogous to that. But here nothing is to be done to the casks, which are merely left with the publican till they are empty. That is very different from the case of an article left for repair. The case of *Muspratt v. Gregory* was much nearer the present; but there it was said, that the principle of exemption ought not to be carried further. If we were to extend the principle to a case like the present, we should get into too wide a sea; and it is, therefore, better to adhere to the decided cases.

PARKE, B. I am entirely of the same opinion. A landlord has a right to distrain all goods found upon the demised premises, with the exception of certain specified cases, which are not to be extended. *Primâ facie*, every deposit of goods upon the premises where the trade is carried on, would have relation to that trade, and an exemption from distress would, in that view, be for the public good. But to hold all such goods to be exempt, would be establishing a very wide principle; and the case of *Muspratt v. Gregory* having decided that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision. The rule, therefore, must be absolute to enter a nonsuit.

ROLFE, B., concurred.

Rule absolute.

[456] THOMPSON v. GIBSON AND ANOTHER. Exch. of Pleas. Jan. 22, 1841.—Action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October 1838, and, in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought:—Held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable.

[S. C. 9 Dowl. P. C. 717; 10 L. J. Ex. 241, 330; 5 Jur. 390. Applied, *Clarke v. Midland Great Western Railway*, [1895] 2 Ir. R. 294. Referred to, *Bennett v. Bayes*, 1860, 5 H. & N. 391; *Dawson v. Great Northern and City Railway*, [1904] 1 K. B. 282: reversed, [1905] 1 K. B. 260: see further, 8 M. & W. 281.]

This was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was held. The defendants pleaded not guilty. A new trial had been granted; and on the second trial of the cause, before Coltman, J., at the last Assizes for Westmoreland, the defendants' counsel took an objection, that the action could not be maintained. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, though not on their own land, but on that of the corporation of Kendal, (of which they were members), and that it had continued there, obstructing the market, until after the commencement of this action. Lord Lonsdale was the owner of the market in October 1838, and in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought. The defendants contended, that, under these circumstances, they were not responsible for the continuance of the nuisance; that they were distinct persons from the corporation; and that, though they were guilty of erecting the nuisance, they could not be considered as having continued it, because they were not in possession of or interested in the soil on which the building was erected. The learned Judge overruled the objection, but reserved the point.

Dundas having, in Michaelmas Term last, obtained a rule to enter a nonsuit, Cresswell, Alexander, and Cowling, in the same term, shewed cause. The defendants have directed that to be done which the jury have found to be a nuisance. As-[457]-suming that they were acting for themselves, there can be no doubt that they would be responsible for the nuisance; and the case is not altered by the fact, that the defendants were, at the time of the erection of the nuisance, members of a corporate body. That could not affect the plaintiff's right of action against the individuals who have directed the nuisance to be created; as, for a tort the individual is always liable: *Wilson v. Peto* (6 Moore, 47). In *Stone v. Cartwright* (6 T. R. 411), which was an action against the manager of a mine for damage done by the negligence of persons who were employed by him in the service of his principal, it was held, that the principal, or those actually employed, were alone liable. Lawrence, J., there points out the distinction between that case and the present. He says, "If the plaintiff had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case." It must therefore be taken to be, and is, the same as if the defendants had erected this building with their own hands. Now it is clear that an action might have been maintained by the then owner of the market for the immediate injury; but it is said, that though the defendants were guilty of erecting the nuisance, they are not liable for its continuance, because they are not in possession of or interested in the soil on which the nuisance stands. The case of *Rosewell v. Prior* (Salk. 459) is in point as to this objection. There a tenant for years erected a nuisance, and afterwards made an under lease of the premises. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an underlease. It was held, that the action would lie; "for he transferred it with the original wrong, and his demise affirms the continuance of it" In *Some v. Burwisch* (Cro. Jac. 231), it [458] was held, that for a

nuisance erected in the time of the devisor, and continued afterwards, the devisee shall join in the action; for the continuance thereof is a new erection of such nuisance. The defendants, therefore, are liable to the plaintiff as lessee, as for a new nuisance. [Parke, B. The defendants, not being in possession of the soil, have no power to remove the nuisance.] A party cannot excuse the continuance of a wrong by saying that he has no power to remove it. That is the result of the original wrongful act, for which he is responsible.

Dundas, W. H. Watson, and Ramsay, contra. The action is brought for an injury to this market by continuing a building, and not for the erection of a nuisance; but the defendants cannot be liable for an injury they have not committed, nor for the continuance of a building over which they have no control. If they were to remove the building, they would be guilty of a trespass, and liable to an action. If the argument on the other side is to prevail, even the carpenter who did the woodwork of the building will be liable for the continuance of it. In *Wilson v. Peto*, the question was, whether the defendant was a person who could be fixed with the act itself? And in *Stone v. Cartwright*, the defendant was interested in the nuisance. *Rosewell v. Prior* is more fully reported in 12 Mod., 639, where the Court say, that "if the alienee of the land brought an action against the erector, and the erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee." In *Rex v. Pedley* (1 Ad. & Ell. 822; 3 Nev. & M. 627), it was held, that if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being [459] continued or created during the term; but the reason of that decision was, that the landlord had or ought to have reserved a right of entry, for the purpose of preventing the premises from becoming a nuisance; but these defendants have no means whatever of removing this nuisance. They therefore are not liable.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This was an action on the case for continuing a nuisance to the plaintiff's market by a building, which excluded the public from a part of the space on which the market was lawfully held. There was a plea of not guilty, on which the question arises.

A new trial had been already granted in this case. On the second trial, the defendants' counsel took an objection that the action would not lie against them. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but that of the corporation of Kendal, of which corporation they were members, and it had continued there, obstructing the market, until after the commencement of the action. The building was erected in October, 1838. Lord Lonsdale was the owner of the market, and demised it to the plaintiff after that time, namely, in February, 1839; and the market was afterwards obstructed by the building.

It was contended, under these circumstances, that the defendants were not responsible for the continuance of the nuisance; that they were distinct persons from the corporation; and that though they were guilty of erecting, they could not be considered as having continued the nuisance, because they were not in possession of or interested in the soil on which the building was erected.

My Brother Colman overruled this objection, but re-[460]-served the point; and a rule nisi having been granted to enter a nonsuit, and cause shewn, we have now to decide whether the objection was well founded or not; and we are all of opinion it was not. That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable, just as the servant or an individual is if he is actually concerned in erecting a nuisance; *Wilson v. Peto*: and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what other limit can be assigned to their responsibility other than the continuance of the injury itself? Is he, who originally erects a wall by which ancient lights are obstructed, to pay damage for the loss of the light for the first day

only? or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? and if the then owner of the market might have maintained an action against the defendants for the injury to his franchise, for the whole period during which the defendant's act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance: and to that effect is the authority of Roll's Abr., Nuisance, K. 2. "If one is seised of land near a river, and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is surrounded, the lessee shall have an action on the case against him; for though the stoppage was in the time of his lessor, the continuance was a wrongful [461] damage to the lessee, for his land was surrounded." That is the case of *Westburne v. Mordant* (Cro. Eliz. 191): and in like manner, *Penruddock's case* (5 Rep. 100 b.) shews that a feoffee may bring a quod permittat for a nuisance, erected in the time of the feoffor, against him who did the wrong; and an action on the case is a substitute for this old writ. And further, in the case of *Some v. Barwish* (Cro. Jac. 231), it was held that the devisee might sue for a nuisance erected in the time of the devisor, and continued afterwards; for the continuance is as the new erecting of such a nuisance. In the case of *Rosewell v. Prior* (Salk. 459; 12 Mod. 639), which was an action against the defendant, who erected an obstruction to the ancient lights of the plaintiff, and then aliened, Lord Holt lays it down, that "it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages; and here," he says, "the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated." And he adds, "that it shall not be in his power to discharge himself by granting it over." It is true that Lord Holt afterwards says, "that if the alienee of the land brought an action against the erector, and the erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee. Lord Holt, however, does not intimate that the action would not lie; and the authority above cited, as well as the principle, that the assignee or lessee ought to enjoy the estate as fully as the assignor or lessor, and has a similar claim to compensation for the injury during his own time, shews that the action will lie. What is said in this and the other reports of this case as to the assignment of the nuisance affirming the continuance, appears to us to be given by way of additional reason. It was argued, however, that the assignee or lessee was not without remedy: he might abate the [462] nuisance; but that affords no compensation in damages, and may, in some cases, be an expensive remedy; or he might maintain an action against the corporation who receive the rents of the building, or the tenants who occupy as appears by the case of *Rippon v. Bowles* (Cro. Jac. 373); but that case shews that he is not bound to pursue that remedy, but may sue the original wrongdoer. It was also said that the defendants could not now remove the nuisance themselves, without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by shewing their inability to remove it, without exposing themselves to another action. We are therefore of opinion that the action is maintainable, and the rule must be discharged.

Rule discharged.

AMLOT v. EVANS AND OTHERS. Exch. of Pleas. Jan. 23, 1841.—Service of a rule to compute principal and interest on a bill of exchange or promissory note, upon one of several defendants, is sufficient, as service upon one is service upon all.

[S. C. 10 L. J. Ex. 120; 5 Jur. 154.]

Streeten moved to make a rule absolute for computing principal and interest on a promissory note, on an affidavit of service. It appeared that there were four defendants in the action, but the rule had been served upon two only, on which ground the Master had objected to the sufficiency of the affidavit. Streeten contended that the objection was not a valid one, and that it had been so decided in *Figgins v. Ward* (2 C. & M. 424). There, in an action on a promissory note against three defendants, who suffered judgment by default, it was held that service of the rule on one was [463]

service on all; and Bayley, B., said—"By suffering judgment to go by default, the defendants acknowledge a joint cause of action, and therefore, *quoad hoc*, they are partners."

PARKE, B. Yes; that is an authority in point. The service is sufficient, and the rule may be made absolute.

Rule absolute.

EVANS v. MANERO. Exch. of Pleas. Jan. 23, 1841.—A writ of *ca. sa.* was indorsed by mistake for a larger sum than the amount really due, and after the debtor had been taken in execution, the mistake was corrected by a Judge's order:—Held, that the sheriff's claim for poundage must be regulated accordingly, and that he was only entitled to poundage upon the debt really due.

[S. C. 9 Dowl. P. C. 256; 10 L. J. Ex. 209; 5 Jur. 153.]

Debt for sheriff's poundage. The declaration stated, that after the making of a certain act of Parliament, made and passed in the reign of our Lady Elizabeth, late Queen of England, intituled "An act to prevent extortion in sheriffs, under-sheriffs, and bailiffs of franchises or liberties, in cases of execution," and before the commencement of this suit, to wit, on &c., the now defendant sued and prosecuted out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, &c., a certain writ of our Lady the Queen called a *capias ad satisfaciendum*, directed to the sheriffs of London, whereby the sheriffs of London were commanded to take John Reckless the younger, if he should be found in their bailiwick, and him safely keep, so that they should have his body before the Barons of our Lady the Queen's Exchequer at Westminster, immediately after the execution thereof, to satisfy the now defendant as well a certain debt of 172*l.* 5*s.* 10*d.* which the said now defendant then lately, in the borough Court of Liverpool, by the judgment of the said Court, recovered against the said John Reckless, as also 4*l.* 16*s.* 8*d.* which were adjudged to the said now defendant in the said Court for his damages which he had sustained, as well on occasion of detaining the said debt as for his own costs and charges by him about his [464] suit in that behalf expended; whereof the said John Reckless was convicted, as appeared to our said Lady the Queen by the certificate of register of the said borough Court of Liverpool; and on which judgment, in pursuance of the statute in such case made and provided, it was by an order dated the 7th day of May then instant, made by Sir Robert Mounsey Rolfe, one of the Barons of our Lady the Queen's said Court of Exchequer, ordered that a writ or writs of execution might issue out of our said Lady the Queen's Court of Exchequer of Pleas for the amount of such judgment, with costs of and occasioned by the application for the said order, to be taxed by the Master of the said Court of Exchequer, together with the costs of execution, and which said costs of and occasioned by the said application for the said order, were, on &c., taxed and allowed by the said Court, before the barons of our said Lady the Queen's Exchequer at Westminster, at the sum of 3*l.* 7*s.*; and further to satisfy the said now defendant the sum of 3*l.* 7*s.*, together with interest upon the several sums of 172*l.* 5*s.* 10*d.*, 4*l.* 16*s.* 8*d.* and 3*l.* 7*s.*, at the rate of £4 per cent. per annum, from &c., and to have there then that writ. And afterwards, and before the delivery of the said writ to the plaintiffs as hereinafter mentioned, to wit, on &c., the defendant, by a certain indorsement on the said writ, directed and marked on the back of the said writ, that the said sheriffs should take 1732*l.* 9*s.* 6*d.*, and interest thereon, from &c., till paid; that the said writ so indorsed as aforesaid, afterwards, and before the commencement of the suit, to wit, on &c., was delivered to the plaintiffs, who then, and until and after the arrest of the said John Reckless, were sheriffs of the city of London, to be executed in due form of law. And the plaintiffs, being such sheriffs as aforesaid, afterwards, and after the delivery of the said writ to them as aforesaid, and during the continuance of their said shrievalty, and before the commencement of this suit, to [465] wit, on &c., in &c., and within their bailiwick, as such sheriffs as aforesaid, and by virtue and in pursuance and in command of the said writ, they arrested the said John Reckless by his body, and had and detained him in their custody, in due form of law, in execution for the debt and damages aforesaid, according to the exigency of the said writ, and the said indorsement so made thereon as aforesaid: whereby, and by force of the statute in such case made and provided,

the said now defendant became and was liable to pay to the plaintiffs, and an action had accrued to the plaintiffs, as such sheriffs as aforesaid, to demand and have of the said now defendant the sum of 45l. 16s., that is to say, twelve pence of and for every twenty shillings of £100, part of the debt and damages aforesaid, and so marked on the back of the said writ as aforesaid, and sixpence, for every twenty shillings of the residue of the said sum so marked on the back of the said writ, as aforesaid, being over and above the said sum of £100. Breach, that the defendant had not paid the same.

Plea, as to the cause of action in the declaration mentioned, except as to the sum of 6l. 9s. 6d., parcel of the money thereby demanded, the defendant says, that the said judgment recovered by the now defendant in the borough court of Liverpool, mentioned in the writ of *capias ad satisfaciendum* in the declaration in this cause particularly set forth, was so recovered by the now defendant against the said John Reckless, upon and by virtue of an order of the said borough court of Liverpool, made by the said Court, to wit, on &c., and whereby, upon hearing the attorney for the now defendant and the said John Reckless in person, and by consent, it was ordered by the said borough Court that all proceedings in that action should be stayed, and that the plaintiff therein should be at liberty to sign final judgment for the sum of 1724l. 5s. 10d., for the purpose of securing the due and punctual payment of the following promissory notes (the [466] plea then set out three notes, one of which was for £150, and two others for £25 each). And it was thereby also ordered, that any execution to be issued by virtue of that rule should be merely to secure the amount of such of the said promissory notes as should be due at the time of issuing such execution, together with the costs of judgment, officers' fees, and all other incidental charges thereon; nevertheless in case of the bankruptcy or insolvency of the defendant in that action before payment of the said notes, or any or either of them, the plaintiff therein was to be at liberty to prove under the estate of the defendant in that action for the sum of 1724l. 5s. 10d., or so much thereof as should be due at the time of such bankruptcy or insolvency, the said several promissory notes having been accepted by the plaintiff in that action, from the defendant therein, as a composition of the said sum of 1724l. 5s. 10d.; as by the said order, remaining in the said borough court of Liverpool, reference being thereunto had, will fully appear: That at the time of the making of the said order of the said Sir Robert Mounsey Rolfe in the declaration mentioned, and also of the issuing of the said writ of *capias ad satisfaciendum* in the declaration mentioned, the real debt *bonâ fide* due to the now defendant, and for which he the now defendant was entitled to issue execution upon the said judgment amounted to the sum of 150l. 5s. 10d. and no more, together with 4l. 16s. 8d. being the costs of the said judgment, and also the costs of and occasioned by the application for the said order with the costs of execution, which said costs of and occasioned by the said application for the said order were, to wit, on &c. in the said declaration in that behalf mentioned, taxed and allowed at the sum of 3l. 7s., as in the declaration mentioned. But the now defendant in fact saith, that after the issuing of the said writ of execution in the declaration mentioned, and before the delivery thereof to the plaintiffs, as such sheriffs as in the said declaration [467] mentioned, to wit, on &c., in the declaration in that behalf mentioned, the now defendant, by mistake and misapprehension, caused the said indorsement in the declaration mentioned to be made on the said writ, whereby it was directed that the said sheriffs should take 1732l. 9s. 6d. and interest thereon from &c., till paid, whereas the now defendant should and ought by the indorsement to have directed the sheriffs to take 158l. 9s. 6d. and interest thereon from &c., till paid, and no more. And the now defendant further says, that immediately after the arrest of the said J. R. by the said sheriffs under and by virtue of the said writ of execution as in the said declaration mentioned, and whilst the said J. R. was in the custody of the said sheriffs under and by virtue of the said writ, the said mistake in the said indorsement was discovered by the now defendant, whereupon the now defendant then caused such proceedings to be taken by virtue of the said execution in the said action, before the said Sir Robert Mounsey Rolfe, then being one of the Barons of her Majesty's Exchequer, that it was afterwards to wit, on &c. in due manner ordered by the said Sir Robert Mounsey Rolfe, that the now defendant should be at liberty to amend the said indorsement upon the said writ of *capias ad satisfaciendum*, by reducing the sum of 1732l. 9s. 6d. indorsed thereon as aforesaid, to 158l. 9s. 6d.: as by the said order, reference being thereunto had, will more fully appear: which said last mentioned

order is still in full force and effect, and hath not been in any manner reversed, annulled, or vacated. And the now defendant further saith, that afterwards, to wit, on &c., he the now defendant caused the said order to be in due manner served upon the said sheriffs, and also then caused the said indorsement on the said writ to be amended, and the same then was amended, under and by virtue of the said last-mentioned order, that is to say, by reducing the sum of 1732l. 9s. 6d. indorsed on the said writ of execution, to the [468] said sum of 158l. 9s. 6d.; and thereupon, by the said amended indorsement on the said writ of execution, it was directed and marked on the back of the said writ, that the said sheriffs should take 158l. 9s. 6d. and interest thereon from &c., until paid, which said sum of 158l. 9s. 6d. was the real debt *bonâ fide* due and claimed by the now defendant against the said J. R. under and by virtue of the said execution. And the now defendant further saith, that the amendment was so made in the said indorsement on the said writ as aforesaid, to wit, on &c. last aforesaid, during the continuance of the shrievalty of the now plaintiffs, and before the commencement of this suit, and whilst the said J. R. was in the custody of the now plaintiffs as such sheriffs as aforesaid, under and by virtue of the said writ, and that thereupon and thereby the now plaintiffs as such sheriffs as aforesaid detained the said J. R. in their custody, under and by virtue of the said writ, in execution for the monies so mentioned in the said amended indorsement on the said writ, and for no other or greater sum of money. And the defendant in fact saith, that the plaintiffs, so being such sheriffs as aforesaid, were not prejudiced by the said mistake so committed in the said indorsement as aforesaid:—By reason of which said several premises, the now defendant became and was liable to pay the plaintiffs, by force of the statute in such case made and provided, poundage for the said monies so mentioned in the said amended indorsement, and thereby marked and specified on the back of the said writ, that is to say, the sum of 158l. 9s. 6d., and for no other or greater sum, and which said poundage for the said last-mentioned monies amounted to a certain sum of money, to wit, the sum of 6l. 9s. 6d., and was and is the sum of 6l. 9s. 6d. in the introductory part of this plea mentioned. Verification.

General demurrer, and joinder. The point marked for argument on the part of the plaintiffs was, that the plea did not disclose any defence to the claim of poundage on the whole sum marked on the writ.

[469] W. H. Watson, in support of the demurrer. The sheriffs are entitled to poundage upon the sum which was originally indorsed upon the writ. By the stat. 29 Eliz., c. 4, sheriffs are entitled to twelve pence for every twenty shillings where the sum does not exceed £100, and sixpence for every twenty shillings being over and above the sum of £100, that he or they shall levy or extend and deliver in execution, or take the body in execution for, by virtue and force of any extent or execution whatsoever. There can be no doubt that under that statute sheriffs are entitled to poundage upon the whole amount for which the party is taken in execution. In *Com. tit. Viscount* (F. 1), it is said—"If there be execution by *ea. sa.*, the sheriff shall have his fees for the whole debt:" and again, "Though the writ be erroneous, he shall have his fees." The stat. 3 Geo. 1, c. 15, s. 17, after reciting that "it often happens that small sums only are remaining due upon judgments, &c., and nevertheless, upon executing writs of *capias ad satisfaciendum*, the sheriff demands and takes for his fees, poundage for the whole money for which such judgments, &c. are entered," enacts, "that poundage shall in no case be demanded or taken upon executing any writ of *capias ad satisfaciendum*, or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff amounteth unto, which sum the plaintiff shall be and is hereby obliged to mark and specify on the back of such writ, before the same be delivered to the sheriff to be executed." The sheriff is only entitled to poundage, therefore, on the debt really due and claimed by the plaintiff; but the sheriff cannot know what is the amount really and *bonâ fide* due, and it is the plaintiff's duty to indorse that amount on the writ, and the sheriff is bound to levy accordingly. Here a writ is delivered to the sheriffs, indorsed with the amount of the judgment, which they cannot dispute; and it is no answer to say that a mistake was made [470] in the indorsement. In *Earle v. Plummer* (Salk. 332), it was expressly held, that if a writ be delivered to the sheriff, and he executes it, he shall have his fees though the writ be erroneous. That shews that although the plaintiff has committed an error, he cannot set it up as an answer, but must pay the fees. So if a sheriff levy under a *fi. fa.*, he is entitled to

his poundage, though the parties compromise before any of the goods are sold; *Alchin v. Wells* (5 T. R. 470). In *Rawstorne v. Wilkinson* (4 M. & Selw. 256), where the sheriff levied under a *fi. fa.* and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, he paid it back with the assent of the plaintiff; it was held that his remedy by action of debt against the plaintiff for his poundage was not taken away. That case is in point, and is a strong authority in favour of the plaintiffs. Here the effect of the Judge's order was to set aside the execution *pro tanto*; but still the sheriff is entitled to his poundage for the sum which was indorsed upon the writ which he has executed.

Martin, *contra*. The right of the sheriff to poundage arises from no contract with the party, but from the execution of his duty as sheriff, and the statute provides the compensation which he is to have for the risk incurred. In the event of an escape, the sheriff would only be liable for the amount really due from the defendant in the original action, and not for the sum erroneously indorsed upon the writ. The remedy by action of debt for an escape was given by the statutes of Westminster 2, 13 Edw. 1, c. 11, and 1 Ric. 2, c. 12; and in *Bonafous v. Walker* (2 T. R. 162), Buller, J., says—"The sense of these statutes is, that the party who suffers by the escape shall have the same remedy against the gaoler which he had against the debtor. But he cannot [471] recover more than he could have recovered against such original debtor; and the debtor in this case would have been entitled to be discharged on paying what was really due." The cases cited for the plaintiffs are not applicable. *Earle v. Plummer* was the case of an irregular writ, and the sheriff would be entitled to his poundage, because he would be liable in the event of an escape, unless the writ was set aside for irregularity, as he could not say, in an action brought against him for an escape, that the writ was void. In *Alchin v. Wells*, the sheriff had incurred a responsibility by making the levy, and the subsequent agreement between the parties could not deprive him of his poundage, which he had become entitled to for that responsibility. So also, in *Rawstorne v. Wilkinson*, the judgment and execution were set aside for irregularity; but the sheriff had incurred a responsibility, and it was just that he should receive his remuneration. But in the present case the sheriffs never incurred any responsibility beyond the sum of 158l. 9s. 6d., the amount really remaining due. The stat. 3 Geo. 1, c. 15, s. 17, is conclusive in favour of the defendant; for it limits the right to poundage to the debt really and *bonâ fide* due. In the case where a judgment is signed for the penalty of a bond conditioned for the payment of a smaller sum, the sheriff is not entitled to poundage upon the amount of the penalty, but upon the sum really due. [Parke, B. By the statute, the plaintiff is to mark on the back of the writ the sum really due; and if the sheriff takes poundage on a greater sum, he is liable to extortion. Suppose the plaintiff directs the amount of the penalty to be levied, is not the sheriff to do so? What is there to guide the sheriff but the indorsement? According to your argument, the sheriff would be liable for extortion.] It is not necessary to contend for that. The case of a sheriff coming to insist upon a demand to which he is not entitled, is different from that of a party seeking to make the sheriff liable for extortion by reason of a mistake in the indorsement on the writ. [472] [Parke, B. The meaning of the statute is, that the amount to which the sheriff is entitled is to be measured by the sum really due; and the sheriff can only know what is due by the indorsement. Lord Abinger, C. B. Suppose the plaintiff in an action obtained judgment for a certain sum, and by mistake indorsed a larger sum on the writ of execution; in an action for an escape, he would have to set forth the judgment, and could not recover more than the amount of the judgment. Or suppose the judgment by mistake to have been entered up for more than was due or recovered at the trial, and execution was issued for that amount, and afterwards the plaintiff applied to the Court and corrected the error by reducing the amount, in an action against the sheriff for an escape, he surely would be liable only for the amount really due.]

Watson, in reply. Take the case as it stood on the day of the arrest in execution, and suppose the defendant in the action had escaped the day after, and the plaintiff had brought his action against the sheriffs on that day, the sheriffs would have had no means of examining the correctness of the judgment or indorsement on the writ, and must have had judgment against them for the amount indorsed on the writ; and they are therefore entitled to their poundage upon the sum directed to be levied. If indeed the amount indorsed upon the writ were more than the amount of the judgment, the sheriffs would only be entitled to poundage upon the amount of the judgment; but in this case there is a judgment for the whole amount indorsed upon the writ.

The sheriffs were bound to obey the writ, and to execute it according to its terms. They could not come to the Court to alter the indorsement by the judgment, which would be conclusive against them. In an action for an escape, the declaration sets out the judgment and the writ delivered to the sheriff; and if the judgment and the writ correspond therewith, they would be conclusive against [473] him. The defendant might shew that less was due, but the sheriff has no right to do so. The right to poundage arises on the making of the arrest, and cannot be affected by anything which takes place afterwards.

LORD ABINGER, C. B. I have always thought that where the sheriff is charged in debt for an escape, he stands in the same situation as the defendant in the original action; and if so, he is entitled to all the equities which the latter would have had against the plaintiff, and may shew the real merits of the case, and to what extent the defendant was liable. Then his right to poundage is to be measured by his liability. The Court, however, will take time to consider.

PARKE, B. I have some difficulty in saying that, in an action for an escape, the plaintiff is not entitled to recover the amount of the judgment as originally indorsed upon the writ. No doubt the Court would exercise an equitable jurisdiction over the matter, and the sheriff might shew that part of the debt had been paid, but that is entirely a collateral proceeding.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B. We have considered this case, and are of opinion that the sheriffs are not entitled to poundage on the sum originally indorsed upon the ca. sa. It appears that the indorsement on the writ was, by mistake, of a greater sum than the amount really due; and the plaintiffs claim poundage in respect of the sum so indorsed. Now, by the statute 3 Geo. 1, c. 15, s. 17, it is enacted, "that poundage shall in no case be demanded or taken upon execution of any writ of capias ad satisfaciendum, &c., or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt bona fide due and claimed by the plaintiff amounteth [474] unto, which sum the plaintiff shall be and is hereby obliged to mark and specify on the back of such writ before the same be delivered to the sheriff to be executed." The claim of the sheriff for poundage is plainly limited to an amount calculated with reference to the sum really due; and although the amount actually indorsed may, prima facie, be the basis of that calculation, yet if an indorsement be made by mistake, and that mistake be corrected, the sheriff's claim must be regulated accordingly.

Judgment for the defendant.

LAIRD v. PIM AND ANOTHER. Exch. of Pleas Jan. 18, 20, 1841.—Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract.—In assumpsit by the vendor against the purchasers of land, the declaration stated, that in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same. Averment, that although the plaintiff had allowed the defendants to enter into possession of the lands, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing; yet the defendants did not regard their said promise, and did not pay the plaintiff the purchase-money, or any part thereof. Plea, that no conveyance had ever been made or executed to the defendants:—Held, on general demurrer, that the plea was bad, and the declaration good.—Quære, whether the declaration would have been sufficient on special demurrer.

[S. C. 8 Dowl. P. C. 860; 10 L. J. Ex. 259. Distinguished, *Yates v. Gardiner*, 1851, 20 L. J. Ex. 327. Applied, *East London Union v. The Metropolitan Railway*, L. R. 4 Ex. 310. Referred to, *Leader v. Tol-Heutley*, [1891] W. N. 38.]

Assumpsit. The first count of the declaration stated, that on the 6th day of April, 1836, in consideration that the plaintiff, at the request of the defendants, would

sell them a lot or parcel of land, situated between Bidston Road and Cleveland Street, in the county of Chester, at the price or rate of 7s. 6d. by the square yard, to be paid as soon as the conveyance thereof should be completed, with interest thenceforth on such purchase-money, at the rate of £5 per cent. by the year, until paid, the defendants to have the liberty of making bricks and erecting steam-engines on such lot or parcel of land, the defendants promised the plaintiff to purchase the said lot or parcel of land of the plaintiff, and to pay him for the same at the rate or price and on the terms aforesaid. And the plain-[475]-tiff says, that although the plaintiff, relying on the said promise of the defendants, did, within a short and reasonable time from the making of the said promise, to wit, on the day and year aforesaid, allow and permit the defendants to enter into and take possession of the said lot or parcel of land, and the defendants did, to wit, then, take such possession thereof, and have continued in such possession for a long time, to wit, hitherto: and although the plaintiff, from the time of making the said promise to the commencement of this suit, has performed and fulfilled every thing on his part to be performed and fulfilled, and has always been ready and willing to make appear to the defendants a good and sufficient title in, and right and power to convey, the said lot or parcel of land in fee-simple, together with the liberty aforesaid, and to execute and complete a conveyance thereof in fee-simple to the defendants, together with the liberty aforesaid; and after the expiration of a reasonable time, and before the commencement of this suit, to wit, on the 28th of October 1837, offered the defendants to execute and complete a conveyance thereof, together with the liberty aforesaid, to the defendants, and would then have tendered to the defendants a draft of a proper conveyance, and also a proper conveyance, for the purpose aforesaid, but that the defendants then discharged the plaintiff from so doing; of all which the defendants, from the time of making the said promise, have had notice: yet the defendants did not regard their said promise, and did not nor would pay the plaintiff the said purchase-money for the said lot or parcel of land, together with the said liberty, or any part thereof, at or after the expiration of the said reasonable time as aforesaid, or at any other time, but have wholly neglected and refused so to do; and the plaintiff has been and is wholly deprived of the said purchase-money, amounting to a large sum, to wit, £125, together with interest thereon, to which he ought and otherwise would have been entitled as aforesaid. [476] There were also counts for use and occupation, goods sold and delivered, and upon an account stated.

The defendants pleaded non assumpserunt, and several special pleas, of which the sixth plea (to the first count) was, that no conveyance of the said lot or parcel of land, or any part thereof, has ever been made or executed or completed to them the defendants, or either of them, or to any person on their behalf, or in any manner whatsoever. Verification.

The plaintiff took issue on all the pleas except the above, to which he demurred generally, and the defendants joined in demurrer. The point stated for argument by the plaintiff was as follows:—The plaintiff contends that the execution of a conveyance was not a condition precedent to his maintaining this action, and that if it were it has been waived, and that consequently the plea demurred to is bad. The defendants' points were as follows:—The defendants will contend that the plea is a sufficient answer to the first count of the declaration; and they will also contend that the first count is insufficient, inasmuch as it shews no sufficient breach of the contract stated in that count; and also that the statement in the declaration, that the plaintiff offered to execute a conveyance, and would have tendered one, but that the defendants dispensed with it, is no sufficient ground for alleging as a breach that the defendants did not pay the purchase-money; and that upon the promise stated in the first count, the non-payment of the purchase-money is no breach of contract as alleged in that count; and that the breach alleged in the first count, and the claim to damages as therein stated, are not warranted by the premises or allegations in that count.

The cause came on for trial upon the issues in fact, before Rolfe, B., at the last Liverpool assizes, when it appeared that the defendants (who were directors of a company called the Saw-Mills' and Timber Company, for which the purchase [477] was made) had been put into possession of the land under the agreement, and had taken therefrom and sold a quantity of brick clay. They subsequently refused altogether to complete the purchase, upon which the plaintiff brought this action, for the recovery of the purchase money, and for the value of the clay so taken and sold. It was contended for the plaintiff at the trial, that the amount of the purchase-money

agreed on, with interest, was the proper measure of damages on the first count. For the defendants it was insisted, that the plaintiff could not be entitled to recover the purchase-money, as the land had never been conveyed, and the plaintiff still remained the owner of it as before the agreement for sale to the defendants. The learned Judge was of opinion that the plaintiff could not recover the whole purchase-money, but was entitled, on the first count, to such damages only as had resulted from the defendants' breach of their contract: and a verdict was accordingly taken for the plaintiff for £750, made up as follows:—£680 for interest on the purchase-money up to the commencement of the action, and £70 for the value of the brick clay. In last Michaelmas Term (Nov. 3rd),

Cresswell moved, pursuant to leave reserved by the learned Judge, for a rule to shew cause why the damages should not be increased by the sum of £4125, the amount of the purchase-money. The plaintiff is entitled to recover the full amount of the purchase-money. This is a contract for a specific plot of land, to which the plaintiff has shewn a good title, and which he has offered to convey to the defendants in pursuance of the contract. He has a right to consider them as the owners, and to insist on payment of the price. Sir E. Sugden (1 Vend. & P., 10th ed. 374) appears to consider, that a vendor may recover the purchase-money without having executed a conveyance, where the purchaser has discharged [478] him from so doing. [Alderson, B. It is like the case of goods bargained and sold, and an action brought for not accepting them, in which case the damages sustained by the breach of contract can alone be recovered.] There the plaintiff treats the goods as still his own. [Parke, B. So here, the land is still yours at law: you might bring ejectment for it immediately after this verdict.] In *Hawkins v. Kemp* (3 East, 410), which was an action by the vendors of an estate against the vendee, who had refused to prepare any conveyance as required by the conditions of sale, or to pay the remainder of the purchase-money beyond the deposit, a verdict was given for the whole residue of the purchase-money. The defendants may afterwards go into equity to compel a conveyance.

PARKE, B. The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again. The direction of my Brother Rolfe, therefore, was quite correct.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule refused.

The demurrer was now argued by

Cowling, for the plaintiff. The execution of a convey-[479]-ance is not a condition precedent to the plaintiff's recovering in this action, and if it were, it has been waived by the defendants. The plea is clearly bad. It states no more than is admitted on the face of the declaration; it amounts in effect only to a demurrer to the first count. But it will be argued that that count is bad. It is submitted, however, that although it may be somewhat more diffuse than was necessary, it is good. It states the contract—the possession taken by the defendants—the plaintiff's readiness to execute a conveyance—the expiration of a reasonable time—and that the plaintiff offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. There is nothing to take this case out of the ordinary rule, that the purchaser is bound to prepare the conveyance; but nevertheless, the plaintiff has offered a conveyance here, but the defendants have dispensed with it. That condition precedent, if it be one, has therefore been waived. Then it is said the plaintiff is not entitled to recover the whole purchase-money; but the declaration does not seek to do so: the breach is only for the damages sustained by the non-performance of the contract. But even if the declaration were wrong in seeking to recover the whole purchase-money, that would be no bar to the action; but the defendants undertake by this plea to say something in bar of the whole action. [He was then stopped by the Court.]

Wightman, for the defendants. The first count of the declaration is bad. The

breach alleged does not properly follow from the premises stated. The count alleges that, in consideration that the plaintiff, at the request of the defendants, would sell them a lot or parcel of land, &c. at the price of 7s. 6d. the square yard, to be paid as soon as the conveyance thereof should be completed, &c., the defendants promised the plaintiff to purchase the land of [480] him, and to pay him for the same at the rate or price and on the terms aforesaid: and the breach assigned is, that the defendants did not regard their promise, and did not nor would pay the plaintiff the said purchase-money, &c. There is no good breach, therefore, unless the defendants were bound under the circumstances to pay the purchase-money; if they were not it is a bad breach, and the plaintiff cannot recover in respect of it. The rule as to dependent covenants is thus laid down in the notes to the case of *Portage v. Cole* (1 Saund. 320 a., n. (4)) :—"It is justly observed, that covenants &c., are to be construed to be dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention." The following rules are then enunciated :—1. "If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance of that which is the consideration of the money or other act." A vendor, therefore, may declare for non-payment of the purchase-money on a certain day, although no conveyance have been executed. "But, 2, when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c., before performance." The present case falls within the latter rule. It does not appear here, that if the plaintiff were to recover the purchase-money, the defendants would have any remedy against him for the land; they only stipulate to pay as [481] soon as the conveyance shall be completed. [Parke, B. The conveyance and the payment are to be contemporaneous acts.] A tender of the conveyance is not sufficient; it must be executed before payment can be enforced. So, "if two men should agree, one that the other should have his horse, the other that he will pay £10 for him, no action lies for the money till the horse be delivered:" *Thorpe v. Thorpe* (1 Salk. 171; 1d. Raym. 662). [Parke, B., referred to *Knight v. Keech* (Skin. 344).] It does not appear here that there were any mutual remedies, or, if there were, that the defendants intended to rely upon them: they stipulated to pay their money only when the purchase was completed; and although they may have subjected themselves to an action for damages, they are not liable to this action until after the execution of the conveyance. The plaintiff has therefore mistaken his remedy; he should have declared merely for damages for the non-completion of the contract, whereas here his only breach is the non-payment of the purchase-money, which, on this statement, he is not entitled to: *Warn v. Bickford* (7 Price, 550), *Phillips v. Fielding* (2 H. Bl. 123).

The Court then called on

Cowling to proceed with his argument. In the first place, the count does not claim to recover the whole purchase-money. The breach, it is true, states that the defendants did not nor would pay the plaintiff the said purchase-money, or any part thereof, and that the plaintiff has been and is wholly deprived of it. But it would have been sufficient if it had alleged merely, that the defendants did not regard their said promise, and then concluded to the damage of the plaintiff, &c. The special damage alleged cannot be traversed or demurred to, and the plaintiff may [482] always recover for the damage properly alleged. Under that form of breach, the plaintiff might have recovered all that he has actually recovered in this action; and upon this demurrer, (the plea being to the whole count), the only question is, whether the plaintiff is entitled to recover anything. *Jones v. Barkley* (2 Dougl. 684) is an express authority for the plaintiff. There it was agreed that on the plaintiffs, who were assignees of a bankrupt, assigning the equity of redemption in certain Bank Stock to L., a mortgagee, and executing to him a general release, the defendant should, four months after the allowance of the bankrupt's certificate, pay a certain sum to the plaintiffs for the benefit of the creditors. The declaration stated, that the plaintiffs had at all times since the agreement been ready and willing, and at the expiration of

the four months, viz. on &c., offered to assign the equity of redemption to L., and to execute a general release, and did then and there tender to the defendant a draft of such assignment and release to L., for the defendant's approbation, and did then and there offer to execute and deliver, and would have executed and delivered to the defendant, such assignment and release, but that the defendant then and there absolutely discharged the plaintiffs from executing the same, or any assignment or release whatever: and it was held, on demurrer, that the plaintiffs might maintain their action for the non-payment of the money by the defendant: on the ground, that where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. *Glazebrook v. Woodrow* (8 T. R. 366), *Goodisson v. Nunn* (4 T. R. 761), and *Martin v. Smith* (6 East, 555), are authorities to the same effect. [Parke, B. [483] Your argument is, that nothing remains to be done which is beneficial to the plaintiff, but the payment of the money.] Yes; the plaintiff has perhaps even done more than was necessary. In *Glazebrook v. Woodrow*, Le Blanc, J., says—"The payment is the consideration for the conveyance, and cannot be enforced till that be made, or at least offered to be made, by the plaintiff." Here more than that is shewn to have been done.

Wightman. Unless the defendants are bound to pay the purchase-money, no damages can be recovered for the non-payment of it: the plaintiff, therefore, must shew not only that the defendants did not pay, but also that they were bound to pay. The cases cited on the other side are distinguishable, and fall within the first rule cited from the note to *Pordage v. Cole*. In all of them, the conveyance was to be executed, and payment to be made, on a certain day; and when the plaintiff had done all that it was incumbent upon him to do on that day, the non-payment was a breach of contract on the part of the defendant. But here the time for payment has not yet arrived. [Parke, B. In *Jones v. Barkley*, the payment depended on the previous act of assignment, as here of conveyance.] There was in that case a fixed day appointed: the defendant was not bound to pay until that day, although all the conditions precedent had been performed by the plaintiffs; but on the other hand, he was bound to pay on that day, unless he could shew good cause to the contrary. [Lord Abinger, C. B. The day was material until the four months had elapsed, but not afterwards. Parke, B. After the expiration of the four months, *Jones v. Barkley* became identical with the present case; the money was then to be paid simply on the execution of the assignment. Lord Mansfield says, "The question is, whether there was a sufficient performance. The party must shew he was ready; but if the other stops him on the ground of an intention [484] not to perform his part, it is not necessary for the first to go farther, and do a nugatory act."] But here the money is not to be paid until after the completion of the conveyance. True, it is by the defendants' default that it is not completed, and they may be liable in damages for that default; but not for non-payment of the money, until the time for payment of it has actually arrived. The case falls entirely within the rule laid down by Lord Holt in *Thorpe v. Thorpe*. Then as to the breach, it is clear that it must be taken to be contained in the express allegation that the defendants did not pay the purchase-money after a reasonable time. Suppose the Court held that, on this declaration, the plaintiff might recover the whole purchase-money; what counter-remedy have the defendants? Mutual promises are not even alleged. [Lord Abinger, C. B. It is certainly informal; but does it not amount in substance to a complaint against the defendants for not completing the purchase?] Assuming it to be so, still that does not entitle the plaintiffs to recover the purchase-money: but the non-completion of the purchase is not assigned as a breach, but is stated before the allegation of the breach.

LORD ABINGER, C. B. I think that the breach is informally alleged, and that the words, "that the defendants did not regard their said promise," are not sufficient to constitute a good breach, so as to cure the defect; but the objection, as it arises on general demurrer, cannot prevail. With regard to the averment of the plaintiff's being ready and willing, and having offered, to execute a conveyance, the case of *Jones v. Barkley* appears to be an express authority, and must govern the present case. The averment is, that the plaintiff offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. That, coupled with the other allegations in the declaration, is substantially the same as if

it had been averred that the [485] defendants had refused to execute a conveyance actually tendered to them. Our judgment must therefore be for the plaintiff.

PARKE, B. I have had considerable doubt on this case in the course of the argument, but I have at length arrived at the same conclusion as that stated by my Lord. This declaration is certainly informally drawn, but I think it is sufficient on general demurrer, upon the principle laid down in *Jones v. Barkley*. Upon the facts alleged in this declaration, the plaintiff is substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him. The distinction which it has been attempted to draw between this case and *Jones v. Barkley*, is no distinction at all; it proceeds altogether on the ground, that there two contemporaneous acts were to be done on a particular day: but the case is just the same whether two contemporaneous acts are to be done at an indefinite time, or on a specified day. The only distinction is, that in that case one simple act was to be done by the plaintiffs, which the defendant discharged them from doing; here, what the plaintiff has to do is somewhat more complicated; first he is to make a good title, then the defendants are to prepare the conveyance, and the plaintiff to execute it; and the defendants having discharged him from doing that, it is the same as if it had been done. According to *Jones v. Barkley*, therefore, the plaintiff is in the same situation as if he had performed all his part of the agreement; that is, as if he had perfected a conveyance. That is the conclusion to which I have at length arrived, and to which, perhaps, I should not have come but for the case of *Jones v. Barkley*. This is all on [486] general demurrer; had the question arisen on special demurrer, I doubt whether I should have come to the same conclusion.

GURNEY, B. and ROLFE, B. concurred.

Judgment for the plaintiff.(a)

PALMER AND ANOTHER v. GOODEN AND OTHERS. Exch. of Pleas. Jan. 25, 1841.

—Plea, to an action of covenant for rent due for turnpike tolls, that before it became due, the trustees, on &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c. from thence hitherto. Replication, that the trustees did not enter into or upon the said part of the tolls, or eject, &c. the defendant from the possession thereof, modo et formâ:—Held bad on special demurrer, as putting in issue not only the expulsion, which was the only material allegation of the plea, but also the entry, which was immaterial.

[S. C. 9 Dowl. P. C. 248; 10 L. J. Ex. 135: reversed, 8 M. & W. 890.]

Covenant, by the trustees of the Honiton turnpike-road, for rent due for turnpike-tolls demised to the defendants, and payable by certain monthly payments. Breach, the non-payment of five such monthly payments. Second plea, as to the sum of &c., parcel &c.; actionem non, because before the said sum of &c. became due, and after the making of the said indenture, to wit, on &c., the said trustees in the said indenture and in the declaration mentioned, with force and arms &c., entered into and upon a certain part or portion of the said demised tolls, that is to say, &c. [setting out certain of the tolls], and then ejected, expelled, put out, and removed the defendant, Robert Gooden, from the possession thereof, and kept and continued him so ejected, expelled, put out, and removed, from thence hitherto. Verification. There was also a third plea, differing from the second only in stating that the tolls from which the defendant was evicted, were certain tolls on lime use for agricultural purposes.

Replication, that the said trustees did not enter into or upon the said part or portion of the said demised tolls, or eject, expel, put out, or remove the defendant, Robert Gooden, from the possession thereof, modo et formâ.

(a) See *Poole v. Hill*, 6 M. & W. 835.

Special demurrer, assigning for cause, that the replication puts in issue the entry, which is an immaterial fact, as well as the expulsion, which is the only material fact [487] alleged in the plea; that it puts in issue two facts, whereas it ought to put in issue one only, &c.

Cowling, in support of the demurrer. The replication is bad. The traverse ought to have been confined to the substantial allegation of the plea, namely, the eviction, whereas it comprehends also the immaterial fact of the entry: *Hodgskin v. Queenborough* (Willes, 129), *Bushell v. Lechmore* (Lord Raym. 369). There may be an eviction without an entry, and the former is the only material part of the plea. In Vin. Abr. Disseisin (C. 5), it is said,—“If a man hath a house, and locks it and departs, and another comes to his house and takes the key of the door into his hand, and says that he claims the house to himself in fee, without any entry into the house, this is a disseisin of the house.” And again (id. (C. 7))—“If a man that has a right to enter into lands, in coming towards the land is disturbed from entering, this is a disseisin.” [Parke, B. I do not know how an entry could be made on tolls.] How then can the defendants prove the issue cast upon them by the replication? The averment of entry is a mere inference of law, like that of the entry of a tenant, alleged in covenant or debt for rent, and cannot be traversed. The case resembles that of the traverse of a particular day, where time is not material: *Hawe v. Planner* (1 Saund. 13).

Crowder, contra. The replication does in fact take issue on the only point which was traversable. The entry being wholly immaterial, and indeed impossible, the denial of it does not throw any onus of proof on the defendants; and it is in effect a denial of the eviction only. The cases referred to on the other side only prove that an issue on the eviction only would have been good: but the eviction includes an entry. The averments of payment by the [488] defendant, and acceptance in satisfaction by the plaintiff, may be included in one traverse: *Webb v. Weatherby* (1 Bing. N. C. 502; 1 Scott, 477). [Parke, B. There must have been an acceptance in satisfaction, to constitute a payment in satisfaction: the one proposition is involved in the other.] So here, the eviction involves an entry.

Per Curiam. The plaintiffs have included immaterial matter in their traverse, which they ought not to have done. The replication is contrary to the usual forms of pleading. You had better amend.

Leave to the plaintiffs to amend on payment of costs; otherwise
Judgment for the defendants.(b)

WATKINS v. WAKE. Exch. of Pleas. Jan. 25, 1841.—Debt is maintainable on a bill of exchange by indorsee against his immediate indorser.

[S. C. 9 Dowl. P. C. 248; 10 L. J. Ex. 135.]

Debt upon a bill of exchange for £40, by indorsee against his immediate indorser. General demurrer, and joinder.

G. T. White, in support of the demurrer. Debt is not maintainable against the indorser of a bill of exchange: the only remedy is by assumpsit. The promise of an indorser is not an absolute undertaking to pay the bill, but is in the nature of a collateral engagement only, to pay if the acceptor makes default. And *Randall v. Rigby* (4 M. & W. 130) is an authority to shew that debt cannot be maintained on a collateral covenant. No case has yet decided that debt is maintainable by an indorsee against an indorser of a bill of exchange. In *Bishop v. Young* (2 Bos. & P. 78), it was held that debt [489] would lie by the payee against the maker of a promissory note; and it appeared also, by the declaration, that the note was expressed to be made for value received. So, in *Pridly v. Henbrey* (1 B. & Cr. 674; 3 D. & R. 165), the action was by the drawer against the acceptor of a bill, and it was shewn to have been given for value received in goods. In *Hatch v. Traves* (3 P. & D. 408), also, the action was by payee against maker of a note; and in *Watson v. Kightley*

(b) The plaintiffs declined to amend, and there was judgment for the defendants, which, however, has since been reversed on error in the Exchequer Chamber. See post, vol. 8.

(*ibid.*), by drawer against acceptor of a bill. In all these cases, the party sued was primarily liable. But debt will not lie by the indorsee against the acceptor of a bill: *Cloves v. Williams* (3 Bing. N. C. 868; 5 Scott, 68). Here the defendant is described and sued, not as a drawer, but as an indorser.

Peacock, *contra*. Debt will lie on a bill or note, wherever there is a privity of contract between the parties: *Bishop v. Young*, *Priddy v. Henbrey*. Therefore, on a bill payable to the order of the drawer, debt is maintainable at the suit of the first indorsee against the drawer: *Stratton v. Hill* (3 Price, 253; 2 Chit. 126). That case is expressly in point, because every indorser is in law a new drawer. The action cannot, indeed, be maintained by an indorsee against the acceptor, or against a prior indorser; because, in such case, there is no debt between the parties. But the contract of an indorser with the party to whom he indorses, is not a conditional engagement to pay the acceptor's debt, but a direct contract to pay his own debt, if the acceptor do not pay for him. Any party may sue in debt the party to the bill immediately before himself, who is therefore his debtor on the bill, and against whom the bill would be evidence of an original debt due from him to the party suing, to sustain an *indebitatus* count.

White, in reply. The privity of contract, which is sufficient to enable a party to sue in debt, means a privity [490] independent of any security, and that is the ground upon which, according to the judgment of Bayley, B., in *Priddy v. Henbrey*, the decision in *Bishop v. Young* proceeded. Where the defendant is drawer as well as indorser, he may be liable in debt, because the indorsement does not alter his original liability. But the engagement of the indorser is a merely collateral one, on the default of the acceptor, to take upon himself his debt.

LORD ABINGER, C. B. The case of *Stratton v. Hill* is a sufficient authority to shew, that where the bill has been transferred immediately from the defendant to the plaintiff, debt will lie; and the point having been once determined, I see no reason why we should depart from that decision. The promise of the drawer, as well as of the indorser, is a conditional one to pay on the acceptor's making default; yet that case recognizes the principle that debt lies by the payee against the drawer, and the same principle applies here.

PARKE, B. I have also no doubt that debt is maintainable in this case, by reason of the privity between the parties. The case of *Stratton v. Hill* is a precise authority in favour of the plaintiff; that case is thus explained in the judgment of the Court in *Priddy v. Henbrey*:—"The only ground upon which that decision could properly have proceeded was this, that between the immediate indorser and his indorsee there was privity. The indorsement implied that the indorser was debtor pro tanto to the indorsee, and that the indorsement was a contract by the indorser that that debt should be duly paid." The act of indorsement is an admission of a debt due from the indorser to his indorsee, and also implies a conditional promise to pay that debt if the acceptor do not, and upon having due notice of the dishonour of the bill. On those events occurring, it becomes an absolute debt payable on request. The law [491] is so laid down in *Stratton v. Hill*, and I think that is a just and sound principle.

ALDERSON, B. I am of the same opinion. The circumstances stated in this declaration shew, that, as between these parties, there is a debt of £40.

Judgment for the plaintiff.

CHRISTIE v. PEART. Exch. of Pleas. Jan. 25, 1841.—In an action brought by the public officer of a joint-stock banking copartnership, established under the 7 Geo. 4, c. 46, it is sufficient to state in the declaration, that the plaintiff is the manager of a certain joint-stock copartnership established for the purpose of banking, and that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership, under the provisions of the statute, without stating expressly that he has been named as manager, or that the copartnership has been established, under the provisions of the act.—In assumpsit by the indorsee against the acceptor of a bill of exchange, the declaration, after stating that the bill was not paid, although duly presented on the day when it became due, alleged that the defendant afterwards, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said bill according to the tenor and effect of his said

acceptance:—Held sufficient on special demurrer, as amounting, after the bill became due, to a promise to pay on request.

[S. C. 9 Dowl. P. C. 291 ; 10 L. J. Ex. 195.]

Assumpsit by the plaintiff, as manager of the Eastern Bank of Scotland, against the defendant as acceptor of a bill of exchange, drawn by J. H. L., and indorsed by him to the Banking Company. The declaration commenced thus:—"William Christie, the manager of a certain joint-stock company or copartnership, the shares whereof are transferable, established in Scotland for the purpose of banking, under the name and description of the Eastern Bank of Scotland, which said William Christie hath been duly named and appointed as the nominal plaintiff for and on behalf of the said copartnership, under and according to the provisions of a certain act of Parliament made and passed in the 7 Geo. 4, intituled &c., complains" &c. : and after alleging the acceptance, indorsement, &c., of the bill, the declaration stated, that the bill was not paid, although duly presented on the day when it became due, and that the defendant "afterwards, to wit, on the day and year last aforesaid, promised the said copartnership to pay them the amount of the said bill, according to the tenor and effect of his said acceptance thereof."

[492] Special demurrer, on the grounds,—1st, that it was not alleged in the declaration that the plaintiff was named manager in pursuance of the act of Parliament, or that the society was established in Scotland under the provisions of the act ; and 2ndly, that the promise alleged in the declaration was insensible and repugnant, and would not by law be inferred, inasmuch as it was a promise which it would be impossible to perform, if made, as alleged, after the bill was due.

Bayley, in support of the demurrer, having mentioned the first point, the Court referred to *Spiller v. Johnson* (6 M. & W. 570) as an authority against him. On the second, he urged that the promise was improperly stated ; it ought to have been alleged as a promise by the defendant to pay the bill when he should be thereunto afterwards requested. *Donaldson v. Thompson* (id. 316) appeared to be an authority against the defendant, but that was an action against the maker of a promissory note, which, on the face of it, imports a promise to pay.

Per Curiam. After the dishonour of a bill, it is payable on request ; a promise, therefore, by the acceptor, after the bill is due, to pay it according to the tenor and effect of his acceptance, is a promise to pay it on request. The effect of the acceptance is, after dishonour, to make the bill payable on request.

Judgment for the plaintiff.

[493] MARY ANN JONES, Administratrix of Richard Jones, Deceased v. JOHN WILLIAMS. Exch. of Pleas. Jan. 26, 1841.—A declaration in assumpsit stated, that in consideration that R. J. in his lifetime (of whom the plaintiff was administratrix) would execute a bond to W. J. in the penal sum of £600, the defendant undertook that he would save harmless and indemnify R. J., his executors and administrators, from any loss or damage by reason of his executing the bond : the declaration then averred the execution of the bond by R. J., his death, and the grant of administration to the plaintiff, and that the plaintiff, as administratrix, became liable to pay and satisfy the bond to W. J., of which the defendant had notice ; but that the defendant did not indemnify the plaintiff, as such administratrix, from loss or damage by reason of the execution of the bond ; by means whereof the plaintiff, as administratrix, was called upon, and forced and obliged, to pay, and did pay to W. J. the sum of £310, secured by the bond, and a further sum for the costs of an action against her, &c. Plea, that the plaintiff, as administratrix, was not called upon, or forced or obliged, to pay, nor did she pay to W. J. the monies in the declaration mentioned, nor was she damnified as therein mentioned, in manner and form, &c. The bond, when produced on the trial, appeared to be subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice to be given to pay the same : " and there was no proof of such notice having been given. It appeared, however, that the defendant had notice of the action being commenced against the plaintiff on the bond (which was stayed by a Judge's order on payment of debt and costs), and did not come in to defend it:—Held,

that this was sufficient to entitle the plaintiff to recover on the above issue.—The defendant's undertaking was contained in two letters, addressed to C. J., the brother of the plaintiff's intestate R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join, in a security for the repayment of money to be advanced to the defendant for carrying on a suit in Chancery; and in the second he again urged that they should lend their names for this purpose, and added,—“I should consider it a matter of favour to myself if your brothers will join, and I will see that they come to no harm.” R. J., in consequence, executed the bond in question:—Held, that the letters amounted to an actual guarantee, on which the defendant was liable to the plaintiff, and not merely to a representation, with a view to the parties doing an act against the consequences of which they should afterwards be protected.

[S. C. 10 L. J. Ex. 120. Applied, *Widgery v. Tepper*, 1877, 6 Ch. D. 369.

Referred to, *Taylor v. Roe*, [1894] 1 Ch. 413.]

Assumpsit. The first count of the declaration stated, that heretofore, to wit, on &c., in consideration that the said Richard Jones, in his lifetime, at the request of the defendant, would, by his writing obligatory sealed with his seal, acknowledge himself to be firmly bound to one William Jones in the penal sum of £600, to be paid to the said William Jones, or his certain attorney, executors, administrators, or assigns, he, the defendant, undertook and faithfully promised that he would save harmless and indemnify the said Richard Jones, his executors and administrators, from any loss or damage by reason of his making and executing the said writing obligatory. And the plaintiff in fact saith, that the said Richard Jones, confiding in the said promise of the defendant, did afterwards, to wit, on &c., seal, and as his act and deed deliver to the said William Jones a certain writing obligatory, the date whereof is a certain day, to wit, &c., and did thereby and therein acknowledge himself to be bound to the said William [494] Jones in the penal sum of £600, to be paid to the said William Jones, his executors, administrators, or assigns: and afterwards, to wit, on the 21st day of April, 1839, the said Richard Jones died; after whose death, to wit, on the 10th of May, in the year last aforesaid, administration of and singular the goods, chattels, rights, and credits of the said Richard Jones, deceased, at the time of his death, who died intestate, in due form of law was granted to the plaintiff; and the plaintiff, as administratrix as aforesaid, became liable to pay and satisfy the said writing obligatory to the said William Jones; of which the defendant then, to wit, on &c., had notice: Yet the defendant, not regarding his said promise, did not nor would indemnify or save harmless the plaintiff, as such administratrix, from loss and damage by reason of the making and executing of the said writing obligatory, but wholly neglected and refused so to do; by means and in consequence whereof the plaintiff, as administratrix as aforesaid, afterwards, to wit, on &c., was called upon, and forced and obliged, to pay, and did then pay to the said William Jones, a large sum of money, to wit, the sum of £310, payable and secured to the said William Jones by the said writing obligatory, and also a further large sum, to wit, the sum of £10, as and for the costs and expenses of a certain action commenced and prosecuted by the said William Jones against the plaintiff, as administratrix as aforesaid, in her Majesty's Court of Exchequer, &c., upon and in respect of the said writing obligatory, and for enforcing payment of the money secured thereby; and also she the plaintiff, as administratrix as aforesaid, by means of the premises, was forced and obliged to incur, and did incur, certain costs, charges, and expenses, amounting in the whole to a large sum of money, to wit, the sum of £40, in and about the defence of the said action, and in and about the settling and putting an end to the said action; and the plaintiff, as administratrix as aforesaid, [495] hath been and is damaged to the amount thereof. There was also a count on account stated with the plaintiff as administratrix.

Pleas, first, non assumpsit; secondly, (to the first count) that the plaintiff, as administratrix as aforesaid, was not called upon, or forced or obliged to pay, nor did she pay, to the said William Jones, the said monies in the said first count in that behalf mentioned, nor was the plaintiff, as administratrix as aforesaid, damaged as in the said first count mentioned, in manner and form, &c.; on which issues were joined.

At the trial before Lord Denman, C. J., at the last Montgomeryshire Assizes, the

following letters from the defendant to Charles Jones, a brother of the intestate, were put in to shew the contract of indemnity. They were without date, but were shewn to have been received prior to the advance of the money by William Jones, and to the execution of the bond.

“Llanwchllyn.

“My Dear Sir,—I don't know whether I mentioned to you the result of this business (I mean the £200) after your return from Manchester; I sent the bill of the ‘Old People’ (a) to my brother David, to get him to send it to Hyde (who is his regular agent), which he did; but Hyde declined taking it; I therefore promised to obtain the money before the 1st of June for him, otherwise he would have declined to carry on the suit. I have now had a promise of the money, provided you and your brother will join the ‘Old People’ in the security, to which I hope neither of you will have any objections, as it is not likely that you will ever be called upon to pay the money; for in the event of our succeeding, of which there cannot be a doubt, we shall soon get the money back, and the cause will be now heard in less than a month, if we can muster the funds; [496] otherwise it must of necessity be given up, which would be a great pity, after fighting victoriously thus far. You and I are already in, and I fancy your brothers would not object, under the circumstances, to do the like. May I beg the favour of you to speak to them? as I must determine one way or the other to-day, whether this money will be taken or not, which will only be advanced on you and your brothers joining; and the fate of this well-fought cause now depends upon it.—Yours faithfully,

“J. WILLIAMS.”

“To C. Jones, Esq.

“Vownog, Monday Morning.”

“My dear Sir,—It is a great pity, after spending so much money, and bringing the cause almost to a conclusion, that it should be abandoned, with a certainty of losing the costs already incurred, and the shame of retreating under such circumstances. I only ask your brothers to lend their names on this emergency. I will engage that the ‘Old People’ or the chapel shall make up the money if occasion requires, but I have no doubt I shall procure it from our opponents; however, I should consider it a matter of favour to myself if your brothers will join, and I will see that they come to no harm by it.—Yours faithfully,

“J. WILLIAMS.”

“To C. Jones, Esq.

“Vownog, Monday.”

It was proved that, on the faith of this engagement, the sum of £300 was advanced by William Jones to the defendant, for securing which the bond in question was given to William Jones by the intestate and his two brothers, Charles and Robert Jones. The bond, being put in, appeared to be subject to a condition for repayment by the obligors of the sum secured, with interest, “at or before the expiration of six months’ notice to be given to [497] them to pay the same, without deduction, and without fraud or further delay.” The proceedings in the action brought by William Jones against the plaintiff upon the bond were also put in, and it appeared that it was terminated, after declaration, by the proceedings being stayed on payment of the debt and costs under a Judge’s order. It was not proved that six months’ notice of payment was given to the plaintiff, according to the condition of the bond; but it appeared that the defendant had notice of the action against her, and of the proceedings therein.

On behalf of the defendant, it was objected, first, that the undertaking of the defendant was a promise to answer for the debt or default of another, within the 4th section of the Statute of Frauds, and that no sufficient consideration appeared upon the face of it; secondly, that there was no privity of contract between the defendant and the intestate, Richard Jones, on which the plaintiff could sue, the letters being addressed, and the undertaking in terms given, to Charles Jones personally; thirdly, that the letters did not constitute a guarantee, but merely amounted to a proposal to enter into an engagement in future; and lastly, that, it not

(a) A dissenting congregation, who had engaged in a suit in Chancery, to carry on which the money was wanted.

having been proved that the six months' notice to pay the money secured by the bond, to which by the condition the obligors were entitled, had been given, the allegation in the declaration, that the plaintiff "was called upon, and forced and obliged to pay," which was traversed by the second plea, was not sustained. The Lord Chief Justice overruled all the objections except the last; but, being of opinion that the notice ought to have been proved, on that ground nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the sum of 321l. 17s., the amount of principal, interest, and costs, if the Court should think that proof of the notice was unnecessary.

In Michaelmas Term, Welsby obtained a rule nisi accordingly, contending, first, that the allegation of the [498] plaintiff's liability on the bond was admitted by the plea, which put in issue only the fact of the payment; and secondly, that if not, yet, as against the defendant, the bringing of the action was sufficient *prima facie* evidence of notice. Against this rule,

Jervis, Cowling, and W. Yardley now shewed cause. The nonsuit was right. Notice not having been proved to be given according to the condition of the bond, there was no evidence to sustain the allegation in the declaration, that the plaintiff was called upon, and forced and obliged to pay. It is said that the plea admits the allegation in the declaration, that the plaintiff, as administratrix, became liable to pay the amount secured by the bond, and puts in issue only the fact of the payment being enforced against her. But the only allegation of liability is that the plaintiff became liable as administratrix, by the grant of the letters of administration, in the same way as her intestate; and the question, whether she was duly called upon for payment by a proper notice, and so forced and obliged to pay, remains open on the plea. Now this is not a common money bond, but is subject to a special condition, that the obligors shall repay the amount "at or before the expiration of six months' notice to be given to them to pay the same." That implies that such notice shall be given before putting the bond in suit. Suppose the plaintiff had set out the bond in the declaration; she must have averred that notice was given pursuant to the condition: *Batson v. Spearman* (9 Ad. & E. 298; 3 Per. & D. 77). It is like the case of an action on a bill of exchange against the drawer, in which regular notice of dishonour, through all the parties, must be proved: *Marsh v. Maxwell* (2 Camp. 210, n.). [Lord Abinger, C. B. There the want of notice discharges the party altogether from the debt: here it comes only to a question of time. [499] Alderson, B. The money is to be paid at or before the expiration of six months' notice. Suppose, this action having been defeated for want of notice, another were brought—would not that be evidence of notice?] The condition refers to a notice in the ordinary sense of the word, and assumes that a prior notice shall be given before bringing an action. In Sheppard's Touchstone, 390, it is said,—"If the obligee be sued unjustly, either because he is sued before the money is due, or otherwise, or if the bond in which he is bound be against law, and void, and he suffer himself to be unjustly vexed thereupon, and doth not take advantage of it, it seems this is no breach of the condition of the bond to save harmless."

But secondly, these letters do not constitute a guarantee sufficient to bind the defendant. They amount to no more than a proposal, that, on the doing of some future act, the defendant will enter into a contract of indemnity. Further, there is no contract with the intestate, but only with Charles Jones, to whom the letters are addressed. It is merely a representation to him, with a view that he and his brothers should do something, against the consequences of which they should afterwards be protected.

Alexander, Welsby, and Tomlinson, contra, were stopped by the Court.

LORD ABINGER, C. B. I think there is no ground on which the nonsuit can be sustained. The first objection made at the trial, as to the form of the guarantee, arises on the general issue. We must interpret the two letters together, and read them as if they constituted one document; and when so interpreted, I think it is clear that they disclose an actual binding guarantee. The general issue, therefore, is not sustained. Then as to the second plea: suppose the record had set out the condition of the bond, and the plea had alleged the want of the six months' [500] notice before the bringing of an action: if the fact were so, it could only have protected the defendant from the costs of the former action, because the bringing of the action would itself be notice, and if the plaintiff paid afterwards, that would be a

payment after notice. That is the utmost benefit the defendant could have derived from such a plea. I think, however, that it was not necessary for the plaintiff to prove more than was proved in this case. The defendant had notice of the action, and might have come in and defended it, if there was a good defence by reason of the want of notice. The second issue ought, therefore, to have been found for the plaintiff, and consequently the nonsuit must be set aside.

PARKE, B. I agree that this rule must be made absolute to enter a verdict for the plaintiff. If the nonsuit could have been sustained on any of the grounds taken at the trial, or if the jury ought to have been directed on either of the issues in favour of the defendant, then, no doubt, the rule ought to be discharged. The ground on which the nonsuit proceeded was, that it was necessary for the plaintiff, on the second issue, to prove notice given to her according to the condition of the bond. I think there was sufficient evidence to shew that she was bound to pay according to the terms of the bond. The condition is, that the obligors shall pay the amount secured "at or before the expiration of six months' notice to be given to them to pay the same." Supposing no notice to have been given, it is a question, whether the defendant might not have paid, in order to save the penalty, before notice. I do not rely on the ground taken on moving for this rule, that the liability of the plaintiff is admitted on the record, because I am disposed to think that the averment of her liability, in the declaration, is only as a consequence of the character in which she sues, as administratrix: but I think there was sufficient evidence to shew that the defendant [501] was bound to pay. It was proved that the defendant had notice of the action upon the bond, and he ought to have undertaken the defence. The case is within the authority of *Duffield v. Scott* (3 T. R. 374), where Buller, J., says,—“The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money.” On that ground, I am of opinion that sufficient evidence was given that the defendant was bound to pay, having had notice of the action, and having made no defence to it.

As to the other objection, I quite agree that the letters amount to an absolute guarantee to save the intestate harmless from a security, the nature of which may be explained by parol evidence. There was, therefore, evidence for the plaintiff on both issues. Then *Duffield v. Scott* shews that she is entitled to recover the whole amount.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute accordingly.(b)

[502] COCKER v. TEMPEST. Exch. of Pleas. Jan. 19, 1841.—Where a Judge's order for staying proceedings in an action brought against good faith, was made in Trinity Vacation, and a motion to set aside that order was not made until Michaelmas Term:—Held, that the mere lapse of time was not sufficient to preclude the application, no injury having accrued to the defendant thereby.—Every Court has an unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made whilst the parties were not under the authority of the Court.

[S. C. 9 Dowl. P. C. 306; 10 L. J. Ex. 195.]

Trespass for false imprisonment, against the late sheriff of Yorkshire. It appeared from the affidavits, that, on the 16th of May, 1840, the plaintiff had been taken in execution on a ca. sa., and whilst imprisoned in York Castle, an order for his discharge, purporting to come from the execution creditor, had been sent to the sheriff. It was afterwards suggested that this order was forged, and the sheriff again took the plaintiff into custody. The plaintiff's wife then applied to the sheriff for his discharge,

(b) See *Huntley v. Sanderson*, 1 C. & M. 467.

and was told that the plaintiff would be discharged upon signing a paper, which turned out to be an undertaking not to bring any action against the sheriff. The plaintiff signed the paper, and on the 26th of June, 1840, commenced the present action for false imprisonment. Application was made to Parke, B., in Trinity Vacation, to stay the proceedings; and he made an order accordingly.

W. H. Watson, on the last day of Michaelmas Term, obtained a rule nisi to rescind this order; against which

Cresswell and Humfrey now shewed cause. First, the application is too late. Nothing is shewn by the affidavits to account for the delay in not applying to the Court until the last day of the term subsequent to the order. [Parke, B. That is a mere lapse of time, and not a delay by the parties with a view to benefit themselves; and no injury having accrued to the defendant, we do not see anything to preclude the plaintiff from making the application. Alderson, B. Lapse of time may, under some circumstances, preclude a party from applying to the Court, but those circumstances do not exist in the present case.] As to the other point, there can be no doubt of the power of the Court to stay proceedings, when the justice of the [503] case requires it. It is the constant practice to do so where a second action is brought before the costs of a former suit are paid. It was so done in *Weston v. Withers* (2 T. R. 511), *Moulton v. Bingham* (ibid. n.), *Baldwin v. Richards* (ibid. n.). [Alderson, B. The consolidation rule depends upon the same principle, and also the practice of the Courts, before the late act, as to issuing commissions for examining witnesses. The only doubt appears to be, where the agreement is entered into whilst the parties are not under the authority of the Court.] The only difference in that case is, that the Court requires to see that the agreement was reasonable.

W. H. Watson, in support of the rule. The Court has no jurisdiction to stay proceedings, except in cases where the agreement is made under the authority of the Court. Where the parties are before the Court, it may impose upon them such terms, as to giving security and paying costs, as shall seem reasonable; but there is no power to exclude suitors from the Court. If indeed such power existed, it would be in most cases unnecessary to apply to the Court of Chancery for an injunction. According to the argument on the other side, every inferior Court might exercise the same power.

PARKE, B. There can be no doubt that the Court has power to stay an action which is brought against good faith, but the power is one which requires great discretion in the exercise of it.

ALDERSON, B. The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused [504] for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion; and where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably; but if it be made out that the process of the Court is used against good faith, the Court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a Court of Equity in granting an injunction, is, that the injunction stops proceedings in another Court, this only in the Court in which the proceedings are.

GURNEY, B., and ROLFE, B., concurred.

The rule was ultimately discharged on the merits.

TURQUAND AND OTHERS, Assignees of B. & S. Vanderplank v. MOSEDON. Exch. of Pleas. Jan. 27, 1841.—In trover by the assignees of a bankrupt, the defendant pleaded, that, before the bankruptcy, he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought. Replication, that it was corruptly, and against the form of the statute, &c. agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money £10 per cent.—Held, on special demurrer, that the averment of the contract being against the form of the statute was not a sufficient allegation that it was illegal; and that the replication was bad, for not alleging either that the contract was made before the 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Ex. Div. VII.—28

Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts.

[S. C. 9 Dowl. P. C. 282; 10 L. J. Ex. 196.]

Trover by the assignees of a bankrupt. The defendant pleaded, as to parcel of the goods in the declaration mentioned, that, before the said B. Vanderplank and S. Vanderplank became bankrupts, to wit, on &c., they requested the defendant to lend and advance to them the sum of £150, and then offered to the defendant, as a security for the repayment of the said sum to be so lent and advanced, and interest thereon, to deposit with the said defendant certain goods and chattels, to wit, ninety-six ends of grey cloths, and that the defendant should hold and retain the same until the said sum of £150, so to be lent and advanced, and interest thereon, should be repaid [505] and satisfied; and thereupon, before the said B. Vanderplank and S. Vanderplank became bankrupts, the defendant then contracted and agreed with the said B. Vanderplank and S. Vanderplank to make such loan and advance of £150, upon having the last-mentioned goods and chattels so deposited with the said defendant, as such security for the repayment thereof, and upon the terms that he might hold the said last-mentioned goods and chattels as such security for the repayment of such loan; and the said B. Vanderplank and S. Vanderplank then contracted and agreed with the defendant to borrow of him the defendant the said sum of £150, and to make the said deposit, and permit the defendant to hold the said last-mentioned goods and chattels, as such security as aforesaid for the repayment of the said loan and advance: that the said contract and agreement being so made as aforesaid, afterwards, and before the said B. Vanderplank and S. Vanderplank became bankrupts, the defendant did accordingly, and in pursuance of the said contract and agreement, at the request of the said B. Vanderplank and S. Vanderplank, lend and advance to them the sum of £150; and in consideration thereof, the said B. Vanderplank and S. Vanderplank did then, and before they became bankrupts, in pursuance of the said contract and agreement, deposit with the defendant the said ninety-six ends of grey cloth, for the purpose and under and upon the terms of the said contract and agreement: and thereupon, on the occasion aforesaid, and before the said B. Vanderplank and S. Vanderplank became bankrupts, the said B. Vanderplank and S. Vanderplank then further contracted and agreed with the said defendant, that he should be at liberty to keep absolutely the said last-mentioned goods and chattels, 2s. 8d. per yard, if decided on by the defendant in one month from the date of the said last-mentioned agreement; and that if the said last-mentioned goods and chattels should not be kept so absolutely [506] by the defendant, they the said B. Vanderplank and S. Vanderplank further contracted and agreed to give the defendant interest on the said sum of £150 so lent and advanced as aforesaid, at and after a certain rate then agreed upon between the said defendant and the said B. Vanderplank and S. Vanderplank; and that if the said last-mentioned goods and chattels should be kept so absolutely by the defendant, then that no interest was to be charged: That afterwards, and before the said B. Vanderplank and S. Vanderplank became bankrupts, and whilst they were so possessed of the goods and chattels in the introductory part of this plea mentioned, parcel &c., and before the expiration of one month from the date of the last-mentioned contract and agreement, and before the said defendant had decided to keep the said ninety-six ends of grey cloth, at the rate aforesaid, and whilst the same ends of grey cloth were so in the possession of the said defendant, for the purpose, and under and upon the terms of the said contracts and agreements, it was further contracted and agreed by and between the said defendant and the said B. Vanderplank and S. Vanderplank, and at the request of the said B. Vanderplank and S. Vanderplank, that the said defendant should return and re-deliver to the said B. Vanderplank and S. Vanderplank the said ninety-six ends of grey cloth so deposited with the said defendant as aforesaid; and that, in consideration of such return and redelivery to the said B. Vanderplank and S. Vanderplank, they the said B. Vanderplank and S. Vanderplank should deposit with the said defendant, in exchange for the said ninety-six ends of grey cloth, and in lieu and instead thereof, certain other goods and chattels, to wit, the goods and chattels in the introductory part of this plea mentioned, parcel &c., and that the said defendant should receive, have, hold, and detain the said last-mentioned goods and chattels, parcel &c., in such exchange, lieu, and stead of the said ninety-six ends of grey cloth, for the [507] purpose and under and upon the

terms of the said first-mentioned contracts and agreements. The plea then averred that the defendant returned the ninety-six ends of grey cloth, &c., and that the said B. Vanderplank and S. Vanderplank deposited with him, in lieu thereof, the goods and chattels in the introductory part of the plea mentioned; that the defendant had not decided upon keeping the same, and that the £150 and interest remained unpaid, wherefore the defendant detained the goods, as he lawfully might.

Replication, that, before the lending and advancing of the money in that plea mentioned by the defendant to the said B. Vanderplank and S. Vanderplank, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the defendant and the said B. Vanderplank and S. Vanderplank, that the said B. Vanderplank and S. Vanderplank should pay to the defendant, for such time as the defendant should forbear and give day of payment of the sum of money in the said plea mentioned, a certain sum of money, to wit, at and after the rate of £10 per cent. per annum: and that the said sum or rate so agreed to be given and paid by the said B. Vanderplank and S. Vanderplank to the defendant, for such loan and forbearance as aforesaid, exceeds the rate of £5 for the forbearance of £100 for a year, contrary to the form of the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that although the plaintiffs, by their replication, have confessed the making of the several contracts in the plea mentioned, and the lending and advancing of the money by the said defendant to the said B. Vanderplank and S. Vanderplank, and the deposit of the said goods and chattels by the said B. Vanderplank and S. Vanderplank with the defendant, under and upon the terms of the said contracts, yet the plaintiffs have, in and by their said replication, stated and [508] insisted on, by way of answer and avoidance, matters which, if true, since the passing of a certain act of Parliament made and passed in the 2nd and 3rd years of the reign of her Majesty Queen Victoria, intituled "An act to amend and extend, until the first day of June, 1842, the provisions of an act of the first year of her present Majesty, for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury," have been and are wholly inoperative and insufficient as an avoidance and answer to the said matters in the said plea alleged. And also that if the plaintiffs had intended to insist that the said B. Vanderplank and S. Vanderplank had made no such contracts for the loan and forbearance of money as came within the intention of the said statute, they should have traversed or denied the statement in the plea, that the said B. Vanderplank and S. Vanderplank had made such contracts as are set forth, instead of admitting such facts as they have done; or if the plaintiffs had intended to insist that the same contracts and agreements were not such contracts and agreements as came within the protection of the above-named statute, they should have shewn by their said replication that this present action was commenced before the passing of the said last-mentioned statute, or that the said contracts were made and entered into by and between the said B. Vanderplank and S. Vanderplank, before the passing of the last-mentioned statute, or such other matters as the case might have required.

Wightman, in support of the demurrer. The replication is no answer to the plea. It does not appear from the plea when the contract was made, whether before the passing of the stat. 2 & 3 Viet. c. 37, or since. The plaintiff ought to have shewn it to have occurred before the recent statutes relating to usury. The first of those statutes (the 3 & 4 Will. 4, c. 98) was passed in the year 1833, and by the 7th section [509] of that statute, bills of exchange and promissory notes, payable at or within three months after date, are exempted from the operation of the usury laws. The next statute (the 7 Will. 4 & 1 Viet. c. 80) which was passed in the year 1837, extended the provisions of that section; but no question arises in the present case on either of those statutes, which are applicable only to bills of exchange and promissory notes. The 2 & 3 Viet. c. 37, was passed in the year 1839, to amend and extend the operation of the 7 Will. 4 & 1 Viet. c. 80 to the year 1842; and by the first section of that statute it is enacted, that "no contract for the loan or forbearance of money above the sum of £10 sterling" shall, by reason of any interest taken thereon or secured thereby, be void by reason of any statute or law in force for the prevention of usury, except as to loans made on the security of lands; but there is no security here which brings this case within that exception. [Lord Abinger, C. B. Are not those words confined to such contracts as arise on bills of exchange or promissory

notes?] The section clearly comprehends two distinct cases: the first applies to contracts arising on bills of exchange payable twelve months after date; the other is applied to all contracts where the sum exceeds £10; with respect to bills of exchange there is no such limitation. The replication, therefore, furnishes no answer to the plea; for a contract for the payment of more than £5 per cent. interest on the loan or forbearance of money, is not illegal since the 2 & 3 Vict. c. 37, unless the amount of the loan does not exceed £10, or it is made upon the security of lands. The allegation in the replication, that "it was corruptly, and against the form of the statute in such case made and provided, agreed," &c., is not sufficient. The word "corruptly" is merely a technical expression, and means no more than duly or feloniously would. As to the words "against the form of the statute," the contract may be contrary to the 12 Anne, c. 16, and yet be protected by the 2 & 3 Vict. c. 37. [Parke, B. The [510] question is, what must the plaintiff prove in support of the replication? It would be necessary to prove enough to constitute the offence.] The statute of Anne remains in force, though it has become inoperative in certain cases. The defendant could not, therefore, take issue on the allegation that the agreement was against the form of the statute. The plea discloses a legal contract, and it is for the plaintiff, if he seek to invalidate it, to shew, beyond doubt, that the contract was illegal; for no presumption can be made in favour of illegality. All that the plaintiff in his replication says is, that it is "against the form of the statute," which it may be, and yet the contract may be perfectly legal. [Parke, B. The meaning of that allegation is, that it is against the form of some statute then in force. Now, as the statute of Anne is suspended as to loans above £10, does not that allegation, therefore, point to the 2 & 3 Vict., and in that way disclose the illegality?] The illegality must be stated with certainty, and if in truth this were a contract for a loan not above £10, or if it came within the proviso respecting security on land, the proper form of replication would be so to state, and the illegality would then appear. If the time is material, it lies on the plaintiff to shew it; but it is submitted that the words in the act are general, and extend to all contracts, whenever made.

Petersdorff, *contra*. The defendant ought to have taken issue on the replication, and then the plaintiff must have proved that the contract was made while the statute of Anne was in force, or have relied on some other fact or matter which excepted it from the operation of the stat. 2 & 3 Vict. c. 37. The replication avers that the contract was contrary to a particular statute, and that averment is *prima facie* sufficient; and it lies on the defendant to shew that he is protected by a subsequent statute, if such be the fact. It is an established rule, that where a party seeks by his plea to avail himself of a statute, and there is an exception contained in the enacting clause, he must shew that he does not come within the terms of the exception; but if a proviso be contained in another and distinct clause, he need not do so, but it must be shewn by the opposite party (1 Chit. on Plead. 6th edit. 223). The same rule is applicable to informations before a magistrate, where it is not necessary to negative any matter which is not contained in the particular section relied upon. The proper course would have been to have denied the illegality, and then the question would have arisen whether this was an illegal contract or not. It was sufficient for the plaintiff to allege that the contract was against the form of the statute; and if the defendant meant to rely upon any subsequent statute which rendered it valid, he should have set up that as an answer in his rejoinder. But the replication may be sustained, even if this were a transaction which took place subsequent to the passing of the statute 2 & 3 Vict. c. 37, as that statute was not intended to apply to any other contracts than those on bills of exchange and promissory notes. The words "as aforesaid," contained in the first section, have reference to and must be taken in conjunction with the antecedent matter, which is bills and notes. If the legislature had intended that the clause should apply to other contracts, they would have used words which clearly expressed it. [Alderson, B. How, according to that construction, can you give effect to the proviso at the end of the first clause, that "nothing therein contained shall extend to the loan of any money upon the security of any lands," &c., because that applies to mortgages—clearly not bills of exchange or promissory notes? If your construction be correct, those words would be entirely useless.]

Per Curiam. There must be judgment for the defendant.

Judgment for the defendant.

[512] *BENNISON AND OTHERS v. THELWELL*. Exch. of Pleas. Jan. 27, 1841.—Assumpsit by the indorsee against the acceptor of a bill of exchange, drawn by D. upon the defendant. Plea, that the defendant, by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D. as such agent, a certain sum in full satisfaction and discharge of the causes of action. Replication, that the defendant, by D. his agent, did not pay to the plaintiff, nor the plaintiff accept or receive of D., as such agent, the said sum in full satisfaction and discharge of the promises in the plea mentioned:—Held, on special demurrer that the replication was good.

[S. C. 9 Dowl. P. C. 739 ; 10 L. J. Ex. 192.]

Assumpsit on a bill of exchange drawn by H. & R. Daniel upon and accepted by the defendant, for the sum of £200, payable three months after date, and indorsed by H. & R. Daniel to the plaintiffs.

Plea, that, after the bill became due, and before the commencement of the suit, the defendant, by the said H. & R. Daniel, his agents duly authorized in that behalf, paid to the plaintiffs, and the plaintiffs then accepted and received of the said H. & R. Daniel, as such agents, a large sum of money, amounting to £210, in full satisfaction and discharge of all the promises and causes of action in the declaration mentioned. Verification.

Replication, that the defendant, by the said H. & R. Daniel, did not pay to the plaintiffs, nor did the plaintiffs accept or receive of the said H. & R. Daniel, as such agents, the said sum of money in the said plea mentioned, in full satisfaction and discharge of the promises in the said plea in that behalf mentioned, modo et formâ.

Special demurrer, assigning for causes, that it is ambiguous and uncertain from the said replication, whether the issue raised by the same is, whether the payment in the plea mentioned was made at all, or whether the said H. & R. Daniel were the authorized agents of the defendant in making the same; that the plaintiffs have not taken or tendered any single or material issue out of or upon the said plea of the defendant, but have stated and put in issue, both that the plaintiffs did not accept and receive from the said H. & R. Daniel the said sum of money, and also that the said H. & R. Daniel were not the agents of the defendant; and that the replication is bad, as containing a negative pregnant with an affirmative.

Crompton, in support of the demurrer. Looking at the [513] decision in *Webb v. Weatherby* (1 Bing. N. C. 502 ; 1 Scott, 477), perhaps it cannot be contended that the replication is double, but it is at best ambiguous and uncertain; it is uncertain whether it is intended to deny the authority of H. & R. Daniel, or the receipt of the money by the plaintiffs in satisfaction. It is quite ambiguous whether the one allegation or the other is intended to be denied. This is not a plea on which one general traverse can be taken. In *Myn v. Cole* (Cro. Jac. 87), which was an action of trespass for breaking and entering a house, the defendant pleaded that the plaintiff's daughter licensed him, &c., and that he entered by virtue of that license; to this the plaintiff replied, quod non intravit per licentiam suam. This was considered to be a negative pregnant, and it was held that the plaintiff ought to have traversed either the entry by itself, or the licence by itself, but not both together. So, in *Auberie v. James* (Steph. on Plead. 425, 2nd edit., citing 1 Ventr. 70 ; 1 Sid. 444 ; 2 Keb. 623), where, in trespass for an assault and battery, the defendant justified, that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, the plaintiff moderately chastised him; the plaintiff traversed, with an absque hoe that the defendant moderately chastised him; and the traverse was held to be a negative pregnant, because, whilst it purported to put in issue only the excess, (admitting by implication the chastisement), it did not distinctly make that admission, and was therefore ambiguous. So here, the replication does not expressly admit or deny either of the allegations contained in the plea; it puts them both together, and leaves it uncertain which it intends to deny. The plea is clearly not in excuse, but in discharge, and the plaintiff must take issue on some one allegation in the plea, and cannot be allowed to traverse the plea generally.

[514] Barstow, contra. This defence would have been raised by the plea of the general issue before the new rules, and it was never intended by them to place the parties under any difficulty. It cannot be doubted that the plea is good; and if the

defendant makes the agency a part of his defence, the plaintiff has a right to traverse it. Undoubtedly, the general replication *de injuriâ* would not have been proper; but where several facts are stated in the plea, which form but one entire defence, the whole may be traversed. It would be hard to put the plaintiff in a situation to admit a fact which may or may not be true.

Crompton was heard in reply.

PARKE, B. It would be a good replication to a plea of payment by an agent, that he the defendant did not, by his agent in that behalf, pay, &c. The case of *Webb v. Weatherby* (1 Scott, 477; 1 Bing. N. C. 502) is an authority to shew, that where two matters form but one defence, both may be included in one traverse.

The rest of the Court concurred.

Judgment for the plaintiff.

[515] STOCKEN v. COLLIN. Exch. of Pleas. Jan. 30, 1841.—In an action by the indorsee against the drawer of a bill of exchange, it is enough for the plaintiff to shew, to the satisfaction of the jury, that the letter containing the notice of dishonour, was posted in such time as that, by the due and usual course of the post, it would be delivered on the proper day.—The post-office mark is not conclusive of the time when a letter is posted.

[S. C. 10 L. J. Ex. 227.]

Assumpsit by the indorsee against the drawer of a bill of exchange. Plea, no due notice of dishonour.

At the trial before Rolfe, B., at the Middlesex Sittings in this term, it appeared that the bill on which the action was brought became due on the 27th of April; that the plaintiff, who was then the holder of the bill, wrote a letter to the defendant, who resided in London, giving him notice of the dishonour of the bill, which letter, according to the evidence of the plaintiff's clerk, who posted it, was put into the office before one o'clock on the 28th, so that, in due course of delivery, it would have reached the defendant on that day. The letter was produced in evidence, and bore the post-mark—ten in the forenoon, April 29. The jury found for the plaintiff, but the learned Judge gave the defendant leave to move to enter a nonsuit.

Wordsworth now moved accordingly for a nonsuit, or for a new trial. If the letter had been put into the office on the 28th, the presumption is that it would have been delivered on that day; but the post-office mark was conclusive against the plaintiff, and shewed that the letter was not posted in time for delivery, in due course of post, on the 28th. But further, it was not enough to shew that it was posted on the 28th; the plaintiff was bound to prove that the notice actually reached the defendant on the 28th. The post was only the agent of the plaintiff for the purpose of delivery. He cited *Smith v. Mullett* (2 Camp. 208) and *Hilton v. Fairelough* (id. 633), to shew that if a notice of dishonour is sent through the post, it must be proved to have been put into the office at such an hour that, in the due course of delivery, it would have arrived in time, which he con-[516]-tended could not have been done in the present case, as the post-mark sufficiently proved.

PARKE, B. It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th; the post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jury have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonour into the post, so that in the due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his that delay occurs in the delivery.

ALDERSON, B. The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine, that the post-office is only the agent for the delivery of the notice, were correct, no one could safely avail himself of that mode of transmission. The real question is, whether the party has been guilty of laches.

ROLFE, B., concurred.

Rule refused.

[517] HUMBLE v. LANGSTON. Exch. of Pleas. Jan. 28, 1841.—On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7l. 5s. per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3rd of March, the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied the same day, "we herewith send you transfer of thirty Bristol and Exeter shares in blank." This was accordingly done, and the purchase-money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls:—Held, that under the above circumstances there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.—The declaration, after setting forth the contract, contained an averment that the plaintiff had "always from the time of the sale of the said shares, and the making of the said promise hitherto been ready and willing to transfer the said shares to the defendant, according to the terms of the said contract." This was traversed by plea:—Held, that there was sufficient evidence in the case of such readiness; but that if it had been necessary, in order to support the allegation, to prove the tender of a valid conveyance, it would not have been sufficient.

[S. C. 10 L. J. Ex. 442. Distinguished, *Bayley v. Wilkins*, 1849, 7 C. B. 904; *Walker v. Bartlett*, 1856, 18 C. B. 862. Applied, *Sayles v. Blane*, 1849, 14 Q. B. 207; 6 Railw. Cas. 82. Considered, *Moule v. Garrett*, 1870, L. R. 5 Ex. 137; *Marted v. Paine*, 1871, L. R. 6 Ex. 153. Referred to, *Kellock v. Enthoven*, 1874, L. R. 9 Q. B. 246.]

Assumpsit. The declaration stated, that the plaintiff heretofore, and before and at the times of the sale and of the delivery and of the promise in this count after mentioned, was possessed of divers, to wit, thirty shares, whereof he was registered owner, in a certain railway company called the Bristol and Exeter Railway Company: that the defendant, to wit, on the 20th of February 1838, agreed to buy off and from the plaintiff, and the plaintiff to wit, then, and at the request of the defendant, agreed to sell to the defendant thirty shares in the said Railway Company, at and for a certain price, to wit, the price or sum of 7l. 2s. 6d., to be thereupon paid by the defendant to the plaintiff for each and every of the said shares; and thereupon, in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant the certificates of the said shares so bought as aforesaid, and would transfer the said shares to him on request, he, the defendant, to wit, then promised the plaintiff to accept and receive the same of and from the plaintiff, and to indemnify and save harmless the plaintiff from all subsequent payments and liabilities for or in respect of the shares, the certificates of which he should so deliver as aforesaid, or for or in respect of any call or calls which should or might be thereafter made upon or in respect thereof. And although the plaintiff, to [518] wit, on the day and year aforesaid, delivered to the defendant, in performance of the said contract, the certificates of the said shares whereof he was so possessed, and was such registered owner as aforesaid, and the defendant then accepted and received the same of and from the plaintiff, and then paid him for the same, according to the terms of the said sale: and although the plaintiff hath always, from the time of the sale of the said shares, and the making of the said promise, hitherto, been ready and willing to transfer the said shares to the defendant, according to the terms of the said contract; of all which said several premises the defendant, in a reasonable time in that behalf, to wit, on the day and year aforesaid, and during all the time aforesaid, had notice; and although the plaintiff hath always since the said agreement well and truly performed the terms thereof in all things on his part and behalf to be performed and fulfilled; and although, subsequently to the said sale and to the said delivery, to wit, on the several and respective

days and times hereinafter next mentioned, to wit, on the 14th of May 1838, the 20th of October 1838, the 6th of April 1839, the 6th of August 1839, and the 6th of November 1839, the plaintiff, as such registered owner of the said shares as in this count before mentioned, became and was liable to divers respective calls respectively made, subsequently to the said promise, sale, and delivery, for and in respect of the said shares respectively, amounting altogether to a large sum of money, to wit, to the sum of £2000, and by reason of the premises the plaintiff afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, was forced and obliged to pay, and did then actually pay a large sum, to wit, the sum of £1000, for and in respect of the said calls; and was afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, forced and obliged to pay and give, and did then pay and give divers, to wit, two promissory notes [519] of him, the plaintiff, for divers large sums of money, amounting in the whole to a large sum, to wit, the sum of other £1000, for and in respect of the said calls, which said promissory notes of the plaintiff are still respectively outstanding and unpaid, and which the plaintiff still is liable to pay and discharge; of all which said several premises in this count mentioned, the defendant afterwards, and in a reasonable time in that behalf, to wit, on the 1st of December 1839, had notice, and was then requested to indemnify and save harmless the plaintiff from the said payments and liabilities. Yet the defendant did not nor would, when he was so requested, or at any other time whatsoever, indemnify or save harmless the plaintiff from the said payments or liabilities, or any of them, or any part thereof, but therein wholly failed and made default.

There was a second count on an account stated.

Pleas, first, to both counts, non assumpsit. 2dly, to the first count, that there never was any such consideration for the said alleged promise of the defendant in that count mentioned, as therein alleged. 3rdly, that he, the defendant, did not agree to buy of or from the plaintiff, nor did the plaintiff agree to sell to him the defendant, the said shares in that count mentioned, or any or either of them, *modo et formâ*. 4thly, that the plaintiff hath not been nor was ready or willing to transfer the said shares, or any or either of them, to the defendant, *modo et formâ*. 5thly, that the defendant had not notice of the plaintiff's readiness or willingness to transfer the said shares, or any or either of them, to him the defendant, *modo et formâ*. 6thly, that he, the defendant, had not notice of the said alleged liabilities of the plaintiff in the first count mentioned, or of any or either of them, or of any part of the same, *modo et formâ*. 7thly, that the plaintiff hath been and was damnified as in the said first count mentioned, of his own wrong, and by and through his own means, default, [520] and neglect. 8thly, that after the making of the said alleged promise in the first count mentioned, and before any breach thereof, and before the said shares, or any or either of them, had been transferred to the defendant, to wit, on the 21st of February 1838, the defendant was absolved, exonerated, and discharged by the plaintiff from his the defendant's said promise, and the performance of the same.

Replication to the 1st, 2nd, 3rd, 4th, 5th, and 6th pleas, *similiter*. To the 7th plea, that he the plaintiff was not damnified as in the said first count mentioned, of his own wrong, or by or through his own means, default, or neglect, *modo et formâ*. To the last plea, that the defendant was not absolved, exonerated, or discharged by the plaintiff from his the defendant's said promise, or the performance of the same, *modo et formâ*.

At the trial before Rolfe, B., at the last Summer Assizes at Liverpool, it appeared that the plaintiff, being in possession of thirty shares in the Bristol and Exeter Railway Company, employed Messrs. Richardson & Thompson as his brokers, to dispose of them for him. The defendant, a share-broker at Manchester, being desirous of obtaining shares in that Company, employed Messrs. Atkinson & Townley, share-brokers in Liverpool, to purchase them for him, and they applied to Messrs. Richardson & Thompson for that purpose. At that time, £10 per share had been paid on these shares, but they were at a discount. Messrs. Richardson & Thompson agreed, on behalf of the plaintiff to sell these thirty shares at 7l. 2s. 6d. per share, which sum Messrs. Atkinson & Townley agreed to pay for the same, as brokers for the defendant, and in pursuance of that agreement, the shares were sold to Messrs. Atkinson & Townley for the defendant, and the following contract notes passed between the brokers.

[521] "Liverpool, 20th February, 1838.

"Sir,—We have this day sold to you thirty shares in the Bristol and Exeter Railway at £10 0 0 paid
2 17 6 discount

£7 2 6 per share net.

—Yours, &c.

"RICHARDSON & THOMPSON.

"To Messrs. Atkinson & Townley."

"No. 363.

"66, Castle-street, 20th February, 1838.

"Messrs. Richardson & Co.—We have this day bought from you the shares under-mentioned,—And remain yours,

"For G. ATKINSON & TOWNLEY,

"EDWARD BOURNE.

"Thirty Shares Bristol and Exeter Railw., at 7l. 2s. 6d. per share."

In pursuance of this contract, the shares were sent by the plaintiff's brokers, with a blank transfer, which at that time was stated to be the ordinary course of business. The purchase-money was paid by Atkinson & Townley to Richardson & Thompson, and was charged by the former in account with the defendant, who allowed it to them in his account. Subsequent calls were made on these shares, and the shares not having been registered in the books of the Company in the defendant's name, but the plaintiff remaining the only apparent owner of them, he was compelled to pay those calls, amounting to 957l. 5s. 2d., and it was to recover the money so paid that the present action was brought. The calls were paid to the Company partly in cash, and partly in promissory notes which were outstanding. By the contract notes, the shares were sold to the defendant at 7l. 2s. 6d. net, [522] but Atkinson & Townley, as brokers for the defendant, would be entitled to a commission of 2s. 6d. per share for purchasing, and they, in rendering their account to the defendant, added the commission to the purchase-money, which made the shares stand at 7l. 5s.

Several letters from the defendant were put in, shewing his anxiety to purchase shares in this railway, and that he had sold shares in that Company at higher prices. The following letters were also read:—

"Manchester, 3rd March, 1838.

"Messrs. Atkinson & Townley,—Pray dispatch the thirty Bristol and Exeter shares forthwith. I have sold at 9l. 17s. 6d.

"THOMAS LANGSTON."

"Liverpool, 3rd March, 1838.

"We herewith send you transfer of thirty Bristol and Exeter shares in blank.

"Mr. Thomas Langston.

"ATKINSON & TOWNLEY."

"Mr. Thomas Langston.

"Bought from Atkinson & Townley, 20th February, 1838,

| | | | |
|--|-------------|-----------|----------|
| "Thirty shares of Bristol and Exeter Rails, at 7l. 5s. | £217 | 10 | 0 |
| Stamp | 2 | 0 | 0 |
| | <u>£219</u> | <u>10</u> | <u>0</u> |

It was objected at the trial, at the close of the plaintiff's case, that in the absence of any express contract, there was no implied undertaking, on the part of the person purchasing the shares, to indemnify the vendor against [523] the calls, and therefore, as there was no liability, the plaintiff ought to be nonsuited. It was also objected that the averment in the declaration, that the plaintiff was ready and willing to transfer, was not proved. The learned Judge directed the jury to find their verdict for the plaintiff, which they accordingly did, with £900 damages, but he gave the defendant leave to move to enter a nonsuit on the above grounds. Alexander, in Michaelmas Term last, obtained a rule accordingly.

Cresswell and Crompton shewed cause in this term (Jan. 16). The material question in this case is, whether there is any implied undertaking on the part of the purchaser of shares to indemnify the seller from subsequent calls made by the Company upon him. Another question is, whether the averment in the declaration, that the plaintiff was ready and willing to transfer the shares, which is traversed by the fourth plea, was proved at the trial. Of that there was abundant evidence. Perhaps *Hibblewhite v. M'Morine* (6 M. & W. 200) may be relied upon on the other side, but there the party never had the property to transfer, and therefore the case is totally different. Then, as to the main point, there was an implied undertaking by the purchaser to indemnify the seller from subsequent calls. In a transaction of this nature, there is an implied undertaking to protect the seller from all the consequences of his remaining the nominal or registered owner. If the plaintiff remains nominally on the books the owner of the shares, he then becomes a trustee for the purchaser, and the purchaser is bound to indemnify him from all the liabilities which he incurs by his being placed in that situation. The drawer of an accommodation bill is bound to indemnify the accommodation acceptor, because the law in such case implies a promise to indemnify, without any express promise being [524] made. So here, there was an implied promise to indemnify, without reference to the terms of the contract. Here shares are transferred to a purchaser, who takes them subject to all the liabilities of the vendor, under the act of Parliament by which the company was formed and regulated.^(a) One condition of the act is, that the purchaser of the shares shall pay all the calls. The case falls within the principle of the decision in *Burnett v. Lynch* (5 B. & C. 589; 8 D. & R. 368). There lessee, by deed poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under the assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee; and it was held that the lessee might maintain an action on the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. Here the parties have contracted with reference to the statute, and the defendant, by purchasing these shares, has undertaken that he would perform all the liabilities to which the owner of them was subject, and free the seller from them. In *Burnett v. Lynch*, Lord Tenterden says (5 B. & C. 601)—“It is true he [the defendant] entered into no express covenant or contract that he would pay the rent and perform the covenants. But he accepted the assignment, subject to the performance of the covenants, and we are first to consider whether any action will lie against him. If we should hold that no action will lie, this consequence will follow, that a man having taken [525] an estate from another, subject to the payment of the rent, and the performance of the covenants, and having thereby induced an understanding in that other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense shew that that never could be intended; and if the law of England allowed any such consequence to follow, in that case it would cease to be a rule of reason.” The other judges entirely concurred in that decision, which, in principle, is an authority in the present case. The seller of these shares does not enter into a new liability, but continues in his original liability at the request of the purchaser, and the law will imply a promise to indemnify from that circumstance. [Parke, B. The case of *Burnett v. Lynch* was cited and approved of in *Wolveridge v. Steward* (1 Cr. & M. 644), in the judgment of the Court of Exchequer Chamber, delivered by Lord Denman, C. J.] *Burnett v. Lynch* is a strong authority to shew that assumpsit would have lain under the same circumstances. Covenant would not lie, because it was a deed poll. Suppose in the present case the purchaser had expressly requested the seller to let the shares stand in his name, would not a promise to indemnify be implied from that request? It is submitted that it clearly would: and this is substantially the same thing. The present is perhaps more like the case of an accommodation bill, than that of principal and surety. The acceptor, by accepting the bill,

(a) The 169th section of the Bristol and Exeter Railway Act, 6 Will. 4, c. xxxvi., was stated to be exactly the same as the 140th section of the London and Brighton Railway Act, which see, in a note to *Hibblewhite v. M'Morine*, 6 M. & W. 205.

does not relieve the drawer from liability, but contracts a liability at his request. Here, by the original bargain, the seller had a right to call for a legal transfer of the shares, but the purchaser requests the shares to be sent to him. By that he means the certificates, as is shewn by what was done—they send him accordingly the certificates and a blank transfer.

[526] Alexander and Cowling, contra. There is no analogy between the case of *Burnett v. Lynch* and the present. There the defendant was claiming a benefit under the lease, and could not gainsay it. Here the person whose name is registered is the person entitled to all the benefits to be derived from the shares. There the assignee had possession of the land, and an implied contract arose from the assignment, under which he took that benefit. Here the vendor is in the legal possession. Besides, the question in that case arose after verdict, and all would be assumed to have been proved at the trial which was necessary to sustain the action. Here, the transfers being in blank, were not legal, and could not be made legal by subsequent signature, and therefore conferred no title or benefit on the defendant. [Parke, B. The question is, was not this a contract for shares, to be completed within a reasonable time, the remedy for breach of which would be an action for special damage, for not completing the contract within a reasonable time? and then the plaintiff is in this situation, that he has not tendered a valid conveyance.] It cannot be that the law will imply any promise from the defendant to indemnify the plaintiff. The parties never contemplated any such indemnity. The plaintiff would be a fortunate person indeed, if he got the price of his shares, and a promise to indemnify, without the defendant's obtaining any valid title to the shares. [Parke, B. In such a case another promise to be implied would be, that the vendor should pay the profits to the vendee.] There is nothing, either in principle or authority, to shew that such a promise to indemnify would be implied by law. Suppose the case of a vendor and purchaser of land, and the agreement were not performed, could it be said that there was an implied promise, in case the outgoings were greater than the profits, to indemnify the vendor? That could not be so, at all events, before a conveyance were tendered. If the plaintiff had tendered to the defendant [527] a regular deed of transfer, and he had refused to execute it, then, perhaps, he might have recovered; but here there was only a transfer in blank, which was illegal. This is personal property only. That was decided in *Bligh v. Brent* (2 Y. & C. 268: see also *Bradley v. Holdsworth*, 3 M. & W. 422). In Com. Dig., Covenant (A. 2), it is said, "a covenant personal is by express words, or by a covenant in law." And again (A. 3)—"The law does not create a covenant for a personal thing." The rule of law as to caveat emptor is an instance of that. If the vendor required anything beyond what is incident to the mere contract of sale, he ought to have stipulated for it: no such contract can be implied. The cases put on the other side are cases of loan. In the case of an accommodation bill, the acceptor lends his name and responsibility. So in the case of principal and surety. But here the promise laid in the declaration is founded only on the contract of sale. The case of principal and surety is totally distinct; there the surety incurs a liability, and solely a liability, for another person. But here the supposed surety has the power in his own hands of saving himself harmless, and it is a mere naked contract as between seller and purchaser. In *Hare v. Waring* (3 M. & W. 362), where the certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them, it was held that such certificates were insufficient, inasmuch as they did not shew a title in the plaintiff to convey the shares under the act of parliament.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. There were two questions in this case, which were argued a few days ago, on shewing cause [528] against a rule to enter a nonsuit. First, whether, on a contract by the defendant to buy of the plaintiff some shares in the Bristol and Exeter Railway, the law implied a promise by the purchaser, to indemnify the vendor against all subsequent calls; or there was any evidence in the case to go to the jury of a promise to that effect. And secondly, whether the averment in the declaration, that the plaintiff was ready and willing to transfer, which was traversed in one plea, was proved. It appeared that the plaintiff tendered an assignment, in the form required by the 169th section of the act, but with the name of the assignee in blank, which was not objected to, and no other was required. The second objection may be easily

disposed of. If it had been necessary, in order to support the allegation in the declaration, to prove the tender of a valid conveyance, this would not have been sufficient: but it being requisite only to prove a readiness to transfer, we think there was sufficient evidence in the case of that readiness. Little reliance, indeed, was placed upon this objection. The other was more strongly insisted upon. We are of opinion that, under the circumstances of this case, there was no undertaking implied by law, to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. On the 20th of February 1838, the contract was entered into, which was simply an agreement by the plaintiff to sell, and the defendant to buy, thirty shares, at the price of 7l. 5s. per share, no time being specified for the completion of the purchase; nor was there any such stipulation in the contract as the conveyance itself would have contained if completed, that is, that the vendee should be subject from the date of it, or any future time, to the conditions upon which the vendor held them. If the case had rested upon this contract, the situation of the parties would have been this:—The plaintiff, after shewing a good title to the defendant, would have had a right to call upon him to complete his [529] purchase in a reasonable time, by preparing a deed in the statutory form; and if the defendant had done so, the plaintiff might then have executed it, and required the defendant to do the same, and to deliver, or attend with him to deliver, the deed to the Company, that a memorial might be entered into and indorsed on the deed of transfer, pursuant to the 169th section. If all this had been done, the plaintiff would have been no longer liable to any call: if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount, by way of special damage for the defendant's breach of contract. But in this case, the plaintiff did not pursue the course which, according to law, he ought to have done. The defendant appears to have been satisfied with the title, and both the plaintiff and he to have been content, the one to deliver, and the other to accept, a transfer with the name of the vendee in blank; for the purpose, no doubt, of the defendant selling and transferring those shares to another, and filling in the name of some subsequent purchaser from himself; or, more probably, of handing over the instrument to some purchaser from himself, on receiving the price; for the shares were clearly bought on speculation. On this occasion, when this, probably the customary course, was adopted, instead of that which the law, in the absence of custom, prescribes, the plaintiff might have insisted that he would not deliver such a blank conveyance as was asked, which might postpone indefinitely the actual conveyance to a vendee, unless the defendant would indemnify him against all intermediate calls; and if that had been done, the plaintiff would have been safe; but this he omitted, and there is no trace of any evidence of such a contract having been made or contemplated. The truth probably is, that the plaintiff did not think of [530] this future liability at all, or if he did, he thought that the shares would be sold, after a new call, to a purchaser who would take the amount into consideration in fixing the price, and pay the calls to the Company in order to get the transfer completed.

We cannot therefore think that the plaintiff and defendant ever contemplated such an undertaking as the declaration in this case describes; and that the evidence does not warrant the jury in drawing an inference of any such engagement.

Does the law raise any such contract? We think it does not. The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoing; but there is no authority for saying that the law makes any promise by a *cestui que trust* to a trustee, simply to repay all that the trustee may pay on his own account, still less on that of the subsequent *cestui que trust*.

The principle of the case of *Burnett v. Lynch* (5 B. & C. 589) does not apply. The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable, in the nature of a surety as between himself and the assignee, for the performance of the same covenants, during the continuance of his interest as assignee; the consequence is, that a duty is imposed on the assignee at common law to perform the covenants during that time, for which an action on the case will lie. But here the defendant contracts no liability at all with the Company, so that the plaintiff is not a surety for him; and if there were

any analogy between the two cases, the defendant's implied promise would only be to indemnify against such calls as should be made whilst he should be beneficially interested, so that the promise in the declaration, which is to indem-[531]-nify against all future calls, is too large, and no amendment could make it good, as none of the calls, the subject of this action, seem to have been made until after the defendant himself had parted with the shares.

We are of opinion, therefore, that this action will not lie, and the rule must be absolute to enter a nonsuit.

Rule absolute.

MAGHEE AND WIFE v. O'NEIL. Exch. of Pleas. Jan. 27, 1841.—A verbal acknowledgment by the debtor, within six years, of the part payment of a debt, is not sufficient to take the case out of the statute of limitations.

[S. C. 10 L. J. Ex. 326.]

Debt for money lent by the female plaintiff to the wife of the defendant before their respective marriages, and on an account stated. Pleas, nunquam indebitatus, and the statute of limitations. At the trial before Lord Denman, C. J., at the last Flintshire assizes, it appeared that the action was brought to recover £40, the balance of a sum of £50, alleged to have been lent by the female plaintiff to the defendant's wife, who was her sister, more than six years before the commencement of the action. For the purpose of taking the case out of the statute of limitations, the plaintiffs called a person named Cain, who proved, that about two years ago the defendant's wife requested him to go with her to the Savings' Bank at Holywell, in order to draw out £10, for the purpose of paying that sum to her sister, in part discharge of £50, which she said her sister had lent her several years before. The witness went with her accordingly, but in consequence of her having brought a wrong book, they did not obtain the money. About a week afterwards, Cain saw her again, when she told him she had taken out the £10 from the bank, and had paid it to her sister. It was objected for the defendant, on the authority of the case of *Willis v. Newham* (3 Y. & J. 518), that a part payment, to defeat the [532] operation of the statute of limitations, could not be proved merely by the parol declaration of the debtor. *Waters v. Tompkins* (2 C. M. & R. 723) was also referred to. The Lord Chief Justice thought the case was taken out of the statute, and under his direction a verdict was found for the plaintiffs, damages £40, leave being reserved to the defendant to move to enter a nonsuit.

Jervis having obtained a rule nisi accordingly, citing *Willis v. Newham*, *Waters v. Tompkins*, *Trentham v. Deverill* (3 Bing. N. C. 397; 4 Scott, 128), and *Bayley v. Ashton* (12 Ad. & E. 493; 9 Law J. Rep. (N. S.) Q. B. 376; 4 P. & D. 214).

Hayes now shewed cause. The statute 9 Geo. 4, c. 14, s. 1, which provides that no acknowledgment or promise by words only shall be sufficient to take any case out of the operation of the statute of limitations, unless it be contained in some writing to be signed by the party chargeable thereby, at the same time expressly provides "that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The case of *Willis v. Newham* undoubtedly decided, that part payment of the debt could not be proved by the mere verbal admission of the debtor: And the decision in *Bayley v. Ashton*, in which an unsigned entry made by the defendant was held equally inadmissible for the same purpose, proceeded on the authority of that case. But there Lord Denman, C. J., says—"If I were called upon for the first time to put a construction upon this act of Parliament, I should be inclined to say, that acknowledgment of a debt by promise is one kind of evidence, payment another; and that the act, while it restricted the proof of the former, left payment to be proved as any other fact may be proved. [533] But in two cases, the Court of Exchequer has decided differently." It is clear that although the Court hesitated to overrule the cases already decided, they did not approve of their principle. And the Lord Chief Justice was in error in supposing that this Court had in two cases decided differently, for *Waters v. Tompkins* proceeded on grounds totally independent of *Willis v. Newham*, and in no degree confirmed its authority. Parke, B., there says—"On the first perusal of this clause, (9 Geo. 4, c. 14, s. 1), it would seem that the proviso takes the case of part payment

of principal, or payment of interest, out of the operation of the statute altogether; and therefore that these facts would not only have the same effect, but might be proved exactly in the same way that they would have been if the act had not passed, and consequently by the defendant's parol admission; which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of an acknowledgment of the debt itself." His Lordship then states the decision in *Willis v. Newham*, and adds—"This construction of the act certainly extends the remedy, and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do. But if part payment, or payment of interest, is proved in any legal mode, and not by admission only, this case is no authority that such proof is not sufficient. . . . The reason why the effect of such a payment is not lessened by the act is, that it is not a mere acknowledgment by words, but is coupled with a fact." [Parke, B. *Waters v. Tompkins* was certainly no confirmation of *Willis v. Newham*.] The latter case, therefore, was the only decision (before *Bayley v. Ashton*) in which the proof of payment by the parol admission of the defendant was held insufficient: and it is for the Court now to consider whether it can be sustained on any legitimate principle of construction. The fact of the payment may clearly be proved by the parol evidence of a third [534] person: *Tippets v. Heane* (1 C. M. & R. 252). *Trentham v. Deverill* is no authority against the plaintiffs: there the only question was, whether a memorandum made by the witness at the time was sufficient evidence to go to the jury of the fact of payment, the witness not being able otherwise to recollect the fact.

But even admitting the case of *Willis v. Newham* to be law, it certainly ought not to be carried any farther; and the present case is distinguishable from it, because here the parol admission is coupled with the other contemporaneous circumstances stated in the evidence of Cain, which go to prove the fact of payment. The jury had a right to decide, upon all the facts taken together, whether they satisfied them that the payment had been made.

Jervis and Welsby, in support of the rule. This case is in no respect distinguishable from *Willis v. Newham*. The circumstances referred to on the other side had no connexion whatever with the admission of payment, but occurred a week before, at a time when no payment had been made, but the woman merely made a verbal admission of the existence of the debt, and expressed an intention to pay money on account of it. How can the verbal admission of the debt, which, by the express terms of the statute, can have no effect, be brought in aid of the verbal admission of part payment? The case stands, therefore, altogether upon that admission, and is identical with *Willis v. Newham*. And even though the Court may entertain doubts whether that case was rightly decided, they will not overrule it, recognised as its authority has been by the Court of Queen's Bench in *Bayley v. Ashton*, which even carried the principle further. It has been suggested that the Court were misled, in that case, into a supposition that *Willis v. Newham* had been expressly confirmed in *Waters v. Tompkins*; but [535] that is not so; for although Lord Denman appears to have supposed that such was the case, both Littledale, J., and Patteson, J., were evidently aware of the extent of the decision in *Waters v. Tompkins*, and that there was in that case independent proof of the fact of payment. But further, the stat. 9 Geo. 4, c. 14, s. 1, may well be read so as to support the decision in *Willis v. Newham*; the proviso as to part payment being referred to the case of joint contractors, which is provided for in the clause immediately preceding. The statute having provided that no joint contractor should lose the benefit of its enactments, so as to be chargeable even upon a written acknowledgment or promise made by his co-contractor, the proviso is then introduced to save the operation of part payment by a joint contractor; which has, accordingly, since the statute as before, been held sufficient to charge his co-contractors.(a)

LORD ABINGER, C. B. If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord Tenterden's act to be proved as at common law. But we are not sitting here as a Court of error, and the cases which have been referred to compel us to say that this rule must be made absolute. My impression however is, that the act of Parliament has been pressed beyond its intention. The best way always is to adhere to the words of a statute.

PARKE, B. The case of *Willis v. Newham* is expressly in point, and that of *Bayley*

(a) See *Channell v. Ditchburn*, 5 M. & W. 494, and the cases there cited.

v. *Ashton* is even stronger than the present case. My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench. And although Lord Denman's [536] judgment in *Bayley v. Ashton* seems to have been pronounced under an impression that *Waters v. Tompkins* had confirmed the authority of *Willis v. Newham*, the other judges appear to have had their attention drawn to the terms of the decision in that case. We are not to pronounce our judgment here as a Court of error. The plaintiff may, if he chooses, commence a fresh action, and may then have the opinion of a Court of error upon the question. If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases; but in the present state of the law upon the subject, I think we cannot refuse to make this rule absolute.

ALDERSON, B., concurred.

Rule absolute for a nonsuit.

MOORE AND ANOTHER, Assignees of Tompkins, a Bankrupt v. PHILLIPPS, Esq. Exch. of Pleas. Jan. 29, 1841.—The stat. 2 & 3 Viet. c. 29, s. 2, does not apply to a case where the assignees in bankruptcy were appointed before its passing.

[S. C. 9 Dowl. P. C. 294; 10 L. J. Ex. 129.]

This was an action of trover against the sheriff of Herefordshire, to which he pleaded, that a writ of fieri facias was directed to him as such sheriff, commanding him to levy a certain sum on the goods and chattels of the said Henry Tompkins, by virtue of which writ, after the bankruptcy of the said H. Tompkins, and before the issuing of the fiat, to wit, on the 5th of April, 1839, the defendant took in execution the goods and chattels in the declaration mentioned, and sold them: that on the 4th of May, 1839, a fiat in bankruptcy issued against the said H. Tompkins, under which he was adjudged a bankrupt, and that the plaintiffs, on the 20th of June, 1839, were appointed his assignees; that the said writ of fieri facias so issued against the said H. Tompkins, was bonâ fide [537] issued, and levied by the defendant, before the date and issuing of the fiat, and that neither the execution creditor nor the defendant, at the time of executing and levying the same, had notice of any prior act of bankruptcy committed by the said Henry Tompkins.

Replication, that the plaintiffs were appointed assignees of the said H. Tompkins, and that the defendant committed the grievances in the declaration mentioned, before the passing of the statute 2 & 3 Viet. c. 29. Verification.

General demurrer, and joinder. The point marked for argument on the part of the defendant was, that the stat. 2 & 3 Viet. c. 29, was retrospective, and gave the law to this case.

Shee, Serjt., in support of the demurrer.(a) The object of the stat. 2 & 3 Viet. c. 29 was to destroy altogether the doctrine of relation, by which the title of the assignees, having reference back to the act of bankruptcy, would defeat a bonâ fide execution levied afterwards, although before the fiat. The first case in which a construction was put upon the statute, was that of *Edmonds v. Lawley* (6 M. & W. 285). That case differs from the present, because there the fiat issued after the passing of the act, although the execution was levied before it. Parke, B., there says—"If in this case a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right." But in a subsequent case of *Luckin v. Simpson* (6 Bing. N. C. 353), where the fiat did issue, and the assignees were appointed, before the passing of the act, the Court of Common Pleas nevertheless held that it had [538] a retrospective operation to protect an execution bonâ fide levied after the act of bankruptcy, without notice. [Parke, B. I doubt whether the Court were aware, in that case, that the appointment of the assignees was before the passing of the act. I know from personal communication with them, that they had not taken into consideration, that the effect of holding the statute to apply to such a case would be to take away from the assignees property which had already vested in them, and which perhaps they had

(a) Jan. 20, before Lord Abinger, C. B., Parke, B., Gurney, B., and Rolfe, B.

actually distributed among the creditors.] The Lord Chief Justice, in delivering the judgment of the Court, says—"We are of opinion, looking at the words of the statute, that it gives the law to all cases that come for adjudication before the Court, where the execution was executed before the fiat in bankruptcy, whether the transaction brought before the Court took place before or after the passing of the statute." In *Nelstrop v. Scurisbrick* (6 M. & W. 684), the fiat was levied before, but the assignees were not appointed until after, the passing of the act: but this Court expressed their full concurrence with the decision in *Luckin v. Simpson*. Lord Abinger, C. B., says—"I go the full length of the doctrine laid down by the Court of Common Pleas. . . . I am of opinion, that the proper construction of this act is, that in all cases where the execution creditor bona fide issues and levies his execution, and a sale of the goods takes place, before any of the proceedings in bankruptcy, that execution and sale are not to be prejudiced by a previous act of bankruptcy, of which he had notice." Alderson, B. also expressed his opinion that the Court was bound by the decision in *Luckin v. Simpson*. In truth, the effect of the doctrine of relation, which this act was intended entirely to destroy except in cases of fraud, was to divest rights which were otherwise vested. The execution creditor would have had a vested interest but for the construction put upon the bankruptcy acts.

[539] Erle appeared to support the replication, but

LORD ABINGER, C. B., said—The inclination of the Court is to decide with the plaintiffs, but we think we ought first to consult the Judges of the Court of Common Pleas. If they agree with us in opinion, we shall not call on Mr. Erle; if they still entertain any doubt, we shall hear him.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. In this case the opinion of the Court is, that the statute is not retrospective, so as to affect rights vested before the passing of the act. That was our opinion during the argument of my brother Shee, and we still retain that opinion. As to the case of *Luckin v. Simpson*, we have consulted the Judges of the Court of Common Pleas, and they have stated to us (and indeed it sufficiently appears from the report), that the fact of the appointment of assignees having been previous to the passing of the act, either did not exist, or was not represented to the Court; and that if it had, they should have been of the same opinion as we are, that the statute does not apply, where it would operate to defeat rights antecedently vested in the assignees. The judgment must therefore be for the plaintiffs.

. Judgment for the plaintiffs.

[540] MABERLY v. TITTERTON. Exch. of Pleas. Jan. 29, 1841.—Where a constable, appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76, is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to double costs under the 21 Jac. 1, c. 12, s. 5, and not merely to costs as between attorney and client, under the 5 & 6 Will. 4, c. 76, s. 133.

[S. C. 9 Dowl. P. C. 234; 10 L. J. Ex. 172; 5 Jur. 250.]

This was an action of assault and false imprisonment against the defendant, who was a constable for the borough of Cambridge, appointed in pursuance of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76: (a) to which the defendant pleaded not

(a) Which enables the watch committee of any borough from time to time to appoint a sufficient number of fit men, who shall be sworn in before some justices of the peace, having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace: "and the men so sworn shall not only within such borough, but also within the county in which such borough or part thereof shall be situate, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has, or hereafter may have, within his constableness, by virtue of the common law of this realm, or of any statutes made or to be made, and shall obey all

guilty (by statute). The defendant had taken the plaintiff into custody for an alleged breach of the peace. After notice of trial, the plaintiff discontinued.

Gunning having obtained a rule nisi to enter a suggestion for double costs, under the statute 21 Jac. 1, c. 12, s. 5,

Byles shewed cause. The defendant is a constable appointed under the provisions of the Municipal Corporation Act. He is not, therefore, entitled to double costs under the statute of James, but only to costs as between attorney and client, under the 133rd section of the Municipal Corporation Act. (b) The defence to the action rests [541] upon the ground that the defendant, at the time of the assault complained of, was acting in the execution of his duty, as a constable appointed under the provisions of that act. At all events, a suggestion is not necessary: *Finlay v. Seaton* (1 Taunt. 210), *Wells v. Ody* (2 C. M. & R. 184), *Fosbrooke v. Holt* (1 M. & W. 205). The plaintiff is thereby saddled with the additional costs of this application, which also will be doubled. The Master might have taxed the double costs upon the affidavits, without any order of the Court.

Gunning, contra. It is true that the defendant was appointed, under the provisions of the 5 & 6 Will. 4, but, by the express words of the act, as soon as he was appointed, he had all the privileges of a constable appointed at common law: and the act complained of by the plaintiff was not an act done in pursuance of the statute, within the meaning of the 133rd section, but in the execution of his general duty as a constable. Secondly, it is the usual practice to enter a suggestion in cases like the present. In *Finlay v. Seaton*, the cause had been tried, and the defendant had had a verdict. Here the Master has not, without some rule of the Court, any materials for taxing the costs otherwise than in the ordinary manner. The rule for a discontinuance is matter ex parte. In *Fosbrooke v. Holt*, the rule was disposed of on the ground that the plaintiff had already offered to pay the double costs. Mr. Tidd (Tidd, Pr. 988) states the rule to be, that wherever it does not appear on the face of the record that the defendant is entitled to the [542] benefit of the act, the proper mode is to apply to the Court on affidavit for leave to enter a suggestion.

LORD ABINGER, C. B. There are two questions in this case; first, what costs the defendant is entitled to; and secondly, whether this is a proper application. If the defendant was acting in pursuance of the Municipal Corporation Act, that act would also govern his title to costs: but as it makes him a constable, with all the privileges belonging to the office at common law, the statute of James applies to all cases in which he is acting in the exercise of his common-law authority, and entitles him in such cases to double costs. That appears to have been the case here. We cannot give full effect to the 76th section, unless we interpret it to mean, that whatever the constable does by virtue of his general authority as such, shall have all the protection thrown round it by the law. Then, as to the other point, this is a case in which the plaintiff has discontinued, and there is no judge to try the cause, and grant a certificate under the 7 Jac. 1, c. 5: the Court alone can give a direction on the subject. Probably a suggestion is not necessary, but it is necessary for the Court to give some direction. We think, therefore, that there should be a rule directing the Master to tax the defendant his double costs, without taxing the costs of this rule.

PARKE, B. The rule asks for too much, because a suggestion is not necessary in this case. A suggestion on the record is necessary only where it is needed for the purpose of reconciling some contradiction which would otherwise appear on the face of the record. It is required where the burthen of costs is to be shifted, as where the plaintiff ought to have proceeded in a Court of Requests: but the same reason does not apply to a case of double costs, because it never appears on the record whether

such lawful commands as they may from time to time receive from any of the justices of the peace, having jurisdiction within such borough or within any county in which they shall be called on to act as constables, for conducting themselves in the execution of their office."

(b) Which enacts, "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, &c. &c.: and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client," &c.

the costs are [543] double or treble. I entirely agree, therefore, with the decision of the Court of Common Pleas, in *Finlay v. Seaton*, that a suggestion in cases under statutes of this nature is not necessary. The rule, therefore, asks for too much: but as it is proper that there should be some authoritative document on which the Master should act in taxing the double costs, I think there should be a rule in the terms stated by the Lord Chief Baron. As to the other point, I entirely agree with him as to the construction of the Municipal Corporation Act. The 76th section gives to constables appointed under that act all the authorities and privileges of constables at common law.

ALDERSON, B. I am of the same opinion. The statute of James applies to all constables, however appointed. The Municipal Corporation Act gives a particular form of appointment, but entitles the party to do all that constables might do at common law. It follows that he is entitled to the protection of the statute of James. If indeed his authority were limited to particular matters, it would be different.

Rule accordingly.

PEARCE v. SWAIN. Exch. of Pleas. Jan. 29, 1841.—A distringas may issue after the expiration of four months from the issuing of the writ of summons.—A writ of summons was issued on the 5th of July, but it did not appear whether any attempt was made to serve it or not. On the 5th of December, an alias writ of summons was sued out, and the plaintiff not being able to effect service of it, obtained a distringas, as for non-appearance to the original writ of summons:—Held, that the distringas was not irregular.

[S. C. 9 Dowl. P. C. 724; 10 L. J. Ex. 144.]

Heaton moved for a rule to shew cause why the distringas issued in this cause, and all subsequent proceedings, should not be set aside for irregularity. The affidavits stated, that the original writ of summons issued on the 5th of July last, but it was not stated in the plaintiff's affidavit on which the distringas was obtained, that any attempt had been made to serve that writ. On the 5th of Decem-[544]ber, an alias writ of summons was sued out, and the plaintiff having been unable to serve the defendant with this writ, obtained the distringas, in which it was stated that the goods were to be distrained in consequence of the defendant's not having appeared "according to the exigency of a writ of summons bearing teste on the 5th day of July, 1840." It was now contended that the distringas was irregular, having been obtained upon the service of an alias, which was not a continuation of the first writ; and that it should have stated a non-appearance of the defendant to the second, and not to the first writ, which had ceased, after the expiration of four months from the teste of it, to have any operation.

LORD ABINGER, C. B. The first writ of summons is not absolutely defunct at the end of the four months, but is only so for the purpose of preventing the suspension of the statute of limitations. I do not see that the distringas was irregular. The defendant is required to appear to the first writ, which was the commencement of the suit. Indeed, for aught that necessarily appears on the affidavits, the first writ might have been served.

PARKE, B. The distringas issues in consequence of the non-appearance to the first writ, which is the commencement of the suit. There is no irregularity in that. A defendant may appear to a writ after the expiration of the four months. And it is now settled by the case of *Norman v. Winter* (5 Bing. N. C. 279; 7 Scott, 251), that a distringas may issue and bear teste after the expiration of a previous writ of summons. The Court of Common Pleas had indeed before held that a distringas so issued was irregular (see *Abbotts v. Kelly*, 3 Bing. N. C. 478; *Lemon v. Lemon*, 2 Scott, 506), but they were afterwards satisfied that they were wrong, and in *Norman v. Winter* [545] they retracted their former decision. The rule as now established, is certainly the reasonable one; for as the plaintiff is to have four months in which to serve his writ, and the attempt to serve it may take place on the last day of the four months, it would be most unreasonable to hold that he could not be entitled to a distringas after that time.

ALDERSON, B., concurred.

Rule refused.

SPRY v. BROMFIELD. Exch. of Pleas. Jan. 30, 1841.—A testator devised his real estates at B., after the decease of his wife, to J. B., “but at his death the whole to be for J. B.’s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if the said children should die before they arrived at the age of 21, the testator willed that the estates should go to H. S., and to the use and benefit of him and his children.” J. B. and his wife had five children, one of whom died in the lifetime of the testator, another died after his death under 21, and a third attained 21 and died unmarried and intestate. The two surviving children, after the death of the testator’s widow, and of their parents, executed a disposition under the 3 & 4 Will. 4, c. 74, for barring all remainders in the estates at B.:—Held, that these two children took an estate in fee-simple, as tenants in common, in the estates in question.

[S. C. 10 L. J. Ex. 457: in Equity 9 Sim. 534; 10 Sim. 548, 599.]

The following case was sent by his Honour the Vice-Chancellor, for the opinion of this Court.

Philip Bromfield, late of Rope Hill, in the parish of Boldre, in the county of Southampton, deceased, was at the time of signing and publishing his last will and testament hereinafter set forth, and thenceforth down to and at the time of his death, seised in fee simple of certain estates situate and being in the said parish of Boldre, and called or known by the name of the Rope Hill estate; and being so seised, duly signed and published his last will and testament in writing, executed and attested as was then by law required for passing freehold estates by devise, bearing date the 14th of February, 1799, and thereby gave and devised as follows (that is to say):—“To my executors in trust, who shall hereafter be named, I give all my estates real and personal, monies in the funds, outstanding debts due to me, and all other chattels, goods, and effects whatsoever I may die possessed of, to be disposed of by them as follows:—To my wife Celia Bromfield I give all my real estates, houses and lands, furniture, [546] plate, books, clothes, and linen, for her sole use and benefit as long as she shall live; and within one year after my death I give the following legacies [stating them]. I charge my estates at Lymington and Boldre, real and personal, with a rent-charge of £50 per annum to my sister Mary Bromfield, of Lymington, to be paid to her half-yearly during her life by my wife; and after her decease (if my sister outlives her), the said rent-charge to be continued to my said sister for the term aforesaid, by whoever may possess my houses, lands, and estate in Boldre parish: and at and after the decease of my wife, I give my houses, lands, and estates in the parish of Boldre to my cousin, the Rev. John Bromfield, subject to the rent-charge above mentioned, but at his death the whole shall be for the use of the said John Bromfield’s wife and children; and which children, at the death of their mother, shall inherit the same jointly during their lives; and if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estate in the parish of Boldre go to the Rev. Hume Spry, and to the use and benefit of him and his children.” And after bequeathing a few specific legacies, the testator appointed his wife, Sir Giles Rooke (then one of the Justices of the Court of Common Pleas), and William Forsteen, executrix and executors of his will.

The testator departed this life in the said year 1799, without having altered or revoked his said will, leaving the Rev. John Hume Spry, D.D., the plaintiff in this suit, (in the said will called the Rev. Hume Spry) his heir at law, and the will was proved by his widow and William Forsteen in the proper Ecclesiastical Court. The said Celia Bromfield, the widow of the testator, entered into the possession of the devised estates in the parish of Boldre upon or soon after the testator’s death, and continued in such possession down to her death in 1831. The said Rev. John Bromfield and Ann his wife, named in the will, had five children, [547] namely, Henry John Bromfield, (who died an infant in the lifetime of the testator), Eliza Bromfield, Georgiana Bromfield, Laura Bromfield, and William Arnold Bromfield. Eliza, Georgiana, and Laura Bromfield were all born in the testator’s lifetime, and, together with their parents, were all living at the respective times of his making his will, and of his death. William Arnold Bromfield was born in 1801. The said Rev. John Bromfield died in the year 1801, intestate, leaving the said Ann Bromfield his widow, and his four

last-named children, him surviving. The said Georgiana Bromfield, one of the said children, attained the age of twenty-one years; Laura, another child, died under that age; and both Georgiana and Laura died without having been married, and they respectively left the said Ann Bromfield their mother, and the said Eliza Bromfield and William Arnold Bromfield, their sister and brother, them surviving, also leaving the said William Arnold Bromfield their heir-at-law. Georgiana Bromfield did not execute any assurance of her estate or interest in the Boldre property, which she might be held to have been capable of conveying, or any assurance by which a joint tenancy might have been severed. The said Ann Bromfield died on the 9th of May 1832, intestate as to real estate, leaving the said Eliza Bromfield and William Arnold Bromfield her surviving, and the said William Arnold Bromfield was and is her heir-at-law. The said Eliza Bromfield and William Arnold Bromfield (who are the defendants in this suit), on the death of their mother, entered into possession of the entirety of the said devised estates in the parish of Boldre, claiming under the said will of the said Philip Bromfield, and have ever since been and still are in possession thereof. Some time after the death of the said Ann Bromfield, the said Eliza and William Arnold Bromfield duly made and executed a disposition for barring all estates tail, remainders, and reversions in the said premises, under the stat. 3 & 4 Will. 4, c. 74, [548] and thereby limited the use to themselves and their heirs, as tenants in common.

On the 26th of July 1838, the said Dr. John Hume Spry filed his bill in the High Court of Chancery against the said Eliza Bromfield and William Arnold Bromfield, setting forth the said will, and the several facts and circumstances hereinbefore stated, and also stating (amongst other things), that according to the true construction of the said will, the said Eliza Bromfield and William Arnold Bromfield were joint tenants for life only of the said devised estates in the parish of Boldre, and that the devise or limitation over in the said will contained, to or for the use of the plaintiff and his children, in case the children of the said John Bromfield and Ann his wife should die before they arrived at the age of twenty-one years, having become incapable of taking effect, the reversion in fee simple, immediately expectant upon the determination of the said estates for life of the said Eliza Bromfield and William Arnold Bromfield, had become absolutely vested in the plaintiff, as the heir-at-law of the said testator; and also alleging divers acts of waste, and praying an account and injunction, &c. To this bill the defendants filed a general demurrer for want of equity, and the plaintiff having joined in demurrer, the cause came on to be heard before the Vice Chancery on the 12th of February 1839, when his Honour was pleased to order that a case should be made out for the opinion of the Judges of this Court, and that the question to be submitted to the said Court should be as follows, viz. :—

What estate do the defendants, Eliza Bromfield and William Arnold Bromfield, take in the lands at Boldre, devised by the will of the testator, Philip Bromfield?

The points of argument stated for the plaintiff were the same as those set forth in the bill. The defendant's points were as follows :—

[549] First, that the Rev. John Bromfield took an estate tail, either in possession or in remainder expectant on the life estate of himself and his wife, which estate tail descended on the defendant William Arnold Bromfield : (a) or,

Secondly, that the defendants became, in the events which happened, joint tenants for their lives, with several inheritances in fee-simple, of and in the lands at Boldre.

The case was argued in Trinity Term, 1839, by

Malins, for the plaintiff. First, the children of John Bromfield took, under this will, only estates for life. In order to determine the question in this case, the Court must look at the general frame of the will. The first objects of the testator's bounty were undoubtedly the family of John Bromfield, to a certain extent : then, in a certain event, he gives the estate over to the plaintiff. That event not having happened, the plaintiff cannot claim under the express devise to him ; but he claims the reversion in fee expectant on the life estates of the defendants, as being undisposed of by the will. In order to deprive an heir-at-law of what he would otherwise take, there must be words used sufficient to shew a plain intention in the testator to give it to another. Here, if the devise had stopped with the words, "at his death the whole shall be for the use of the said John Bromfield's wife and children,"—it is clear they would have taken as joint tenants for life only. Then the will goes on—"and which children,

(a) This point was abandoned on the argument.

at the death of their mother,"—shewing that she was to take for life only,—“shall inherit the same jointly during their lives.” Thus far, also, all that the defendants could rely upon to shew that they are more than joint tenants for life, is the word inherit. A devise in remainder to a man and his wife, and after the decease to their children, they having children at the date of the will, gives only an [550] estate for life to the parents, with remainder to their children for life: *Wild's case* (6 Rep. 16 b.). But the defendant relies on the devise over in case of the death of the children under twenty-one. There are undoubtedly cases in which a gift to A., without words of limitation, and if he die under a certain age, then over, has been held to give a fee by implication, because otherwise the words of the devise over would be unnecessary. But this case is distinguishable by reason of the express words “jointly during their lives.” There is no case in which a gift to A., for life, with a devise over in a particular event, will give a fee: in all the cases in which it has been so held, the original devise was unqualified in its terms; as in *Purefoy v. Rogers* (2 Saund. 388 a.), *Doe d. Bramstone v. Holliday* (3 Bur. 1618), *Doe d. Wight v. Cundall* (9 East, 400). But it will be said that the devise may be made consistent, by giving an estate to the children of John Bromfield as joint tenants for life, with several inheritances in fee; in conformity with the decision of this Court in *Doe d. Littlewood v. Green* (4 M. & W. 229). But the cases in which that doctrine has been allowed to prevail, have all rested on much stronger ground than the present. The first and principal of them is that of *Barker v. Giles* (2 P. Wms. 280; 9 Mod. 157). There the testator devised his lands to be sold for the payment of his debts and legacies, and the surplus money to be laid out in lands, and settled to the use of his two nephews, and the survivor of them, and their heirs and assigns for ever, equally to be divided between them, share and share alike: and it was held that they were joint tenants for their lives, with several inheritances. But there were apt words to create a joint tenancy, and also proper words to raise a tenancy in common. In *Turkerman v. Jeoffrys* (Holt, 370), again, the words were—“to J. & E., equally to be divided between [551] them during their lives, and after the death of them two, then to the heirs of J.” So, in *Doe d. Littlewood v. Green*, there were words apt for the creation of a tenancy in common:—“to E. G. & J. P., equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever;” and but for the introduction of these words, they would clearly have been joint tenants in fee. The rule of law on this subject is stated in Litt. s. 283. Here there are no words from which to collect a gift of several inheritances. A tenancy in common, although the Courts lean in favour of it, cannot be given without some words authorizing such a construction, and all the cases to that effect have proceeded on words importing a division, as “amongst,” “equally to be divided,” &c. A devise, whether of land or personalty, to several persons, always makes a joint tenancy, unless there are some words importing a division amongst them: *Campbell v. Campbell* (4 Bro. C. C. 15), *Crooke v. De Vandes* (9 Ves. 591). If, therefore, the inheritance be given at all here, it is in joint tenancy. But then, it will be said, the subsequent words of the will shew that it is given only for the benefit of those children who arrive at the age of twenty-one; and that as their interests must come in esse at different periods, they cannot therefore take as joint tenants. But where there is a devise to a class preceded by an estate for life, it is not necessary, in order to create a joint tenancy, that they should take an interest at the same time, although it would be so if there were no prior estate: *Oates v. Jackson* (2 Stra. 1172). In Fearn's Cont. Rem. 312, it is said—“Where a contingent remainder is limited to the use of several, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet it shall devest as to the proportions of the persons afterwards becoming capable, before the determi-[552]-nation of the preceding estate; and they may take jointly, notwithstanding the different times of vesting.” It is submitted, however, that the children, by the express words of the will, take as joint tenants for their lives only.

Hodgson, contra. There is no misuse of technical words in this will, and it is obvious that the testator intended to devise all his estate. When he disposes of this estate, he departs from all attempt at technical expression, and his intention is apparent, that John Bromfield and his family should take the whole estate, unless in the event of all the children dying under twenty-one; that is, under the time of their ability to dispose of the estate. According to the argument on the other side, if they arrived at the age of twenty-one, the estate would go over to some unknown person.

In *Trant v. Hanning* (10 Ves. 495; S. C. 1 N. R. 116), the words "trustees of inheritance" were held sufficient to carry the whole fee. So here, the words "shall inherit the same," shew the intention of the testator to deal with the whole estate. If so, after the death of John Bromfield and his wife, the children are to have the inheritance, but only in case they live to the age of twenty-one; if they die under that age, then it is to go over to another person. The only difficulty then arises from the introduction of the words "jointly during their lives." It must be admitted that a tenancy in common cannot arise without some words importing a division—except where the estate is to vest at different times. In Co. Lit. 188 a., it is said—"If lands be demised for life, the remainder to the right heirs of J. S. and of J. N.; J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time." In *Oates v. Jack-[553]son*, this position of Lord Coke is said not to be inconsistent with that decision; but in this and other cases, the distinction appears to have turned on some peculiarity arising out of the Statute of Uses. Here the apparent intention to give a tenancy in common is not sufficiently contradicted by the word "jointly." Nor are the words "during their lives" conclusive against the defendants. Where there are successive devises to different parties for their lives, and afterwards, for default of issue, over, these are, notwithstanding those words, held to be estates tail. Those cases stand in pari ratione with those cited for the plaintiff: the one set of words shew that the testator did not intend to give the estate over in any other event than that mentioned in the will; the other, that he did not intend to give it over until the issue was spent. The same reason applies to both; there are words inconsistent with the general intention, but the Courts so control them as not to defeat that intention:—see *Murthwaite v. Jenkinson* (2 B. & C. 357; 3 D. & R. 765), *Wollen v. Andrews* (2 Bing. 126; 9 Moore, 248), *Doe d. Gallini v. Gallini* (5 B. & Adol. 621; S. C. in error, 3 Ad. & E. 340; 4 Nev. & M. 894). It cannot undoubtedly be contended that the word "inherit" means more than that the children shall take the inheritance of the estate as purchasers—not that they shall take by inheritance, i.e. by descent. But the Court may imply either cross remainders, or a joint estate for their lives, with several inheritances after the death of all.

Malins, in reply. The argument on the other side rests principally on the presumed intention of the testator not to die intestate. Now, a case of very probable occurrence is left wholly unprovided for. If the devise gives a fee, then, in the event of all the children dying under twenty-one, it is devested; and to make the argument on the other side complete, it should have appeared that that re-[554]-version is disposed of: whereas the devise to the plaintiff is only to himself and his children, which does not give a fee: *Wild's case* (6 Rep. 16 b.). [Hodgson. A man can never be said to die intestate who devises the inheritance, although he leaves the reversion in fee to descend.] The authority from Co. Litt. 188 a., comes within the class of cases before referred to, where there is no preceding particular estate, and therefore the joint tenants must take at the same time. The cases cited as to estates tail are not disputed: there the Court holds the first devise to be an estate tail, to further the general intention: and here, if there had been a gift over on failure of issue, that would have enlarged the original devise into an estate tail. *Trant v. Hanning* is quite a different case from the present: there it was clear that the testator intended that annuities and charges should be paid by the trustees, for which purpose they must take the legal fee.

Cur. adv. vult.

No judgment was publicly given, but the following certificate was now sent:—

"We have heard this case argued by counsel, and have considered it, and are of opinion that the defendants, Eliza Bromfield and John,^(b) Arnold Bromfield take an estate in fee simple, as tenants in common in the lands in Boldre, devised by the will of the testator Philip Bromfield. Dated this 30th day of January, 1841.

"ABINGER.

J. GURNEY.

"E. H. ALDERSON.

W. H. MAULE."^(c)

(b) By mistake for William.

(c) Another case, somewhat varied in its terms, has since been sent for the opinion of the Court of Queen's Bench. See 10 Simons, 224.

[555] GIBSON AND OTHERS, Assignees of Wiggins, a Bankrupt v. OVERBURY AND ANOTHER. Exch. of Pleas. Feb. 1, 1841.—Assignees of a bankrupt cannot recover in trover a policy of insurance on life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him.—An instrument so deposited is not in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the stat. 6 Geo. 4, c. 16, s. 72.

[S. C. 10 L. J. Ex. 219. Distinguished, *Green v. Ingham*, 1867, L. R. 2 C. P. 525.]

Trover by the plaintiffs, as assignees of James Wiggins, for a policy of assurance. Plea, that the plaintiffs were not possessed, &c. At the trial before Alderson, B., at the sittings in Middlesex after Michaelmas Term, 1840, a verdict was taken for the plaintiffs for the damages in the declaration, subject to the opinion of the Court upon the following case.

This action was brought to recover a policy of assurance effected by the bankrupt, James Wiggins, on the life of R. H. Andrew, with the Norwich Union Society, in the sum of £440, and at the annual premium of 12l. 19s. 7d. The policy was effected on the 15th March 1824, at which time Wiggins was a trader, and so continued until and at the time of his bankruptcy.

A fiat in bankruptcy issued against the said James Wiggins on the 30th of January 1837, under which the plaintiffs are his assignees.

The bankrupt continued to pay the premium until his bankruptcy.

The policy was deposited by the bankrupt with the defendants on the 5th of May 1835, as a security for a balance due to them, and for £300 then lent. There has been no assignment in writing of the policy to the defendants; and the bankrupt, up to the time of his bankruptcy, stood in the Assurance-office books as the party insuring. No notice of any deposit or transfer of the policy to the defendants had been given to the office.

The policy was demanded by the plaintiffs before this action was brought, and the defendants refused to give it up. No part of the balance, or of the £300, was paid or tendered before the commencement of this action.

The defendants, since the bankruptcy, have paid the [556] premiums, four in number; and it is agreed, that if the plaintiffs are entitled to succeed in this action, the policy of assurance shall be delivered up to the plaintiffs, on nominal damages being taken for them, or that, if not delivered up, the Court shall direct what amount of damages shall be entered for the plaintiffs, instead of the damages in the declaration; and that the Court shall be at liberty to draw any inference of fact, as the jury might have done at the trial. But if the plaintiffs are not entitled to succeed in this action, then a verdict is to be entered for the defendants.

The said R. H. Andrew is still alive.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in the action; if so, a verdict is to be entered for the plaintiffs as above, but if not, then a verdict is to be entered for the defendants.

The case was argued in the former part of this term (Jan. 20 and 25), by

Kelly, for the plaintiffs. The assignees are entitled, under the circumstances stated in the case, to the possession of this policy of assurance. The only ground on which the defendants can claim to retain it is, that it has been legally assigned to them. But in this case no legal assignment has taken place; because, in order to constitute a legal assignment of a debt, notice must be given to the debtor, otherwise no legal interest passes, but the debt, and the instrument which is the evidence of it, remain in the original creditor; and if he become bankrupt, it passes to his assignees, as having been in his order and disposition at the time of the bankruptcy, within the meaning of the 6 Geo. 4, c. 16, s. 72. This policy is a chose in action, and is a chattel within the meaning of that section. In the present case, no notice was given to the Assurance Company of the transfer to the defendants, and consequently no interest in the policy passed to them, but it remained [557] in the order and disposition of the bankrupt, and vested on the bankruptcy in his assignees. The defendants, therefore, have no lien on the instrument as against the assignees: *Ryall v. Rowles* (1 Ves. sen. 348). The object of giving notice to the debtor is to vest the debt in the assignee, and to prevent the debtor from paying it to the original creditor. Without

such notice, the Assurance Company might consider the bankrupt as still continuing the owner of the policy, and might, by paying him a sum of money, obtain a release from their covenants under it. Notice is necessary in the case of a bond, and on the same principle must be held necessary in the case of a debt payable on a contingency. *Ex parte Burton* (1 Glyn. & J. 207), *Ex parte Monro* (Buck's Cases in Bankruptcy, 300), *Buck v. Lee* (1 Ad. & E. 805; 3 Nev. & M. 580), *Dean v. James* (1 Ad. & E. 809, n.; 1 Nev. & M. 392). [Parke, B. Those were cases of assignment; here the defendants contemplated nothing more than the obtaining a deposit of the instrument, as a security for their advances. An insurance broker has a lien on the policy, without any notice to the underwriters. I am not aware of any authority to shew that trover can be maintained in a case like this. Then the 72nd section of the Bankrupt Act does not apply, for the bankrupt certainly had not the order and disposition of the policy with the consent of the true owner, within the meaning of that section.] The benefit of the covenant remains to the bankrupt, until notice be given to the covenantor; therefore the right to recover upon it vests in his assignees, and the instrument which is the evidence of that right also passes to them. If the life had fallen, the bankrupt could have compelled the insurers, in equity, to pay him the amount of the insurance.

R. V. Richards, contra. This clearly is not an instru-[558]-ment which remained in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner, unless at least it be made out that the defendants were the true owners by reason of the deposit with them. If the debt be distinguished from the paper writing, that has been in the order and disposition of the defendants, not of the bankrupt: but at law the debt does not pass at all. The defendants never could recover upon the policy except in the name of the bankrupt; which shews that at law the bankrupt continues the owner. Ship policies are almost always pledged with the broker; and it has been held that in such case they are not in the order and disposition of the bankrupt assured, although there have been no notice to the underwriters (*Falkener v. Case*, cited in *Lempriere v. Pasley*, 2 T. R. 491). In order to maintain trover for this instrument, the plaintiffs must shew that the policy is the debt. The defendants' holding the policy will not prevent the assignees from receiving the debt; it is no more than evidence of the debt, and they may recover by giving secondary evidence of its contents. [Parke, B. In *Hunter v. Leathley* (10 B. & C. 858), it was held that an insurance broker, who has a lien on the policy for his premiums, is compellable by the assured to produce it on the trial of an action against the underwriters, and is a competent witness, notwithstanding his lien, to prove all matters connected with it.] If that principle be applicable here, no harm can possibly accrue to the assignees from the defendants retaining possession of the document; but at all events, they can give evidence of its contents. This case has been treated throughout the argument for the plaintiffs as if it were an action for the debt, instead of trover for the paper: the contract has been confounded with the security. In the cases cited on the other side, the debt had been actually assigned; but here there is no assign-[559]-ment, nor even any agreement for an assignment of the debt: the defendants have nothing but a right to hold the policy, which is the evidence of the contingent contract, as a security for their advances.

But even if it be held that there has been an assignment of the debt, yet the plaintiffs cannot recover the policy in trover, without first paying or tendering the amount of the premiums paid by the defendants, the payment of which was essential for keeping alive the claim against the insurers. If, after the life dropped, the plaintiffs sued the defendants for the insurance money, they could only recover the amount minus the premiums: *Schondler v. Wace* (1 Campb 487). [Alderson, B. Can you raise this point? It is not expressly stated in the case that the amount of the premiums has not been tendered.] It was for the plaintiffs to shew a tender; the affirmative of the issue was upon them; and it cannot be necessary to insert a negative in a special case.

Kelly, in reply. No point was made at the trial, or is raised upon the case, as to the want of a tender of the premiums. [The Court suggested that the plaintiffs should have the liberty of still repaying the premiums, and Kelly undertook that they should be paid on the delivering up of the policy, in case the judgment of the Court should be in favour of the plaintiffs.] Then, as to the main point of the case. The difficulty arises from this being inaccurately termed a debt; it is properly a

covenant, a chose in action, which at the time of the bankruptcy was a chattel interest in the bankrupt, and of actual saleable value. Undoubtedly a covenant cannot be assigned at law; it is said also that there is no complete assignment in equity without notice to the covenantor, and therefore the assignee does not become the true owner within the statute. But all the cases in equity go to shew that under such an imperfect assignment, the assignee is the true owner within the [560] meaning of the Bankrupt Act, and that in this respect there is no distinction between a deposit by way of pledge, and an actual assignment. The former is, in equity, an assignment of the interest pledged, entitling the assignee to hold it, not absolutely, but as a security for some smaller interest. This principle was recognised in *Ex parte Waithman* (4 Dea. & C. 412). That was the case of a mere deposit of a policy with a banker by way of security; but no doubt was suggested that the interest would pass to the assignees, unless notice were given in due time to the insurers: it was assumed that a deposit was in this respect on the same footing with an assignment. So in *Ex parte Carbis* (id. 354), the only question was, whether sufficient notice had been given to the Assurance-office: but the case recognizes the doctrine that the statute applies not only to debts, but to policies of assurance. Then, if the benefit of the covenant passed, the instrument in which alone it is contained, and which is the thing itself whereby the right is created, must pass also. The policy is not only the best evidence of the right, but it in fact constitutes the right. The whole must be treated as one right, and all that is incidental to it must pass together. The object of the Bankrupt Act was to defeat transactions of this nature, and to vest in the assignees every thing of value so left in the order and disposition of the bankrupt, whereby he has been enabled to obtain a credit which was not fairly due to him. That object can only be effectuated by passing, with the right or contract, the instrument also without which it cannot be enforced.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was a special case argued [561] during the present term. The case turned upon this point, whether the assignees of a bankrupt were entitled to recover in trover the possession of a policy deposited by the bankrupt with the defendants: and the question to be determined is, whether that deposit was intended as a lien, or whether it was intended to be an assignment of the claim which the bankrupt had on the policy. In which of these two points of view the act of the bankrupt was to be regarded, was left uncertain in the statement of the case; and we apprehend that the assignees were bound to make that clear one way or the other. If they meant to rely upon its being a perfect assignment, and therefore constituting the defendants the true owners, so that the policy remained in the order and disposition of the bankrupt, they should have made that clear upon the case stated, that we might have acted upon it; but as they have stated the facts, we are at liberty to conclude that nothing more was intended than to give a mere lien by the deposit of the policy, and not to confer an equitable right to the defendants to receive the money; in other words, that it was merely intended as a mode of preventing the bankrupt from receiving it, without notice to the parties with whom he had so deposited the policy. Now if that were the case, as we think, upon the facts as stated, it must be taken to be, then we are of opinion that the plaintiffs are not entitled to recover. Various cases have been decided in equity, the authority of which we do not dispute, and which shew that where an equitable assignment of an interest has been contemplated, but there has been no notice to the debtor, the instrument is supposed to remain in the hands of the party making such equitable assignment. The present case does not at all contradict those cases, but is consistent with them. Suppose there had been an assignment in writing of this policy, to secure the debt, but no notice given to the office, then it would fall within several of the cases, and particularly those decided before the Vice-Chancellor, [562] and reported in 2nd Simons (*Williams v. Thorp*, 2 Sim. 257; *Ex parte Coleville*, id. 570, n.), that there had been no equitable transfer, because it was not completed, and that the instrument remained in the possession of the bankrupt notwithstanding the intended transfer; and if it was not complete in equity, then the assignees would not be divested of their right to recover. But in the case of a mere lien from a deposit by the bankrupt, I believe there is no example of the assignees having been held entitled to maintain trover. Our decision in this case will not affect the title of the assignees, who have claimed the debt; they

may still give a discharge to the office for the debt due upon the policy, to which the bankrupt was entitled, and inasmuch as there was no legal assignment of the policy. But the lien upon the policy remains unaffected by the bankruptcy; and therefore we think that the defendants are entitled to judgment.

Judgment for the defendants.

WHEELER v. SENIOR. Exch. of Pleas. Feb. 1, 1841.—Declaration in assumpsit by drawer against acceptor of a bill of exchange for 728l. 6s., dated 15th of February, 1840, payable three months after date. Plea, as to 609l. 10s., parcel of the monies in that count mentioned, that after the acceptance of the bill in that count mentioned, the defendant paid to the plaintiff the sum of £700 in full satisfaction and discharge of (inter alia) the sum of 609l. 10s., parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date 15th of February, 1840, and drawn by the plaintiff upon and accepted by the defendant, and that the plaintiff accepted and received the said sum of money in such full satisfaction and discharge; and that the bill of exchange in the count mentioned was and is the same identical bill as that in the plea mentioned, in respect whereof the said payment was so made, and not any other or different bill. Replication, that the bill in the count mentioned was not nor is the same identical bill as that in the plea mentioned, &c., &c.: concluding to the country:—Held bad on special demurrer.

[S. C. 9 Dowl. P. C. 270; 10 L. J. Ex. 173.]

Assumpsit. The second count of the declaration was upon a bill of exchange for 728l. 6s., dated 15th February 1840, payable three months after date, drawn by the plaintiff upon and accepted by the defendant. The third count stated the drawing and accepting of a similar bill, and that it was transferred by the plaintiff to certain per-[563]-sons, who would have presented it to the defendant for payment on the day when it became due, but that the defendant, in consideration of the plaintiff's procuring the possession of the bill, and preventing it from being so presented, agreed to remit the amount thereof to the plaintiff on the Wednesday after the bill should become due: and alleged as a breach, that the defendant did not remit the amount of the said bill on the said Wednesday, or at any other time.

Plea to the second count, so far as related to the sum of 609l. 10s., parcel of the monies in that count mentioned, that after the acceptance of the said bill of exchange in that count mentioned, and before the commencement of this suit, to wit, on the 18th day of April, 1840, the defendant paid to the plaintiff a large sum of money, to wit, the sum of £700, in full satisfaction and discharge (amongst other things) of the sum of 609l. 10s., parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date the 15th of February, 1840, and then, to wit, on the day and year last aforesaid, drawn by the plaintiff upon and accepted by the defendant; and that the plaintiff then accepted and received the said payment in such full satisfaction and discharge as aforesaid: and that the said bill of exchange in the said second count mentioned was and is the same identical bill of exchange as the bill of exchange hereinbefore mentioned, in respect whereof the said payment was so made as aforesaid, and not any other or different bill of exchange. Verification. A plea in the same terms was also pleaded to the third count.

Replication, that the said bill of exchange in the second count mentioned was not nor is the same identical bill of exchange as the bill of exchange in the second plea mentioned, and in respect whereof the said payment was so made as in that plea mentioned, in manner and form &c.: concluding to the country. The same replication was pleaded to the third plea.

[564] The defendant demurred specially to each of these replications, assigning for causes, that the replication does not state how or in what manner the bill of exchange in the second count mentioned is a different bill of exchange from that mentioned in the plea; and for that the replication admits the existence of the bill in the plea mentioned, bearing date the same day and year as the day and year on which the bill in the second count mentioned is therein alleged to have been made, and also admits that the payment mentioned in the plea was made by the defendant in the manner therein alleged, and yet does not distinctly shew any other bill than that in the plea mentioned,

as the bill mentioned and declared on in the second count of the declaration; and also for that the replication does not, as it ought to do, conclude with a verification, but tenders an issue to the country, and thereby precludes the defendant from making any answer to the bill of exchange in the second count mentioned; and for that, inasmuch as it appears from the pleadings that there were two bills of exchange, bearing date the same day and year, whereby the defendant supposed that the bill mentioned in the second count was the bill upon which the payment mentioned in the plea was made as therein mentioned, the plaintiff ought, by the rules of pleading, to have new assigned, and shewn distinctly what was the bill of exchange in respect whereof such payment was so made, and in what respects the bill in the second count differs therefrom, by which means the defendant would have had the opportunity of pleading to the last-mentioned bill, from which he is wholly precluded by the form of the replication, &c., &c. Joinder in demurrer.

The points marked for argument on the part of the plaintiff were, that the pleas were bad, as they did not state that the payment therein mentioned was made or received in satisfaction of the damages, but merely of the principal sum, and that the plaintiff remained unanswered as to his damages as to that sum; and the payment and receipt in satisfaction of a sum of money, was no answer to the plaintiff's demand for damages for nonpayment of that sum.

The case was argued on a former day in this term (Jan. 18), by

Crompton in support of the demurrer. The first question is, whether the replications are good. There are undoubtedly cases in which it has been decided that a plaintiff need not new assign upon an ordinary plea of payment: *Freeman v. Crafts* (4 M. & W. 4), *James v. Lingham* (5 Bing. N. C. 553; 7 Scott, 603), *Alston v. Mills* (9 Ad. & E. 249; 1 Per. & D. 197); but that is because of the generality of the plea: but it is different where the defendant alleges that he has paid a sum of money, and also that a bill of exchange in respect of which the payment was made, is the same bill as that declared on. It is like the case of two assaults, in which case the plaintiff must new assign. Here the replication admits the existence of two bills, and a payment in respect of one of them, but denies that the bill in respect of which the payment was made was the bill declared on; and the defendant has no opportunity of answering that statement. It is quite unprecedented to traverse the allegation of *quæ est eadem*. Suppose there were two bills of the same tenor, date, and sum, and one had been paid and the other released; and one of them being sued on, the defendant pleads payment, and the plaintiff in his replication denies that the bill paid was the same bill as that declared on; at the trial he may produce and prove the other bill, in respect of which the release was given, and so the defendant would lose the advantage of his defence to both. That would be most unjust. The plaintiff, therefore, ought to have given the [566] defendant an opportunity of answering the statement of the replication. *Heydon v. Thompson* (1 Ad. & E. 210; 3 Nev. & M. 319) is in point. There, to a declaration by indorsee against acceptor of a bill, the defendant pleaded facts shewing that it was a qualified acceptance, without consideration, for the accommodation of the drawer, who had indorsed the bill to the plaintiff with notice of these facts, and without consideration. The plaintiff new assigned, that the bill pleaded was not the same bill as that declared on, but another, for that the bill declared on was accepted generally, and the defendant never accepted it in any qualified manner. The defendant again pleaded, setting out a qualified acceptance as before, and re-stating similar facts as in the plea to the declaration, as to a bill which he stated to be the bill newly assigned. The plaintiff replied, that the bill mentioned in the last plea was not the bill newly assigned, but another and different; and this replication was held bad on demurrer, for concluding to the country, and not with a verification. Patteson, J., there says—"By stating that the bill of exchange mentioned in the plea was not the same as that first described in the declaration, he [the plaintiff] acknowledged the existence of the second bill, and therefore his replication should have concluded with an averment, so as to give the defendant an opportunity of answering what was said of the bill so admitted to be in existence."

Secondly, the pleas are good. The objection taken to them is, that they ought to have been pleaded to the damages as well as to the sum. If there is any thing to which the defendant has not pleaded, and which is not covered by his other pleas, the plaintiff may sign judgment; but that is not ground of general demurrer. A plea to the sum of money is in substance a plea to all the damages in respect of that sum.

[567] Whitehurst, *contra*. It is admitted on the other side, that if this were a general plea of accord and satisfaction, the defendant must have proved a payment in discharge of the specific bill declared on; and what difference can it make, that he has chosen, in his plea, specifically to apply the payment to the bill declared on, by the introduction of the *quæ est eadem*? [Parke, B. I suppose the defendant will say the *quæ est eadem* might have been left out.] Without that allegation it is no plea at all, there being nothing to point it to the claim which is the subject of the action; and the plaintiff was bound to take issue on that allegation, or he could not have answered the defendant's traverse: *Com. Dig. Pleader* (E. 31). The Court will not encourage the increase of new assignments, which are in general mere useless form, as the defendant almost always knows what he has really to answer. It is said that on this record the plaintiff may foist upon the defendant, at the trial, a different bill; but so he might if he had taken issue on an ordinary plea of payment. The plaintiff, by new assigning, would have admitted the existence of a bill in the same terms as that declared on, of the same date, and between the same parties, and must have said that he was suing in respect of another of precisely the same tenor; then, if the defendant pleaded payment, the plaintiff would be bound to prove two bills of the same tenor, which it is manifest do not exist, and therefore he would be defeated. The proper course is to take issue on the replication, and it will then be a question to be left to the jury, whether there are two different debts or not; *Hall v. Middleton* (4 Ad. & E. 107; 5 Nev. & M. 410). He also cited *Hill v. White* (6 Bing. N. C. 23; 8 Scott, 249).

Secondly, the plea is bad, inasmuch as it contains no answer to the plaintiff's claim for damages in respect of the non-payment of the 609l. 10s., to which it is pleaded. This is an action of *assumpsit*, in which the plaintiff does [568] not seek to recover any given sum, but only damages. The proper form would have been to plead, as to the breach of promise as to 609l. 10s., parcel, &c., and the damages resulting therefrom, that the defendant paid, &c. &c. In an action for the non-delivery of a horse pursuant to contract, it would be no plea, that after breach the defendant paid the plaintiff the value of the horse, unless he also averred that he had paid something by way of damages for the breach of contract: *Francis v. Crywell* (5 B. & Ald. 886), *Perry v. Odingsell* (4 Mod. 250), *Corbett v. Swinburne* (3 Nev. & P. 551; 8 Ad. & Ell. 673). [Parke, B. To make this a good plea to the second count, as to the 609l. 10s., parcel of the 728l. 6s., the amount of the bill mentioned in that count, it ought to shew that the payment was made on or before the day when the bill became due, or that, if made on a subsequent day, it was received together with some further sum for interest; otherwise what answer is given as to the claim for interest on that amount? Suppose judgment had been allowed to go by default in the terms of this plea; how much could the plaintiff have recovered? The defendant must therefore contend that it is a plea, not in satisfaction of part of the monies mentioned in the count, but of the damages also. Lord Abinger, C. B. It is no satisfaction of the interest, but it is a satisfaction, *pro tanto*, of the claim which is made up of the 728l. 6s., and the interest. The defendant only seeks to diminish the claim for debt and damages by the sum of 609l. 10s. Parke, B. The goodness or badness of the plea depends upon this, whether it is meant to be applied in bar of so much of the damages in the second count as amounts to 609l. 10s., or of so much of the bill.]

Crompton, in reply. The plea goes to so much of the damages. Under the new rules, the plea is necessarily pleaded [569] in reduction of damages. At all events, it is sufficient on general demurrer. The replication is bad, and contrary to all authority. The traverse in effect admits another bill in respect of which the payment was made: if so, the plaintiff ought to give the defendant an opportunity of answering as to one. The replication introduces new matter, *viz.* the existence of a second bill, and yet does not conclude with a verification. The plaintiff might have obviated the whole difficulty by introducing two counts into his declaration; or he might safely reply, denying that the defendant has paid the bill mentioned in the declaration.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was the case of a demurrer to a replication, on the ground that the plaintiff, having brought his action on one bill of exchange, and by

the form of his pleading admitted the payment by the defendant of a bill drawn and accepted by the same parties, and of the same date, as the bill declared on, ought to have gone on to new assign, and so given the defendant an opportunity of pleading to the other bill. The Court entertained considerable doubt upon the point; and I should have been better satisfied if the authorities had permitted us to hold the replication sufficient; because, if there were a new assignment, the defendant might plead again the same plea as is here pleaded, and so on ad infinitum. But it appears to the Court that we are fettered by the decisions, and that the case of *Heydon v. Thompson* is not substantially distinguishable from the present, and compels us to say that this replication is bad. The plaintiff may amend on payment of costs, and may, if he pleases, demur specially to the plea.

Leave to amend accordingly.

[570] THE EARL OF MACCLESFIELD v. BRADLEY. Exch. of Pleas. Feb. 1, 1841.—Where the defendant had a verdict on one of two issues in a cause, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of the trial.—Where a new trial is obtained ex debito justitiæ, on one of several issues, the rule for a new trial reopens the whole record.

[S. C. 9 Dowl. P. C. 312; 10 L. J. Ex. 182.]

Assumpsit on a bill of exchange, with a count on an account stated. Plea to the first count, denying the acceptance of the bill; to the second, non assumpsit. At the trial, a verdict was found for the defendant on the first issue, and for the plaintiff on the last. The defendant afterwards obtained a rule to set aside the verdict for the plaintiff on the latter issue, and for a new trial, on the ground of misdirection in the Judge; which having been made absolute,

Robinson, for the plaintiff, obtained a rule nisi to discontinue without costs: against which

Jervis now shewed cause. The only question is, whether the defendant is entitled to receive the costs of the trial? *Jolliffe v. Mundy* (4 M. & W. 502) appears to be an authority for the plaintiff, but it is distinguishable. There the new trial was granted on the whole record. Here the defendant succeeded at the trial as to a part of the record, and has at all events a right to the costs of the issue on which he obtained a verdict. [Parke, B. But the rule for a new trial opens the whole record again: a party cannot have a new trial as to a part of a record.] In *Bower v. Hill* (2 Scott, 540), where, on the trial of a right of way, claimed in one count as a public and in the other as a private way, a general verdict was found for the defendant, and a new trial was afterwards directed as to the issue on the second count only, it was held that the defendant, having succeeded on the second trial, was entitled to the costs of the issues found for him on the first trial. [Parke, B. There the new trial was granted on the ground of the verdict being against the evidence as to that issue.]

[571] Per Curiam. Where a cause is sent down to a new trial ex debito justitiæ, and not by the discretion of the Court, it is open on the whole record. This case falls, therefore, within the general rule on this subject, and the rule must be absolute on payment of costs.

Rule absolute accordingly.

REGINA v. WOOD AND OTHERS. Exch. of Pleas. Feb. 1, 1841.—In an action at the suit of the Crown, the Court has no power, under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses.

[S. C. 9 Dowl. P. C. 310; 10 L. J. Ex. 168; 5 Jur. 295.]

This was a scire facias upon a bond given by the defendant, conditioned for the due exportation of a quantity of hops. Wightman, for the defendants, had obtained a rule, calling upon the Attorney General to shew cause why a commission should not issue for the examination of a witness in India.

Jervis now shewed cause. This application is without precedent, and cannot be

supported. The stat. 13 Geo. 3, c. 63, ss. 40-44, authorizes the issuing of a mandamus for the examination of witnesses in India, in the case of indictments or informations exhibited in the Court of King's Bench for misdemeanors or offences committed in India, and also in actions at law or suits in equity commenced or prosecuted by the East India Company, or by other persons, for causes of action arising in India. The stat. 1 Will. 4, c. 22, s. 1, extends the provisions of the 13 Geo. 3, c. 63, to all the foreign possessions of the Crown, and also to all actions depending in the superior Courts at Westminster, in whatever county the cause of action may have arisen, and whether within the jurisdiction of the Court to the Judges whereof the commission may be directed, or not. And s. 4 empowers the superior Courts to order the examination upon oath, on interrogatories or otherwise, before the Master, of any witness within the [572] jurisdiction of the Court, or to order a commission to issue for the examination of witnesses on oath at any place out of the jurisdiction. By the former act, the Crown was bound only in relation to the criminal cases therein mentioned; by the latter, the Crown, if bound at all, is so only with reference to the like criminal cases, when the offence is committed in any of the foreign possessions of the Crown other than India. This is a civil and not a criminal proceeding, and the only course is to file a bill in equity: *Bonham v. Leigh* (5 Price, 444). The only instance in the books of an application at all like the present is that of *The Attorney General v. Laragoity* (3 Price, 221), but that was on the equity side of the Court, and the commission was granted upon a bill filed. There is, indeed, a MS. case in the office, *R. v. Arthur*, in which a commission was granted on this side of the Court, but the depositions, when tendered in evidence, were rejected.

Wightman, contrâ. The conjoint effect of the 13 Geo. 3, c. 63, and 1 Will. 4, c. 22, is to empower the Court to issue a mandamus in this action, although it is a proceeding at the suit of the Crown. The Crown was clearly bound to a certain extent by the 13 Geo. 3, c. 63, s. 40; and the 1 Will. 4, c. 22, s. 1, extends "all and every the powers, authorities, provisions, and matters" contained in the former act, one of which did bind the Crown, to all colonies and places under the dominion of the Crown in foreign parts, and to "all actions depending in any of the Courts of law at Westminster." This language is sufficiently comprehensive to include the case of an action at the suit of the Crown. A scire facias by the Crown, to enforce the payment of a bond, may be considered as an action, within the terms of a remedial statute. If however the Court are of opinion that such is not the effect of the statutes, they may [573] mould the rule, and direct a stay of proceedings unless the Crown will consent to a commission; since otherwise there will be a failure of justice.

LORD ABINGER, C. B. I think this application cannot be granted. The words of the 1 Will. 4, c. 22, as to actions, cannot apply to actions at the suit of the Crown; the Crown is not bound unless specially named. Then the incorporation of the provisions of the 13 Geo. 3, c. 78, cannot amount to more than if those provisions had been enacted de novo; and by them the Crown is bound only as to indictments and informations.

PARKE, B. There are no fewer than four decided objections to this application, on the face of the act of Parliament. In the first place, upon the preamble, so much only of the 13 Geo. 3 as relates to actions is incorporated in the act; secondly, even supposing that the clause relating to indictments and informations is imported into it, that only gives a mandamus; thirdly, they must be indictments or informations for misdemeanors or offences committed abroad; and fourthly, the clause applies only to indictments and informations exhibited in the King's Bench.

ALDERSON, B., and GURNEY, B., concurred.
Rule discharged.

[574] THE SHEFFIELD, ASHTON-UNDER-LYNE, AND MANCHESTER RAILWAY COMPANY v. WOODCOCK. Exch. of Pleas. Jan. 15, 1841.—The Sheffield and Manchester Railway Act, (7 Will. 4, c. xxi.), by s. 115, empowered the directors from time to time to make such calls from the proprietors, on their respective shares, as they from time to time should find necessary, so that no call should exceed £10 on each share, and that there should be an interval of three calendar months between each successive call, and twenty-one days' notice should be given of every such call by advertisement in the local newspapers; and the proprietors were thereby required to pay the calls on their shares to such person, at such

time, at such place, and in such manner, as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call, and the day of payment, but not the place where, or the person to whom, the payment was to be made; but a notice of that call, subsequently inserted in the local newspapers, according to the directions of the act, specified all those matters. In an action for the amount of such call against a party who was a proprietor at the date of the resolution, of the notice, and of the day appointed for payment, it not appearing also that there was any change in the directory during that interval:—Held, that the call was properly made.—By another resolution, made on the 13th of March, the directors resolved that a call of £5 should be made on the 30th of March instant, to be paid on the 1st of May:—Held, that the call was not invalid because the resolution was prospective.—Some of the directors by whom the resolutions for the calls were made, were members of a banking company, who were the bankers and treasurers of the Railway Company, and as such received and gave receipts for calls, and paid cheques drawn by the directors, &c. A clause of the act of Parliament (s. 150) enacted, that no person concerned or interested in any contract with the Company should be capable of being chosen a director, and that if any director should directly or indirectly be concerned in any contract with the Company, he should thereupon be immediately, and was thereby, discharged from the direction:—Held, that this clause applied only to contracts made with the Company in prosecution of its enterprise, and did not disqualify the directors above mentioned.—Another clause (s. 159) directed that the orders and proceedings of the directors should be entered in a book, and signed by the chairman of the meeting, and enacted, that when so entered and signed, they should be deemed originals, and be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman:—Held, that a book of proceedings, purporting to be signed “W. S., deputy chairman,” was evidence per se, without proof that W. S. was in fact deputy chairman, or as such presided at the meeting.—A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors pursuant to the act, but after the passing of the act of Parliament, is good, although the transferor be never registered as a proprietor.—Where the act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser’s name, and stating the consideration untruly, but the purchaser afterwards signed and transmitted to the Company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares:—Held, in an action by the Company against him for calls on such shares, that he was precluded from disputing the validity of the transfer.

[S. C. 2 Railw. Cas 522; 10 L. J. Ex. 492. Referred to, *New Brunswick and Canada Railway Company v. Muggerridge*, 1859, 4 H. & N. 583; *Hull Flax Company v. Wellesley*, 1860, 6 H. & N. 48; *In re Burned’s Banking Company*, 1867, L. R. 3 Ch. Ap. 112.]

Debt for calls on shares in the above railway. The declaration was in the form given by the act of Parliament, 7 Will. 4, c. xxi., s. 118,(a) stating the defendant to

(a) The following sections of the act (which received the royal assent 5th May, 1837) were referred to in the course of the argument, and are material to the case:—

Sect. 110. The said Company shall and they are hereby required from time to time, as occasion may require, to cause the names of the several corporations and the names and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the capital stock of the said Company, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished as aforesaid, to be fairly and distinctly entered in a book to be kept by the clerk of the said Company, and after such entry made, to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate or ticket, with their common seal affixed thereto, to be delivered to every such proprietor, on demand, specifying the share or shares to which such proprietor is entitled, such proprietor paying to the clerk of the said Company the sum of two shillings and

be, at the [575] several times of the making of the several calls thereafter mentioned, and from thence continually to the commencement of this suit, a proprietor of twenty shares in the said undertaking, and to be indebted to the Company in the [576] sum of £450 for four calls of 2l. 10s., £5, £5, and £10 respectively. The defendant pleaded,

sixpence, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatsoever, as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified; and such certificate or ticket may be in the words or to the effect following; that is to say,

“Sheffield, Ashton-under-Lyne, and Manchester Railway Company.

“Number .

“These are to certify that A. B., of [or the name of the corporation] is the proprietor of the share [or shares], number of the Sheffield, Ashton-under-Lyne, and Manchester Railway Company, subject to the rules, regulations, and orders of the said Company. Given under the common seal of the said Company the day of in the year of our Lord .”

Sect. 113. The several persons who have subscribed, or who shall hereafter subscribe or agree to advance or pay any money for or towards the said undertaking, shall and they are hereby required to pay the respective sums of money by them respectively subscribed or agreed to be paid, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under or by virtue of the powers of this act, at such times and places and to such persons as shall from time to time be directed by the said Directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, at the time or respective times and in the manner required for that purpose, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any court of law or equity, together with interest on every such unpaid sum of money at the rate of 5l. per centum from the time when the same was directed to be paid as aforesaid up to the day of the actual payment thereof.

Sect. 115. The directors of the said Company shall have power from time to time to make such calls of money from the proprietors of shares in the capital stock of the said Company who shall not have already paid the full amount due or payable in respect of their respective shares, to defray the expense of the said railway and carry on the same, as they from time to time shall find necessary, so that no such call shall at any one time exceed the sum of ten pounds upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that there shall be an interval of three calendar months at the least between each successive call, and twenty-one days' notice at the least shall be given of every such call by advertisement in one or more newspaper or newspapers published or circulated in each of the counties of York, Derby, Chester, and Lancaster; and the several proprietors of shares in the capital stock of the Company shall and they are hereby required to pay the sum or sums of money subscribed for or payable in respect or on account of their several and respective shares, or so much thereof as shall not have been previously paid up by such calls or instalments, to such person, at such time, at such place, and in such manner as the directors of the said Company shall from time to time direct or appoint, for the use of the said undertaking; and if any proprietor of any such share shall not from time to time pay the rateable proportion or call or instalment due in respect of each such share to the person and at the time and place and in the manner to be appointed for payment thereof as herein-before mentioned, then and in such case and so often as the same shall happen, such proprietor shall pay interest for the amount which shall be so unpaid after the rate of 5l. per centum per annum from the day appointed for the payment thereof up to the time when the same shall be actually paid: Provided, that no proprietor of any share in the capital stock of the said Company shall, under the authority of this act, be called upon or be liable to pay any greater sum of money than with the principal money already paid on account of the subscription for such shares will amount to the sum of £100 in respect of each such share, over and besides any interest paid or payable by reason of default in payment of calls as aforesaid.

Sect. 118. In any action to be brought by the said Company against any proprietor

first, non assumpsit; secondly, that at the time of making the calls in the declaration mentioned, he the defendant was not a proprietor [577] of the said shares in the said undertaking in the declaration mentioned, modo et formâ:—on which issues were joined.

of any share in the said undertaking to recover any money due and payable to such Company for or by reason of any call made by virtue of this act, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in a certain sum of money, being the same sum or thereabouts as the calls unpaid shall amount to, for so many calls of such sums of money upon such share or so many shares belonging to the defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of a share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such calls having been made, without proving the appointment of the directors who made such respective calls, or any other matter or thing whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due (including interest computed as aforesaid) on such calls, unless it shall appear that any such call exceed ten pounds for every share, and was made within the distance of three calendar months from the last preceding call; and in order to prove that the defendant was a proprietor of such alleged shares, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein, provided that the name of the defendant in the record substantially agrees with that in such book; and in order to prove that such notice was given as aforesaid, the production of such newspapers as aforesaid, containing such advertisement as by this act required, shall be *primâ facie* evidence that such advertisements were duly inserted in such newspapers, and that such newspapers were printed and published respectively at the respective times they bear date, and by such printer, or printer and publisher, and at such places and by such persons respectively as they purport to be printed, or printed and published, by and at respectively.

SECT. 125. It shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors, by writing duly stamped, in which the consideration for the same shall be duly stated, to sell and dispose of any share or shares to which they shall respectively be entitled therein, subject to the rules and conditions in this act mentioned; and the form of conveyance of such share or shares may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require; that is to say, —

"Sheffield, Ashton-under-Lyne, and Manchester Railway.

“I, A. B., of _____ in consideration of the sum of _____ paid to me by C. D., of _____ do hereby assign and transfer to the said C. D., _____ share numbered _____ of and in the undertaking called ‘The Sheffield, Ashton-under-Lyne, and Manchester Railway,’ to hold unto the said C. D., his executors, administrators, and assigns [or successors and assigns], subject to the several conditions on which I held the same immediately before the execution hereof; and I the said C. D. do hereby agree to accept and take the said share, subject to the conditions aforesaid. As witness our hands and seals this _____ day of _____ in the year of our Lord _____”

And in every such sale the deed or conveyance (being executed by the seller and purchaser of such share or shares) shall be kept by the clerk of the said Company, &c. &c.

Sec. 127. No person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking, after any call shall have been made by the said directors for any sum of money in respect of such share, unless he or they, at the

At the trial before Rolfe, B., at the last Liverpool Assizes, [578] it appeared that the first general meeting of the Company, pursuant to the 142nd section of the act of Parliament, was held on the 27th of October 1837, when sixteen directors were elected, of whom thirteen were among those [579] named as the first directors in the 152nd section of the act. Three of these (one being Mr. William Sidebottom, the deputy chairman) were partners in the Liverpool and Manchester District Banking Company. That Com-[580]-pany, ever since the formation of the Railway Company, acted as its bankers and treasurers, having been formally appointed by the directors; and in that capacity they receive calls and give receipts for them, and pay money on cheques signed by the directors, and the clerk and secretary. The Company's seal was not affixed to a register of the proprietors, pursuant to the 110th section of the act, until the month of February 1838. The shares in question were transferred to

time of such sale or transfer, shall have paid the full sum of money which shall have been called for in respect of each share.

Sect. 150. No officer of the said Company receiving a salary, nor any person concerned or interested in any contract with the said Company, shall be capable of being chosen a director of the said Company, nor shall any director be capable of accepting any other office or place of trust or profit under the said Company, or of being concerned or interested in any contract with the said Company during the time he shall be a director of the said Company; and if any director of the said Company shall at any time whilst such director accept or continue to hold any other office or place of trust or profit under the said Company, or if any director, or any secretary, clerk, treasurer, or other officer or servant of the said Company, shall, either directly or indirectly, be concerned in any contract with the said Company, or shall participate in any manner in any work to be done for or goods to be sold to the said Company, every such director, clerk, secretary, treasurer, or other officer or servant shall thereupon be immediately and is hereby discharged from the direction, office, service, or employ of, in, or under the said Company, and rendered incapable of being thereafter employed by them, unless re-appointed, and such re-appointment be confirmed at some general or special general meeting of the said Company.

Sect. 152 enacts, that sixteen persons therein named, and the survivors and survivor of them, or such of them as shall continue to act, shall be the first directors of the said Company, and shall continue in office until the first general meeting of the said Company to be held in pursuance of this act; and they the said directors hereinbefore named shall and they are hereby required to fix the time and place of such first general meeting within the limit hereinbefore prescribed, and to give notice thereof in the manner hereinbefore directed as to general meetings of the said Company; and until such first general meeting shall be holden, and such directors shall have been duly elected as hereinafter prescribed, the said directors hereinbefore named, or the survivors or survivor of them, or such of them as shall continue to act, shall and lawfully may allot the shares (if any) remaining undisposed of in the said undertaking, as they the said directors shall think fit, and shall and may exercise all other powers and authorities which are by this act given to, or which may be exercised by the directors who may be elected in pursuance hereof at the first or at any subsequent general meeting of the said Company.

Sect. 153 empowers the directors, at their first meeting, and afterwards yearly, to appoint a chairman and deputy chairman.

Sect. 154 provides, that the chairman, or in his absence the deputy chairman, shall preside at all meetings of the Company.

Sect. 159. The orders and proceedings of all meetings, as well general as special general, of the said Company and of the said directors, and of such committees respectively as aforesaid, shall be entered in some book or books to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors, or being directors or members of the committees, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed.

the defendant by Messrs. Leeds & Son, brokers, of Manchester, in December 1837. Leeds & Son were parties to the subscription deed entered into on the original formation of the Company. The transfer delivered to the defendant with the shares had a blank for the purchaser's name. The consideration was stated in it to be the sum of 18l. 15s., or 18s. 9d. per share; but evidence was given to shew that the sum really paid was £20, i.e. £1 per share. The defendant, after receiving this transfer, signed a proxy paper in the form directed by the 120th section of the act, and transmitted it to the secretary; and his name was in consequence entered in the register, on its formation, as the proprietor of the shares in question.

On the 13th March 1839, the directors resolved that a call of 2l. 10s. per share should be made on the 30th of March then instant, to be paid on the 1st of May following. This was the first call that was the subject of this action. The other three calls were made in pursuance of subsequent resolutions, by which they were expressed to be payable on the 6th of August 1839, the 1st of January 1840, and the 1st of May 1840 respectively. All the resolutions purported to be signed by "William Sidebottom, deputy chairman;" but no evidence was given to shew that in fact Mr. Sidebottom presided as deputy chairman at the several meetings at which the calls were resolved upon. The defendant's counsel objected to the admissibility of the book in which the resolutions were entered, unless such evidence were given: but the learned Judge admitted it. None of the resolutions specified the place where, or the person to whom, payment was to be made: but shortly after the passing of each of the resolutions, notices were inserted in the local newspapers, pursuant to the directions of the act of Parliament, signed, "by order of the directors," by the clerk and secretary, stating, that "the directors having resolved to make a call" for an instalment of _____ per share, the proprietors were required to pay the said call, on or before &c., to some one of the under-mentioned bankers (amongst others, the Manchester and Liverpool District Bank, Manchester).

Several objections were taken for the defendant at the trial. First, that none of the calls were duly made, inasmuch as the election of directors on the 27th of October 1837 was void, not being made by registered proprietors; 2ndly, that the fact of Mr. Sidebottom and the other two directors being also partners in the Bank disqualified them, under the 150th section of the act, from acting, and therefore also the calls were not duly made; 3rdly, that the time and place of payment of the calls ought to have been specified in the resolutions, in order to entitle the Company to recover them; 4thly, that at all events they were not entitled to recover in respect of the first call, for that the resolution to make a call in futuro was not valid; 5thly, that the transfer to the defendant, being from parties who were not registered proprietors, was void; and lastly, that it was also void for not setting forth the consideration truly. The learned Judge thought that the defendant was precluded from insisting upon either of the two last objections, by reason of his having signed the proxy paper, and so represented himself to the Company as the proprietor of the shares. His Lordship, however, reserved all the points for the consideration of the Court, and a verdict was taken for the plaintiff for the amount claimed.

In Michaelmas Term, Cresswell accordingly moved for a [582] nonsuit, pursuant to leave reserved, or for a new trial. First, as to the admissibility of the book in which the resolutions were entered. The 159th section only dispenses with proof of the handwriting, and that the parties signing are directors; but to make the proceedings good, they must be signed by the chairman or deputy chairman, and there was no proof that Mr. Sidebottom was there in the latter capacity. The book is only made evidence when so signed. [Alderson, B. I think the act means that the book is to be evidence of every thing on the face of it. Parke, B. The effect is, that it is to be presumed that the signature was that of the individual who was the deputy chairman.]

Secondly, the proceedings were invalid, by reason of some of the directors who were parties to them being also members of the Banking Company. The 150th section expressly enacts, that if any director shall, either directly or indirectly, be concerned in any contract with the Company, he shall ipso facto be discharged from the direction. Here is a loan of money by the Bank to the Company, and therefore a contract with the Company. [Lord Abinger, C. B. The clause clearly applies to contracts with the Company in the execution of its enterprise.]

Thirdly, the transfer to the defendant was void, first, by reason of the purchaser's name being left in blank, and secondly, by reason of the consideration being untrue

stated. It is said that the defendant, having afterwards signed a proxy paper describing himself as the proprietor, and delivered it to the Company, is precluded from the benefit of this objection. But the instrument must be a perfect deed at the time of delivery: *Hibblewhite v. M'Morine* (6 M. & W. 200). It is clear there could be no estoppel as against the Company, who are no parties to the deed; but estoppels must be mutual. There was no evidence that the Company's position was altered by the act of the defendant. [Parke, B. The defendant held out false colours, [583] to induce the Company to register him as a proprietor, and therefore to bring this action against him. It is a universal rule of law, that where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby.] That principle has never been extended to such a case as this. The Company can have no claim upon the defendant, except in respect of his ownership of the shares. Nor had they any right to allow parties to pretend to transfer shares before a register of the proprietors existed. There is no case in which a different effect has been given to a deed, because a party to it has made a statement of his interest under it. This is no estoppel in point of law, and could not be so pleaded.

Upon these several points the Court refused a rule, but granted it upon all the other grounds of objection. Against this rule

Wightman (with whom was Sir W. W. Follett) shewed cause in this term (Jan. 13). First, it was not necessary that the resolutions for the calls should specify the place where, and the person to whom they should be paid; that might well be done by the subsequent advertisement. All that is required in terms by the 115th section is, that twenty-one days' notice shall be given of every call by advertisement in the newspapers, and the proprietors are required to pay their calls to such person, at such time and in such manner, as the directors shall from time to time direct or appoint. Here the notice, given accordingly by the order of the directors, does specify the persons, and the time and place of payment; and there is nothing to render it necessary that this should be a part of the original resolution. This point has, indeed, already been expressly decided by this Court, in the case of *The Great North of England Railway Company v. Biddulph* (7 M. & W. 243), where the question was fully argued. The time of payment is the only [584] material thing for the proprietors to be apprised of in the first instance, and that is specified in the resolution. Whether the call be considered as being made by the resolution or by the notice, the requisites of the act are complied with by the latter being given in due form, twenty-one days before the time of payment. [Parke, B. The notice in the newspaper, as it seems to me, is the call; it is equivalent to a demand on each proprietor personally, in the terms of that notice. Alderson, B. All that the Company are required, by the 118th section, to prove in an action for calls, is, that the defendant was a proprietor at the time of making the calls, and that notice of the calls was given according to section 115.] It was wholly unnecessary, therefore, for the plaintiffs to have produced the resolution at all.

Another objection is taken to the first call, that the resolution for making it is prospective. But the call was in effect made on the 30th of March; and at all events, the proprietors had due notice of it by the advertisement, within the time limited by the act of Parliament.

[With regard to the objection that the directors by whom the call was made were not duly elected, it appeared, on an examination of the Company's books, that at every meeting at which any of the calls in question was made, five at least of the directors named in the 152nd section of the act were present; even, therefore, if the election of directors at the meeting of the 27th of October was invalid, so that the original directors continued in office, the proceedings were good.]

And as to the objection that the transfer to the defendant was invalid, being made by subscribers not registered, the judgment of the Court of Exchequer Chamber, in the case of *The Grand Junction Railway Co. v. Freeman*, (delivered this day), in which the like objection was held to be unfounded, was relied on.]

[585] Cresswell, Dundas, Crompton, and Cowling, in support of the rule. First, as to the sufficiency of the calls generally. The resolution of the directors is itself the call and ought, therefore, to specify the place and manner of payment. The 115th section requires, first, that a call shall be made by the directors; that is done by the resolution; and then that there shall be notice of the call having been made, which is given by the advertisement. The notice itself refers to the resolution as the call; it

speaks of a call having been theretofore made. If the act had intended the publication in the newspaper to be itself the call, it would have so stated; the words would have been—"shall have power to make such calls, &c., by advertisement in one or more newspapers," &c. It certainly is at the time of the resolution that the directors "find it necessary" to make the call. The making of the call is that which is the act of the directors, viz. the resolution, of which the proprietors are afterwards advertised by the newspapers. The notice in the newspapers may be given by the clerk, and the two cannot be put together so as to make one valid act; there must be the judgment and discretion of the directors upon the whole. The time and place are matters most material to the proprietors; if the time of payment were varied, it would be in effect ordering the payment of a different sum of money; so also, the place is to be mentioned as a security to the shareholders, who would otherwise be bound to pay generally. These matters, thus important, cannot be delegated to the clerk. The resolution, therefore, is the call, though it cannot be enforced until notice—as a Judge's order cannot be enforced until service of it. The 113th section favours this construction; directing that the subscribers shall pay their subscriptions, or such parts of them as shall from time to time be called for by the directors, i.e. by their resolution, at such times and places and to such persons as shall from time to time be directed by the directors; and on their [586] neglect so to pay, that the Company may sue for and recover the same, with interest from the time when the same was directed to be paid, up to the day of payment. So, section 118 requires that the party sued shall be proved to have been a proprietor at the time of making the calls, and that notice was given of the calls having been made: implying that the call and the notice are different things. If the advertisement be the call, it would have been only necessary to say, that it should be sufficient to prove the advertisement, and that the defendant was a proprietor at the time therein mentioned. When does the party become liable to pay,—from the date of the resolution, or of the notice? Again, from what period is he prevented, by the 127th section, from transferring his shares after a call made? Suppose a resolution made on the 1st of August, and advertised on the 20th, can a share be transferred between those days without payment of the call? Again, suppose there were an interval of three months between two successive advertisements, but not between the resolutions; would both the calls be well made? [Rolfe, B. On the other hand, suppose there were a resolution on the 1st of April for a call to be paid on the 1st of July; and on the 2nd of July another resolution for a call to be paid on the 1st of August: that would make two payments within a month. It is quite immaterial to the shareholders when the resolutions are made; not so when the payments are to be made.] The clauses which have been referred to are all in derogation of the common law, and ought to be construed strictly against the Company. The directors do not perform their duty unless they keep a book in which, for the protection of the proprietors, they enter all that they have done, that when they are suing any of the proprietors, they may have regular proceedings to shew against them. If then the resolution be the call, it ought to specify the place and manner of payment. Further, if the advertisement be the call, all is executory [587] until then; the resolution is only that the directors will thereafter do something, which may be after they go out of office. Surely all must be perfected while the directors who resolved upon the call remain in office.

But to the first call the additional objection applies, that upon the face of the resolution, it only imports that a call shall be made in futuro. Can the directors make a call by resolving that they will do it on a future day? A different class of proprietors may be bound, and a different body of directors may be the parties to make it, who may dissent from the act of their predecessors. Could they resolve that a call should be made at any indefinite distance of time thereafter? [Alderson, B. They may know that debts will fall due on a future day, and find it equally necessary to make a call on that day as in præsentia.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The only questions which remained for consideration in this case were two. First, whether the resolutions of the directors, that calls should be made, were valid, inasmuch as neither the person to whom, nor the place where, payment should be made, were specified in the resolutions themselves. Secondly, whether a resolution of the directors, that a call should be made at a future day, was authorized by the

statute, and binding on the proprietors. The first of these objections applied to all the four calls which are the subject of this action, the second to one only.

We think that both these objections are unfounded, and that the plaintiffs are entitled to recover.

The 115th section provides for the making of calls, and is as follows :—[His Lordship read it.] There appears to us to be nothing in the 115th section, nor in any other part [588] of the act, which requires the directors to fix the person to whom and the place where the payment is to be made, at the same time that they resolve that a call shall be made, and as part of the same resolution. It seems to us to be open to them to fix such person, as well as the time and place of payment, at a different period, and by a distinct act. A question indeed may arise in some cases, where there has been a change of proprietorship by transfer, what is the time of making a call, which fixes the liability of the then proprietor of a share under the 118th section, and which prevents the free transfer of a share under the 127th section; whether it is to date from the original resolution, from the time of fixing the mode of payment, of giving notice in the newspapers, or even from the period when the calls become due. It may be that the resolution of the directors is only an inchoate act, and that the call is not complete until the mode of payment is appointed and notice thereof given; so that no one is liable, unless he be a proprietor when the whole of these circumstances have occurred; and until all these have occurred, a proprietor is not deprived of the right of free transfer. It may be that both the liability to pay the instalment, and the impediment to the transfer, attach from the date of that resolution itself, though the mode of payment be not fixed nor notice given till afterwards: or lastly, it may happen that the term “call” may for one purpose date from the resolution, and for another from a different period. But it is unnecessary in this case to determine this question, for whether the first resolution, or the time of fixing the mode of payment, or of giving the notice, (which is in this instance the same), or even the time fixed for the payment, be the call, this defendant was at each time the proprietor of the shares. All that we have to determine now is, that the directors may fix the time, place, and manner of payment, after the original resolution has been made, and by a distinct act.

[589] It is to be observed that there is no intermediate change of directors between the two acts. It is not proved that those who made the resolution were different directors from those who fixed the mode of payment, and we are not called upon to pronounce any opinion whether such a circumstance would make any difference.

The second and only remaining question is, whether the resolution to make a call prospectively be good. This objection applies to the first call only.

The directors, on the 13th of March, resolve that a call be made on the 30th of March, payable on the 1st of May. We think this mode of proceeding is valid. There is certainly nothing in the statute which expressly requires the directors to make the calls immediately; and we do not see any reason why they should be so restrained. They may make calls from time to time, as they think fit, when the exigencies of the Company require it, and the nature of the debts and engagements of the Company may well be such, that the amount of the calls would as certainly be wanting at a future day, as on the very day when the resolution is made. It is probable that even the inchoate liability to this instalment would not attach on any proprietor until the 30th of March, the day as of which the call must, under the resolution, be considered as made, or begun to be made.

The objections therefore cannot prevail; and all the others having been previously disposed of, we have now to pronounce that the rule must be discharged.

Rule discharged.

End of Hilary Term.

[590] VACATION SITTINGS AFTER HILARY TERM.

BARKER AND WIFE v. SMARK. Exch. of Pleas. Feb. 11, 1841. A bond conditioned to secure a principal sum, with interest at 5 per cent. commencing from a previous day, is only liable to stamp duty on the principal sum.

[S. C. 9 Dowl. P. C. 211; 10 L. J. Ex. 200. Referred to, *Duines v. Heath*, 1847, 3 C. B. 938; *Knight's Deep, Limited v. Inland Revenue Commissioners*, [1899] 1 Q. B. 350: reversed, [1900] 1 Q. B. 217.]

Debt on a bond dated 10th June, 1840, conditioned for the payment of £3000, with interest at £5 per cent. from the 25th day of March preceding. Plea, non est factum. At the trial before Maule, J., at the Dorsetshire Summer Assizes, 1840, the bond, when produced, appeared to be impressed with a £7 stamp. It was objected for the defendant, that the stamp was insufficient under the statute 55 Geo. 3, c. 184, Schedule, Part I., inasmuch as the bond being given to secure not only the principal sum of £3000, but also bygone interest from a previous day, the "definitive and certain sum of money" secured by the bond, at its date, exceeded £3000, and it ought therefore to have borne a stamp of £8. The learned Judge overruled the objection, and the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term, Bere obtained a rule nisi accordingly; against which

Cockburn now shewed cause. The stamp was sufficient. The "definitive and certain sum of money" mentioned in the statute, means the sum certain mentioned in the bond itself as being secured by it, and the stamp is sufficient if it covers that. *Dixon v. Robinson* (1 M. & Rob. 115; 5 C. & P. 96), *Foreman v. Jeyes* (5 C. & P. 419), [591] and *Dearden v. Binns* (1 Man. & R. 130), are authorities to shew that the stamp need not have reference to interest accruing after the date of the bond. And the same principle of decision applies also to interest secured from a day prior to the date of the bond. When a bond is given for the payment of £100, with interest at £5 per cent., payable in twelve months, it is obvious that in one sense it is given to secure, not £100, but £105, because *id certum est quod certum reddi potest*: yet it is held that in such case the stamp on £100, the amount of the principal money, is sufficient. It is clear that the distinction is taken between a principal sum and the interest upon it—between that part of the sum advanced upon which the profit is to accrue, and the profit so accruing—and that the "sum certain" mentioned in the statute is taken to be the former only, and the latter is not, in whatever shape it be reserved, to be taken into consideration in calculating the amount of the duty. Here the £3000 is the only sum on which interest was to accrue, and the only difference is, that the interest is calculated thereon from a prior date. In *Pruessing v. Ing* (4 B. & Ald. 204), Abbot, C. J., says—"I am quite satisfied that the words 'sum of money' in the act, mean the principal sum mentioned in the note, and not a sum compounded of principal and interest." [Parke, B. The definition of what is required under the head "Mortgage" favours your argument. There the rule for the calculation of the duty is in these terms:—Where the instrument respectively "shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due or owing, or forborne to be paid, being payable—not exceeding" &c. &c.]

Bere, contra. The question is, what is the meaning of the words "definitive and certain sum of money," in the act of Parliament. The word "principal" is not in the [592] act, although, if its effect was to be so limited, nothing would have been easier than to insert it. Here the definitive and certain sum—the amount already ascertained by the efflux of time—due at the date of the execution of the bond was the principal sum of £3000 plus the quarter's interest which had already accrued. In *Dickson v. Cass* (1 B. & Adol. 343), a bond conditioned for securing £1000, with interest and banker's charges of commission, was held to be insufficiently stamped as a bond to secure a sum not exceeding £1000. [Parke, B. It may be doubtful whether that case can be supported, since the decisions in *Doe d. Scruton v. Snaith* (8 Bing. 146; 1 M. & Scott, 230) and *Paddon v. Bartlett* (2 Ad. & E. 9; 4 Nev. & M. 1).] The case of mortgages is provided for by express words. It can make no difference that the money is secured in the name of interest, if it be due when the bond is executed.

The language of Abbott, C. J., in *Pruessing v. Ing*, is in favour of the defendant. He says—"the object of the legislature was to impose a *pro ratâ* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question therefore is, what was the sum due at the time when the note was taken; for that is the sum secured."

PARKE, B. I think the stamp is sufficient, and that Mr. Cockburn's argument is well founded. The duty is imposed by the statute on bonds, in the following terms:—"Bond, &c., given as a security for the payment of any definitive and certain sum of money not exceeding £50, £1," &c. &c. I construe these words to mean the sum ascertained by the bond itself,—in other words, the principal sum. It is true, at the time of the execution of the bond in this case a sum was due for interest, which was ascertainable: but the amount of interest is not mentioned [593] in the bond, and must depend on the time when it is paid. I think the words "definitive and certain sum" refer to the principal money secured by the bond, which is to bear interest, and not to interest, whether bygone or subsequent. The case of *Pruessing v. Ing* was different from the present, and the judgment must be read with reference to the point then in question.

ALDERSON, B. I am of the same opinion. Interest does not fall within the meaning of a "definitive and certain sum of money" secured by the bond; it is only the amount of damage for the detention of the principal: and although the rate of payment of interest is mentioned in the bond, it forms no part of the definitive and certain sum for which the instrument is a security: whether bygone or subsequent, it is equally in the nature of damage for the non-payment of the sum advanced. The definitive and certain sum is that on which the damage follows, namely, the principal sum.

GURNEY, B. I am of the same opinion. I see no distinction in this respect between interest bygone or to accrue in future; in either case it is beyond the definitive sum secured.

Rule discharged.

BREST v. LEVER. Exch. of Pleas. Feb. 13, 1841.—A plea of *liberum tenementum*, to an action of trespass *qu. cl. fr.*, is not supported by proof of the exercise of acts of ownership by the defendant for a period of less than twenty years, where it appears that before the commencement of that period, and also within twenty years, the estate was in a third person.

[S. C. 10 L. J. Ex. 337.]

Trespass *quare elausum fregit*. Plea, that the close in which &c. was the close, soil, and freehold of the defendant; on which issue was joined. At the trial before Coleridge, J., at the last Wilts Assizes, the defendant, [594] in support of his plea, proved acts of ownership exercised by him over the locus in quo, for a period of seventeen years before the commencement of the action. The plaintiff proved, that at an earlier period, and within twenty years, the property had been conveyed in fee to a person of the name of Barrow. Neither the plaintiff nor the defendant deduced any title from Barrow. The learned Judge, in summing up, told the jury that in his opinion the acts of ownership proved by the defendant made out a *primâ facie* case in support of the plea, notwithstanding the evidence given by the plaintiff: and a verdict was found for the defendant.

Bompas, Serjt., having obtained a rule nisi for a new trial, on the ground of misdirection,

Crowder and Butt shewed cause at the present sittings (Feb. 11), and contended that the question was properly left to the jury, and that it was not necessary for the defendant to produce his title-deeds, but that the acts of ownership made out a sufficient *primâ facie* title, which was not rebutted by the mere proof of the fact that at an earlier period the estate was in another.

Bompas, Serjt., *contra*. By the plea of *liberum tenementum*, the defendant admits a possession in the plaintiff, but undertakes to destroy the presumption arising from such possession, by shewing a legal title in himself. This he might have done, either by proving his title by deed, or by shewing acts of ownership extending over a period of twenty years. But here he has attempted to prove a title by shewing the exercise

of acts of ownership for a less period than twenty years; but the plaintiff rebuts that case, by shewing that within the twenty years the freehold was in a third party, in whom, *primâ facie*, it continues, unless the defendant prove a legal transfer of it to himself. [595] The earlier presumption must prevail until a better title is shewn: *Doe d. Harding v. Cooke* (7 Bing. 346; 5 M. & P. 181).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. [Having stated the facts, his Lordship continued]:—By the plea of *liberum tenementum*, the defendant admits that the plaintiff is in possession, and that he himself is, *primâ facie*, a wrong doer; but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This he was bound to do, either by shewing title by deed, in the usual way, or by proving a possessory title for twenty years. But here the defendant has only proved acts of ownership extending over seventeen years, and has not connected them with any prior title; it amounts, therefore, to nothing more than a longer against a shorter possession—a mere priority of possession—and for a period insufficient to confer any title, except against a mere wrong doer. We think, therefore, that there was a misdirection, and that the rule for a new trial must be made absolute.

Rule absolute.

HAWTAYNE (Public Officer of the Western District Banking Company) v. BOURNE. Exch. of Pleas. Feb. 13, 1841.—The resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears:—nor in any other case of necessity, however pressing.

[S. C. 10 L. J. Ex. 224; 5 Jur. 118. See further, 8 M. & W. 703, and *Cox v. Midland Railway*, 1849, 3 Ex. 268; *In re Cunningham*; *Simpson's Claim*, 1887, 36 Ch. D. 532; *Jacobs v. Morris*, [1902] 1 Ch. 816. Referred to, *Yorkshire Railway Wagon Company v. Moclure*, 1881, 19 Ch. D. 488; *Gwilliam v. Twist*, [1895] 2 Q. B. 84.]

Debt for money lent, and on an account stated. Plea, *nunquam indebitatus*. At the trial before Maule, J., at [596] the last Cornwall Assizes, the following appeared to be the facts of the case:

The defendant, who resides at Liverpool, was the holder of 100 shares in a Company established for the working of a mine called the Trewolvas Mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent, appointed by the directors of the Company for that purpose. In March 1839, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent, from want of funds, became unable to pay the labourers; a considerable number of whom, their wages being in arrear, applied to the magistrates, and obtained warrants of distress upon the materials belonging to the mine. The agent, finding that these warrants were about to be put into execution, applied in the name of the Company, but in fact upon his own responsibility, and without the knowledge of the shareholders, to the St. Columb Branch of the Western District Banking Company, for a loan of £400 for three months, which was advanced accordingly, and placed by the Bank to the credit of the Company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the Bank to keep the concern going: but this evidence was not left to the jury. The learned Judge, in summing up, stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity: and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff.

[597] In Michaelmas Term, Erle obtained a rule nisi for a new trial, on the ground of misdirection.

Bompas, Serjt., and Cockburn now shewed cause. In the first place, there was evidence in this case to go to the jury of an express authority from the defendant to the agent to borrow money for the necessities of the mine. [Alderson, B. That was not left to the jury: the learned Judge reports, that he thought the necessity of the case created, by law, a presumed authority to borrow money.] It was material as shewing the necessity, that the defendant had himself suggested that course. But secondly, the proposition stated to the jury was correct. This money was advanced, not to a common servant or clerk, but to an agent who was entrusted by the Company with authority to carry on the entire control and management of the mine, at a distance from his employers, with whom it was impossible for him to communicate on every sudden emergency. Under such circumstances, the agent has an implied authority to raise money on the credit of the shareholders, whenever an immediate outlay of money becomes necessary for the preservation of the concern. The principle of law is, that where an agent is employed for a specific purpose, he has an implied authority to do what is essentially necessary to carry that purpose into effect. It is like the case of the master of a ship, who has an implied authority to borrow money for the necessary use of the ship, upon the credit of the owner: *Robinson v. Lyall* (7 Price, 592), *Arthur v. Barton* (6 M. & W. 138). In like manner, where a poor person met with an accident, and was attended by the parish surgeon, the parish officers were held liable for the amount of the surgeon's bill, by reason of the necessity of the case: *Lamb v. Buncie* (4 M. & Selw. 275). Suppose a coach were to break [598] down on its journey, would not the coachman have authority to hire another, on the credit of his employers, for the conveyance of the passengers to the end of the journey? [Parke, B. The law provides for that which is common, not for that which is unusual; on that principle it is that the master of a ship has authority to charge his owners, because ships are ordinarily exposed to casualties. There was no evidence here that it was the usual course to borrow money for the use of the mine.] Suppose water had burst in upon the mine, and it became necessary for its preservation immediately to employ persons to clear it, would not the agent have had authority to obtain an advance of the money necessary for that purpose? [Parke, B. Suppose the bankers would not have advanced the money without a mortgage of the mine, would the agent have had authority to contract for a mortgage?] There was no evidence of any repudiation of the act of the agent, which was done solely with a view to the benefit of the Company, and the continuance of the concern; and there are many instances in which, where money has been laid out for a party's benefit, the law will imply a promise to repay it; as in the case of the acceptance of a bill of exchange for the honour of the drawer. [Parke, B. That is by the custom of merchants.] Which arises out of the necessity of the case. [Alderson, B. A party who draws a bill according to the custom of merchants, knows that by that custom a party taking it up for honour has a claim upon him. He contracts on that footing.] Suppose the directors themselves had borrowed this money, would not the partners generally be responsible? Then, whatever they can do, they have invested this their agent with authority to do.

Crowder (with whom was Erle), in support of the rule, was stopped by the Court.

PARKE, B. This is an action brought by the plaintiffs, [599] who are bankers, to recover from the defendant, as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the Company of proprietors for the management of the mine. Now the extent of the authority conferred upon the agent by his appointment was this only—that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible; first, on that of a special authority given to the agent to borrow money; and secondly, on the assumed principle, that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been

expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned Judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely [600] and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion, that the agent of this mine had not the authority contended for. Whether he had or had not was a question for the jury; but, on the general principles of law, it seems to me that the ruling of the learned Judge cannot be supported, and therefore that the rule for a new trial must be made absolute.

ALDERSON, B. I am of the same opinion. There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals. Several cases have been cited as analogous to the present, but they have been already satisfactorily distinguished by my Brother Parke. *Lamb v. Bunce* may appear to be a case similar to the present, but it is very distinguishable, for there is an original liability in parish officers to support the poor in their parish; and it appears, moreover, that the parish officers in that case were aware of the surgeon being in attendance on the pauper, and made no objection. Those were circumstances from which a jury might well infer a contract on their part to pay his bill. In the present case there was no such evidence.

ROLFE, B., concurred.

Rule absolute.

[601] *PENLEY AND ANOTHER, Executors of Penley v. WATTS AND ANOTHER, Executors of Watts.* Exch. of Pleas. Feb. 13, 1841.—A. leased premises to B., from the 25th of March, 1823, for 16 years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th of June, 1834, for four years and three quarters wanting eleven days, and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64l. 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57l. 10s.:—Held, that B. was not entitled to recover also the amount of the costs in the former action.

[S. C. 10 L. J. Ex. 229.]

This was an action of covenant on a lease, brought by the plaintiffs, as the executors of William Penley, deceased, against the defendants, as the executors of George Watts, deceased. The declaration stated, that heretofore, and in the lifetime of the said W. Penley, since deceased, to wit, on the 26th day of March 1823, by a certain indenture made between one Edward Price of the one part, and the said W. Penley of

the other part, the said Edward Price did demise and lease unto the said W. Penley, his executors and administrators, certain premises, particularly mentioned and described in the said indenture, to have and to hold the said messuage or tenement and dwelling-house, with a garden and fore-court, and other the premises thereto belonging, with the appurtenances, unto the said W. Penley, his executors, administrators, and assigns, from the 25th day of March then instant, for and during and unto the full end and term of sixteen years, wanting ten days, then next ensuing: and the said W. Penley did in and by the said indenture, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said Edward Price, his executors, administrators, and assigns (amongst others things), in manner following; that is to say, that he the said W. Penley, his executors, administrators, and assigns, should and would, at his and their own costs and charges, well and substantially repair, uphold, sustain, amend, glaze, pave, cleanse, scour, and keep the said demised messuage or tenement and premises, and the buildings and erections there-[602]-upon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, save and except the outhouses or outbuildings, as to which it should be merely necessary to keep them in the same state as they then were; and particularly should and would, once in every three years during the said term, well and sufficiently paint or cause to be painted in good oil colours all the outside wood and iron work of and belonging to the said messuage or tenement, and such of the said buildings as were then painted, and the inside wood and iron-work, once every five years during the said term; and also should and would hedge, ditch, scour, cleanse, and repair all and singular the hedges, ditches, gates, fences, and quicksets, posts, pales, iron and other rails, walls, privies, sinks, sewers, drains, and vaults belonging to the said demised premises; and the same being in all things so as aforesaid, repaired, upheld, sustained, amended, glazed, paved, cleansed, scoured, and kept, and the hedges, ditches, gates, fences, quicksets, posts, pales, iron and other rails, privies, sinks, sewers, drains, and vaults so hedged, ditched, scoured, cleansed, and repaired, should and would, at the end or other sooner determination of the said term, peaceably and quietly leave, surrender, and yield up unto the said Edward Price, his executors, administrators, and assigns, together with all and every the locks, keys, bolts, bars, chimney-pieces, dressers, shelves, water-pipes, and other things which then were or which should at any time thereafter be set up, affixed, or fastened to the said demised messuage or tenement, or dwelling-house, with the garden or fore-court thereunto belonging, or any part thereof, (fixtures of the nature of furniture, and damaged by accidental fire, only excepted): by virtue of which said demise the said W. Penley then entered into and upon the said demised premises, and became and was possessed thereof for the said term so to him thereof granted by the said Edward Price as afore-[603]-said; and being so thereof possessed, afterwards, and during the respective lives of the said W. Penley and G. Watts, both since deceased, to wit, on the 23rd day of June, A.D. 1834, by a certain indenture then made by and between the said W. Penley of the one part, and the said G. Watts of the other part [profert], the said W. Penley did demise and lease unto the said G. Watts, his executors and administrators, the said several premises particularly mentioned and set forth in the said last-mentioned indenture, being the same premises which were demised to the said W. Penley by the said Edward Price, as hereinbefore mentioned; to have and to hold the said messuage or tenement and dwelling-house, with the garden and fore court and other the premises thereto belonging, unto the said G. Watts, his executors, administrators, and assigns, from the 24th day of June then instant, for and during and unto the full end and term of four years and three-quarters of another year, wanting eleven days, thence next ensuing; and the said G. Watts did, in and by the said last-mentioned indenture, amongst other things, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said W. Penley, his executors, administrators, and assigns, in manner following, that is to say, that the said G. Watts, his executors, administrators, and assigns, should and would, at his and their own costs and charges, well and substantially repair, uphold, sustain, amend, glaze, pave, cleanse, scour, and keep the said demised messuage or tenement and premises, and the buildings and erections thereupon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, save and except the outhouses or outbuildings, as to which it should merely be necessary to keep them in the same state as they then were; and particularly should and would

once during the said term thereby granted, well and sufficiently paint or cause [604] to be painted in good oil colours all the inside and outside wood and iron-work of and belonging to the said messuage or tenement, and such of the buildings as were then painted; and also should and would scour, cleanse, and repair, all and singular the gates, fences, posts, pales, iron and other rails, walls, privies, sinks, sewers, drains, and vaults belonging to the said demised messuage or tenement, outbuildings, hereditaments, and premises; and the said messuage or tenement, buildings, hereditaments, and premises, being in all things so as aforesaid repaired, upheld, sustained, amended, glazed, paved, cleansed, scoured, and kept, should and would at the end or other sooner determination of the said term thereby granted, peaceably and quietly leave, surrender, and yield up unto the said W. Penley, his executors, administrators, and assigns, together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, dressers, shelves, water-pipes, and other things which then were or which should at any time thereafter be set up, affixed, or fastened to the said demised premises, or any part thereof, (fixtures in the nature of furniture, and the fixtures in the schedule to the now-stating indenture, and damage by accidental fire, only excepted), as by the said last-mentioned indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. The declaration then averred, that G. Watts entered into the demised premises, and continued in possession thereof until his death, upon which the premises vested in the plaintiffs as executors; and proceeded to assign breaches of the covenant in not repairing; alleging as special damage, that in consequence of the premises being out of repair, Price had brought an action against the plaintiffs as executors, in which he had recovered against them certain damages and costs, which, together with their own costs in defending such action, they had been forced and obliged to pay. The defendants by their plea denied the breaches assigned, and issue was joined thereon.

[605] At the trial before Alderson, B., at the Middlesex Sittings in last Michaelmas Term, it appeared that an action had been brought by Price, the original lessor, against the present plaintiffs, for breaches of the covenant to repair in the original lease to the plaintiff's testator, in which judgment was suffered to go by default, and upon a writ of inquiry the damages were assessed at the sum of 64l. 10s., the amount of dilapidations proved by a surveyor, whose estimate had been made, and laid before the now plaintiffs, before the action was commenced: the costs in that action also amounted, the plaintiff's to £36, and the defendants' to £40: all which sums had been paid by the present plaintiffs. The learned Judge expressed his opinion that the costs in that action had been unnecessarily incurred, and that, inasmuch as there was no covenant by Watts to indemnify Penley against any breach of the covenants in the original lease, the defendants were not liable to the repayment of those costs: and the amount of dilapidations being proved at the sum of 57l. 10s., the plaintiffs had a verdict for that sum only, leave being reserved to them to increase that amount by the sum of £76.

Thesiger having obtained a rule nisi accordingly, citing *Neale v. Wylie* (3 B. & Cr. 533; 5 D. & R. 442),

Kelly and Saunders now shewed cause. The ruling of the learned Judge was right. One fact which clearly distinguishes this case from the others on this subject, is that the respective covenants of the plaintiffs' testator, Penley, and of the defendants' testator, Watts, are not in the same terms. They differ as to the periods of painting the outside and inside work. And the present plaintiffs have recovered a smaller amount of damages than that recovered against them, which shews that the breaches cannot have [606] been identically the same. But independently of these considerations, the plaintiffs are not entitled to recover the amount of the costs in the action brought against them. The foundation of the right to special damage in the payment of monies, is that the party has been forced and obliged to pay them. They must have been expenses paid under legal compulsion, which he could not resist or prevent. The judgment of the Court in *Neale v. Wylie* rests entirely on the ground, that the costs were damages sustained through the neglect of the defendant, and not in consequence of the plaintiff's own default: but here the costs were incurred unnecessarily. It does not appear, in *Neale v. Wylie*, that there had been any communication between the original lessor and lessee, or that the latter had any means of resisting the demand of the lessor, or of taking any other course than he did: whereas here the amount of the dilapidations was ascertained and made known to the plaintiffs before action

brought, and by payment of that sum they might have prevented the action altogether. Again, *Neale v. Wyllie* was decided before the right existed to pay money into Court in an action of covenant: therefore the defendant there was obliged to suffer judgment by default, in order to reduce the damages to their real amount; so that he could not have prevented the incurring of any part of the costs. But now, under the new rules, the present plaintiffs might have paid the money into Court after declaration. The very principle of their claim is, that they were forced and obliged to pay the costs, which they clearly were not. Besides, in *Neale v. Wyllie* the covenants were in terms the same, and the respective amounts of damages the same, which is not the case here. Suppose an action brought against the drawer of a bill, who resists it without having any real defence; he cannot recover the costs over against the acceptor. In *Short v. Kallway* (11 Ad. & E. 28), Lord Denman, C. J., says, "No person has a [607] right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend." It must be remembered that this is not a case of a contract to indemnify at all events. *Smith v. Compton* (3 B. & Ad. 407) may appear to be against the defendants, but it is not really so, because the case was put entirely on the ground of the covenant in that case (a covenant for good title) being an absolute covenant of indemnity. If the plaintiffs have any remedy in respect of these costs, it must be by action on the case, if there have been any breach of duty in the defendants, whereby they have been subjected to loss: but this action must rest entirely on the covenant, which contains no contract of indemnity.

Thesiger and Ogle, *contra*. The only question is, whether these costs were or were not necessarily incurred; and that depends on whether they were necessarily consequent upon the defendants' breach of covenant. It is said the plaintiffs had such notice of the amount of the damage, that they might have prevented the costs by payment. But that is not so. They were not bound to abide by the mere statement of the surveyor, and they would have been trespassers by going upon the premises to ascertain the amount of the dilapidations for themselves. It now turns out that the real amount of them is less than that originally stated by the surveyor. It is said the covenants are in different terms; but that must be the case, because the covenant must be framed with reference to the state of the premises at the time, and the duration of the term: they are in effect the same. In *Neale v. Wyllie*, the plaintiff, who had a reversion, might equally have ascertained and paid the amount of the dilapidations; or he might have tendered such a sum as a [608] surveyor on his behalf might have considered him liable to. It does not appear that he took any step whatever to prevent the action. But then it is said the present plaintiffs might have saved part of the costs by payment into Court. But suppose the plaintiffs had gone on notwithstanding—the costs would then have been increased. If the performance of the defendants' covenant would have discharged the plaintiffs from all obligation by reason of their covenant, that is sufficient to render the defendants liable. The question is, whether the covenant is identical in those respects to which the breaches of covenant apply. It is said this is no contract of indemnity; the same objection might have been urged in *Neale v. Wyllie*, but the Court thought the plaintiff entitled to recover, because the money had been paid through the consequences of the defendants' default. But in some sense an under-lessee may be considered as a party indemnifying, as an assignee: *Wolveridge v. Steward* (1 C. & M. 660). [Parke, B. The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee; but that is not the case in a sub-lease: the only contract of the sub-lessee is to perform the covenant in his sub-lease: and the only question here is, whether these costs were the necessary consequence of the breach of such covenant. There is clearly no contract of indemnity.] For all that is within the defendants' covenant, it is entirely owing to their default that the action was brought against the plaintiffs. In *Lewis v. Peake* (7 Taunt. 153; 2 Marsh. 431), it was held that if the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued by his vendee, offers the defence to the vendor, who does not interpose, the party defending that action is entitled to recover the costs of it from the original seller of the horse, as part of the damage occasioned by [609] his breach of warranty. [Parke, B. That case was reconsidered in a case which was tried before me at Norwich, of *Wrightup v. Chamberlain* (7 Scott, 598).] The same principle is laid down in *Pennell v. Woodburn* (7 C. & P. 117). [Parke, B. Those cases would be applicable, if the action had been defended in the belief that the

premises were in repair. The case of a warranty applies to an existing state of things, not to a thing to be done in future. Those cases would apply to a covenant that the premises then were in a good state of repair.] At all events, this case is not distinguishable from *Neale v. Wyllie*, it being taken into consideration that the under-lessee's covenant to repair must necessarily be different in terms from that of the original lessee.

PARKE, B. It seems to me that this rule must be discharged. This is not an action on a contract of indemnity; if it were, the defendants would be responsible, unless they had put themselves into the same condition as the plaintiffs, and saved them from all harm, and amongst other things, from the costs of the action brought against them: and if the plaintiffs had desired to be so secured, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease; and then they might have recovered these costs: *Duffield v. Scott* (3 T. R. 364: see also *Jones v. Williams*, ante, 493) is an authority for that. But this is not a contract of indemnity, but only a covenant to keep the premises in a certain state of repair, and a covenant materially differing in its terms from that of the plaintiffs. [His Lordship stated the respective covenants.] These two covenants are not ad idem either in substance or in terms, the dates are different; and under the defendants' contract, the amount of damages is, the damage necessarily sustained by the breach of their own [610] covenant, viz. the amount necessary to put the premises in the same state of repair in which the defendants ought to have kept them. We were strongly of that opinion when this rule was moved, but upon the case of *Neale v. Wyllie*, we thought it expedient to grant a rule; and if the circumstances had been exactly the same as they were in that case, we should have considered ourselves bound by it, although we cannot help thinking that the Court, on that occasion, had not exactly considered the relation of the parties, and the circumstance that the covenants were not in terms the same. In that case there was a demise of premises to one Finch, by an indenture which contained a covenant to repair, and to leave in repair at the end of the term; and the declaration stated, that the interest of Finch vested by assignment in the defendant, who, during the term, suffered the premises to be out of repair, and so left them at the end of the term, by reason whereof the plaintiff had been forced and obliged to pay to one Elizabeth Coppock (by whom the premises had been demised for a longer term to the plaintiff, before his grant of the lease to Finch) the damages and costs in an action brought to recover the premises. The Court there thought that the covenants were the same, and that the plaintiff would not have protected himself by coming on the premises, or by payment. But the present case differs from that in three particulars:—first, the two covenants, which there were assumed to be the same, here differ materially; secondly, here the plaintiffs might have saved themselves from all the costs, if they had paid the amount the surveyor demanded from them; and thirdly, (although that would go only in reduction of damages), it was competent to them to have paid money into Court, and so not to have incurred the subsequent costs. I cannot but think, however, that the Court, in *Neale v. Wyllie*, would not have come to the conclusion they did, if they had adverted to the circumstance that there were two different [611] covenants, under which a different measure of damages was recoverable. But admitting that case to be law, it is materially distinguishable from the present. The only true measure of damages here is, what it would have cost the defendants to put the premises in repair. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable.

ALDERSON, B. I am of the same opinion. In *Neale v. Wyllie*, the Court thought that performance by the assignee of the lessee would have been a performance by the lessor. Whether they were right may admit of question; but that was the principle of their decision. That would not have been so here; and therefore it would not necessarily have prevented Price from bringing the action against the plaintiffs. These are materially different covenants. [His Lordship stated them.] A performance of the one, therefore, would by no means necessarily be a performance of the other. The case is distinguishable from *Neale v. Wyllie* also in the other points mentioned by my Brother Parke; and upon the whole, I do not see how the payment by the plaintiffs was a necessary consequence of the breach by the defendants. I think, therefore, that I was right in the course I took at the trial.

Rule discharged.

[612] *NEGELEN v. MITCHELL*. Exch. of Pleas. Feb. 12, 1841.—Assumpsit on a special agreement, whereby, in consideration of the sale to the defendant of a portrait, and the exclusive copyright of engraving the same for publication; the defendant promised to pay £150, and to deliver to the plaintiff fifty proof impressions of the engraving when made therefrom. The declaration averred that the engraving was made, and that the money was paid, and alleged as a breach, that, although a reasonable time had elapsed for the delivery of the fifty proof impressions, and although the defendant was required to do so, yet the defendant had not delivered them or any part of them, and had neglected and refused so to do. Plea, that, after the making of the promise in the declaration mentioned, and after the making of the said engraving, the defendant delivered to the plaintiff ten proof impressions thereof in part performance of his said promise, and the plaintiff accepted the same in satisfaction and discharge of the promise as to ten of the fifty impressions; that he then was ready and willing, and then tendered and offered to the plaintiff to deliver to him forty other impressions of the said engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant to make his selection of the said forty proof impressions out of all the impressions that were then printed: that the defendant had always been ready and willing to let the plaintiff choose the said forty out of all the impressions then printed, but that the plaintiff had never made any selection of the same, but had always thence hitherto neglected to do so; absque hoc that the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the declaration in that behalf alleged:—Held, that the plea was bad after verdict.—Where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a replacer.

[S. C. 10 L. J. Ex. 349; 1 Dowl. P. C. (N. S.) 110.]

Assumpsit. The declaration stated, that whereas before the making of the promise thereafter mentioned, the plaintiff had with great skill designed, made, and prepared a certain portrait or drawing of a certain person, to wit, Madame Grisi: And whereas the defendant, before the making of the said promise, was desirous of purchasing the said portrait or drawing, and of making prints or engravings therefrom, and publishing the same for the profit of him the defendant; and thereupon, before the commencement of this suit, to wit, on the 21st day of February, A.D. 1839, in consideration of the premises, and that the plaintiff, at the request of the defendant, had then sold to the defendant the said portrait or drawing, together with the exclusive copyright of printing or engraving the same for publication, for the price or sum of £150, and fifty proof impressions, he the defendant promised the plaintiff to pay him the said sum of £150 in two months from the day and year last aforesaid, and to deliver to the plaintiff fifty proof impressions of the print or engraving of the said portrait or drawing when made therefrom; and the plaintiff avers, that although the defendant then had and received the said portrait or drawing, [613] and afterwards, to wit, on the same day and year, made a print or engraving therefrom, and although the defendant, in part performance of his said promise, did afterwards, and at the expiration of the two months aforesaid, pay the plaintiff the said sum of £150, yet, although a reasonable time for the delivery to the plaintiff of fifty proof impressions of the said print or engraving had elapsed before the commencement of this suit, and although the defendant, after the expiration of such reasonable time, and before the commencement of this suit, to wit, on the same day and year, was requested to deliver to the plaintiff fifty proof impressions of the said print or engraving, the defendant has disregarded his promise, and has not delivered to the plaintiff fifty proof impressions of the said print or engraving, or any or either of them, or any part thereof, and has neglected and refused so to do. There were also counts for goods sold, work and labour, and on an account stated.

The defendant pleaded, except as to the first count, non assumpsit; secondly, as to the request mentioned in the first count, to deliver fifty proof impressions of the said

print, that he was not so requested: thirdly, that he the defendant, after making the print or engraving from the said portrait or drawing as in that count mentioned, delivered to the plaintiff fifty proof impressions of the same, according to his said promise in the said first count mentioned: fourthly, "that after the making of the said promise of the defendant in that count mentioned, and after the making of the said print or engraving from the said portrait or drawing, to wit, on the said day and year in the said first count mentioned, the defendant delivered to the plaintiff ten proof impressions of the said print or engraving, in part performance of his said promise in that behalf, and the plaintiff then accepted, had, and kept the said ten proof impressions, in satisfaction and discharge of the said promise of the defendant in the said first count [614] mentioned, as to ten of the said fifty proof impressions to be delivered as in the said first count mentioned; and the defendant further saith, that he then, to wit, on the said day and year aforesaid in the said first count mentioned, was ready and willing, and then tendered and offered to the plaintiff, to deliver to him forty other proof impressions of the said print or engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him the plaintiff have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant that he would make his selection of the said forty proof impressions of all the impressions that were then printed, to wit, of two hundred impressions then printed: and the defendant says, that he has been always ready and willing thence hitherto to let the plaintiff choose the said forty out of all the impressions of the said print or engraving then printed, but that the plaintiff has never made any selection of the same, and the plaintiff himself has always thence hitherto neglected to make a selection as aforesaid: without this, that he the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the said first count in that behalf alleged. On these several pleas issues were joined.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Trinity Term, the jury found a verdict for the defendant on the first and fourth issues, and for the plaintiff on the second and third, with £30 contingent damages as the value of the forty prints, if the Court should be of opinion that the plaintiff was entitled to judgment non obstante veredicto on the fourth plea. In the early part of Michaelmas Term, Thesiger obtained a rule for judgment non obstante veredicto accordingly.

Kelly and Hoggins shewed cause in the same term (Nov. [615] 20). It will be said on the other side, that the traverse at the conclusion of the plea is an immaterial traverse; but that is not so. The plea contains an express reference to the averment of readiness and willingness to deliver contained in the declaration: it commences with an inducement, and concludes with a special traverse. Perhaps the plea might be bad on special demurrer, but after verdict it is a substantial answer to the first count. The rule with respect to inducements is thus laid down in *Stephen on Pleading*, 183 (3rd edition), "that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading." This plea being in denial of the neglect and refusal to deliver the prints, as alleged in the declaration, it will be necessary to call attention to the declaration. It alleges, that although a reasonable time for the delivery to the plaintiff of the prints had elapsed before the commencement of the suit, and although the defendant, after the expiration of such reasonable time, was requested to deliver to the plaintiff the prints, the defendant had not delivered them, but had neglected so to do. The plea, especially after verdict, contains a substantial answer to that breach. [Lord Abinger, C. B. This is a plea in accord and satisfaction.] After verdict, it will be presumed that this substituted agreement was received in satisfaction of the former agreement. [Parke, B. If you strike out the conclusion, of the special traverse, you will find that the plea is defective.] It is submitted that it is a good answer after verdict. The Judge could not have left it to the jury to find for the defendant, unless that which is alleged in the plea took place within a reasonable time. The plea alleges that he the defendant then, to wit, on the said day and year aforesaid in the said first count mentioned, was ready and willing and then tendered and offered the plaintiff to deliver the forty prints. What is the day and year in the first count mentioned? It is the reasonable time mentioned in the declaration; and [616] this amounts in substance to an allegation that an offer to deliver the prints was made within a reasonable time. Mr. Serjeant Williams, in

his notes to *Stennell v. Hogg* (1 Saund. 227), speaking of imperfections which are cured by a verdict at common law, says—"Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." The Court must look to the whole of the plea. [Parke, B. The whole of your argument turns on the allegation of "the day and year aforesaid in the first count mentioned;" but you cannot contend that it was necessary to prove the precise day alleged, for that is not material. You do not aver that the day and year mentioned in the declaration was within a reasonable time. If the traverse is struck out, it is clearly a bad plea. Every allegation in the plea would be supported by proof of a tender and acceptance twelve months afterwards.] The authorities are very strong as to the defect being cured by verdict, of which many instances are put in Mr. Serjeant Williams's notes to the case of *Stennell v. Hogg*. If the defendant did not, as is in substance alleged in the plea, tender and offer to deliver the prints within a reasonable time, the Judge could not have left the issue to the jury, and the jury could not have found a verdict in favour of the defendant. The new rules do not affect the mode of pleading this special traverse. In the *Cross Keys Bridge Company v. Rawlings* (3 Bing. N. C. 71; 3 Scott, 400), the declaration was for carelessly impinging with a ship against the plaintiff's bridge, whereby damage accrued; and there was a plea that the plaintiffs improperly narrowed the [617] channel by an obstruction, without this, that the damage was occasioned by the carelessness of the defendants; and it was held, that under this plea the defendants were entitled to give evidence in disproof of their carelessness, after they had failed to establish the obstruction imputed to the plaintiffs. Tindal, C. J., there says—"The effect of a traverse in pleading is the same as it was before the new rules;" and he adds, "I cannot see how the plaintiff is injured by such a mode of pleading; for by the special inducement the defendants shew that one ground on which they mean to rely is, that the accident was occasioned by the default of the plaintiffs, and not by the negligence of the defendants. And though they failed to establish any default in the plaintiffs, I think they are at liberty, under such a plea, to shew also that the defendants have not been guilty of negligence." If this plea had concluded with a verification, the replication would have been that the defendant did neglect, &c. Then is not the verdict found in accordance with that view? The question before the jury was, did the defendant neglect or refuse to deliver the prints as in the declaration mentioned, and the jury having found in favour of the defendant, all the evidence necessary to support that finding must be assumed to have been given at the trial. In *Rushon v. Aspinall* (Doug. 683), Lord Mansfield states the rule to be, "that where the plaintiff has stated his title or ground of action defectively or inaccurately,—because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,—it is a fair presumption, after a verdict, that they were proved." They cited also *Frederick v. Lookup* (4 Burr. 2018), *Amey v. Long* (9 East, 473), *Ward v. Harris* (2 Bos. & Pull. 265), *Mackmurdo v. Smith* (7 T. R. 518), *Dalby v. Hurst* (1 Brod. & Bing. 224), *Bradely v. Milnes* (1 Bing. N. C. 644; 1 Scott, 626), and *Humphreys v. Pratt* (2 Dow. & Clark, 288).

[618] Thesiger and Cowling, *contra*. The authority of the cases cited on the other side is not disputed. All those cases were intended to establish a distinction between a statement of a defective title, and a title defectively stated. This is not a good answer defectively stated. The real breach of contract here is, that the defendant has not delivered the forty prints, and has neglected so to do. The contract was broken by the non-delivery, and the plaintiff establishes his breach by shewing that they have not been delivered. If the defendant had any answer as to the non-delivery, he should have pleaded it. If this is to be taken as a plea with a special traverse, it is altogether bad, because it is in confession and avoidance; for it amounts to this—I did not neglect to deliver, because I was excused. [Parke, B. The question is as to the meaning of the traverse; if it is a denial of the breach, the plea is good after verdict.] The plea states matter of excuse, and says, therefore I have not neglected to deliver—it states circumstances to shew that there was no neglect, and which yet admit that there was a non-delivery. The plea cannot be read

without the inducement, because that throws light upon the traverse. In Stephen on Pleading, 183 (3rd edition), it is said, "It is a rule that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading; for it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to shew that the last pleading is not true; the absque hoc being added merely to put that denial in a positive form, which had been previously made in an indirect one." If that rule be kept in view, the plea is bad, inasmuch as it expressly shews that the prints have not been delivered. It is impossible after verdict to presume that that was proved at the trial. If the plea had stated that the defendant was ready and [619] willing, and tendered to deliver the prints at the end of a reasonable time, that would have been bad; because the party must always have been willing to deliver the goods, unless they are of a cumbersome nature, which these were not. *Stone v. Gilliam* (1 Show. 149) is the only case where it is laid down that there need not be an actual tender of the goods, and there Lord Holt takes a distinction between the case of cumbersome goods and those which are portable; holding, in the former case, that the bringing them to a convenient place from whence they might be loaded on board a ship, and offering the master to send them on board, was a sufficient tender. That, however, is a totally different case from the present, where the goods were portable. In 1 Wms. Saund. 33 c. it is said—"The action of assumpsit being to recover damages against the defendant for the non-performance of his promise, a tender cannot in this action be pleaded in bar of the damages, for that would be to preclude the plaintiff from recovering his debt, which cannot be, for the debtor must nevertheless pay the debt." But this plea is clearly bad for not averring that the defendant tendered the latter forty prints. [Parke, B. Would it not be good to plead simply that he did not neglect to deliver, in manner and form?] This is a bad plea, because it takes issue on that which is merely aggravation. On the other point, that the inducement cannot be neglected, *Craven v. Sanderson* (4 Ad. & Ell. 672) is an authority. There Littledale, J., says—"In pleas where the traverse is led to by an inducement, facts stated in the introductory part may be very fit to be proved with reference to the matter traversed, but they do not require to be proved as forming part of the inducement." The traverse here is a mere explanation of the inducement, and the inducement ought to be read as connected with the traverse; and if so, the [620] plea is bad in substance, because the traverse is on an immaterial fact.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The question in this case arises upon a motion for judgment non obstante veredicto, on the fourth plea.

The plaintiff declared on a special agreement, whereby in consideration of the sale of a portrait, and of the exclusive copyright of printing or engraving the same for publication, the defendant promised to pay the plaintiff £150 in two months, and to deliver to the plaintiff fifty proof impressions of the print or engraving, when made therefrom. The declaration avers that an engraving was made, and £150 paid, and alleges as a breach, that although a reasonable time had elapsed for the delivery of fifty proof impressions, and although the defendant was requested to do so, yet the defendant had not delivered to the plaintiff fifty proof impressions, or any part thereof, and had neglected and refused so to do. The fourth plea, on which the question arises, is as follows. [His Lordship here read the plea, as ante, p. 613.]

It is to be observed, that the contract, as above stated, required the fifty impressions to be delivered as soon as they were made, or at least a reasonable time afterwards, and the non-delivery at that time is the breach alleged. The rest of the matter stated in the breach, of the non-delivery generally, and the general neglect and refusal is surplage. According to the rules of correct pleading, the plea to this breach should either have stated, that the impressions were so delivered, or should have confessed that they were not, and stated some sufficient matter of avoidance. But the plea in this case (if we read it with-[621]-out the traverse at the end) contains neither of these requisites; it does not state a delivery of the whole, nor a delivery in due time of any part, and therefore is not good by way of denial of the breach; nor, if it is to be taken to have confessed the breach, does it sufficiently avoid it; for, as to part, though it states a tender, the tender is not averred to have been in due time, and what is pleaded afterwards amounts to accord without satisfaction as to that

part. The plea, therefore, would be bad without the special traverse; and would be so non obstante veredicto. And with the special traverse, it is perfectly clear it would have been bad on special demurrer, for several reasons.

But the question is, whether after verdict, this special traverse, issue being joined thereon, is good; and this is the only point on which the Court entertained any doubt, when the case was argued. If the traverse had stood alone, without the inducement, the Court at one time intimated its opinion that it would have been good, as a denial of the breach, on the ground that a plea of non infregit conventionem (1 Lev. 183; Com. Dig. Pleader (2 V.), 5), though bad on demurrer, would have been good after verdict: but on consideration, we are not satisfied that such a traverse would have been a denial of the breach, that is, would have been equivalent to an averment of delivery in due time, even if it had stood alone: but, taken with the inducement, it seems to us that it cannot be understood in any other sense than as a denial of the neglect and refusal altogether to deliver; for the inducement in effect admits non-performance: and then the special traverse, to be consistent, must be taken to mean an averment that the defendant, although he had not delivered in due time, had not altogether refused and neglected to deliver, which is the averment in the declaration, for the declaration asserts in effect that the defendant has never delivered at any time, and has altogether neglected [622] and refused so to do. In that mode of construing the plea, the traverse is bad. If the defendant had proved at the trial an offer to deliver the day before the writ issued, long after a reasonable time had elapsed, the issue would have been found for the defendant; and would certainly be no good answer in point of law.

That being so, the next question is, whether the plaintiff is not entitled to judgment non obstante veredicto. We think he is, and that it is not a case for a repleader. If this had been the sole plea, it would have been a case for a repleader; but there are several other pleas on the record; and if one out of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reasons for a repleader cease. For this the case of *Goodburne v. Bowman* (9 Bing. 532; 2 M. & Scott, 700), which was recognised, with some qualifications, by some of the Judges, in the case of *Collins v. Gwynne*, in Dom. Proc. (since reported under the name of *Gwynne v. Burnell*, 1 Scott's N. R. 711; 6 Bing. N. C. 453), is an authority, and the case of *Plummer v. Lee* in this Court (2 M. & W. 495), in which, under similar circumstances, a repleader was awarded, must be considered as overruled. Indeed, it was not disputed in the present case, that if the issue was immaterial, the plaintiff was entitled to judgment non obstante veredicto.

Rule absolute.

[623] *MERRY v. GREEN AND ANOTHER.* Exch. of Pleas. Feb. 12, 1841.—A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever:—Held, that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that any thing more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny.

[S. C. 10 L. J. M. C. 154.]

Trespass for assault and false imprisonment. Pleas, first, not guilty, whereupon issue was joined; secondly, that the plaintiff, before the commission of any of the said trespasses in the declaration mentioned, to wit, on the 16th day of November, A.D. 1839, at the parish of Ashby-de-la-Zouch, in the county of Leicester, with force and arms, one purse of the value of one shilling, and eight pieces of the current gold coin of the realm called sovereigns, of the value of £8, fifty pieces of the current silver coin of the realm called half-crowns, fifty pieces of the current silver coin of the realm called shillings, fifty pieces of the current silver coin of the realm called sixpences, one

silver coin called a five shilling piece, one piece of gold coin called a guinea, certain valuable securities, that is to say, two promissory notes each for the payment of £20, and of the value of £20; two promissory notes each for the payment of £10, and of the value of £10; twelve promissory notes each for the payment of £5, and of the value of £5; one pair of earrings, one ring, two silver thimbles, and one snuff-box, of the goods and chattels of one Francis Tunnicliffe, of great value, to wit, of the value of £200, then and there being found, feloniously did steal, take, and carry away, against the peace of our Lady the Queen, her crown and dignity; wherefore the defendants did, at the said time when &c., in the declaration mentioned, to wit, at the parish of Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, give the plaintiff in charge to one Robert Knight, then and there being a headborough and peace-officer of our Lady the Queen, in and for the said parish of Ashby-de-la-Zouch, and then requested the said headborough and peace-officer to take the said plaintiff into his custody, and him safely keep until he could be carried and conveyed, and to carry and convey him, before some or one of the [624] justices assigned to keep the peace of our said Lady the Queen within the said county of Leicester, and to hear and determine divers felonies and misdemeanours committed within the said county of Leicester, to be examined by and before the said justice touching and concerning the premises, and to be further dealt with according to law: and on that occasion he the said Robert Knight did, to wit, at Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, take the plaintiff into his custody, and seized and laid hold of the plaintiff, and a little pulled and dragged him about, and compelled him to go from and out of the dwelling-house of the plaintiff at Ashby-de-la-Zouch aforesaid, and to be conveyed in custody along the said streets and highways at Ashby-de-la-Zouch, to the said lock-up, the same being situate at Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, and a proper and fit, and usual and convenient place in that behalf, and did then imprison, and keep and detain him in the said lock-up, in order that he might be, and until he could be, conveniently carried before such justice as aforesaid, the same being a reasonable time, and detention and imprisonment in that behalf; and did at the expiration thereof, and as soon as conveniently might and could be, convey the plaintiff, and forced and caused him to be conveyed in custody, in and along the said other streets and ways, to the said house in the declaration lastly mentioned, the same being situated in Ashby-de-la-Zouch aforesaid, to and before the Rev. John Pidcocke, clerk, then being one of the justices assigned to keep the peace of our said Lady the Queen within and for the said county of Leicester, &c., (the said Rev. John Pidcocke then being at the said last-mentioned house), to be examined by and before the said John Pidcocke touching and concerning the premises, and to be further dealt with according to law; and detained and imprisoned the plaintiff there a reasonable and convenient time, until he the plaintiff could be [625] carried before the said John Pidcocke as aforesaid: by means of which said several premises, the plaintiff was assaulted, seized, laid hold of, pulled, and dragged about, and forced and compelled, and conveyed, and detained and imprisoned, and kept and detained in prison, at Ashby-de-la-Zouch aforesaid, upon the occasion and for the space of time in the declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the causes aforesaid; which are the alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against the defendant: without this, that they the defendants were guilty of the said alleged trespasses, or any or either of them, elsewhere than at the parish of Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid. Verification.

To this plea the plaintiff replied *de injuriâ*, whereupon issue was joined.

At the trial before Tindal, C. J., at the last Warwickshire assizes, the following appeared to be the facts of the case. Messrs. Mammatt and Tunnicliffe, who had for some time resided together at Ashby-de-la-Zouch, in the same house, and keeping the same table and servants, in October, 1839, broke up their establishment, and sold their furniture (which was partly joint, and partly separate property) by public auction. At that sale the plaintiff, who was a shoe-maker also residing in Ashby, became the purchaser, at the sum of 11. 6s., of an old secretary or bureau, the separate property of Mr. Tunnicliffe. The plaintiff kept the bureau in his house, and on the 18th of November following, he sent for a boy of the name of Garland, a carpenter's apprentice, to do some repairs to the bureau. Whilst Garland was so engaged, he remarked to the plaintiff that he thought there were some secret drawers in the bureau, and, touching a

spring, he pulled out a drawer which contained a quantity of writings. The plaintiff then discovered another drawer, in which was a purse contain-[626]-ing several sovereigns and other coins, and under the purse a quantity of bank-notes.^(a) Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse, and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came by the possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the property to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants (one of whom was the solicitor of Mr. Tunnicliffe) went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate, on a charge of felony. The plaintiff was ultimately discharged, the magistrate doubting whether a charge of felony could be supported. At the trial, a witness of the name of Hannah Jenkins was called on behalf of the plaintiff, who deposed that she was present at the auction, and remembered the piece of furniture in question being put up for sale and bought by the plaintiff: that after it was sold, an observation was made by some of the bystanders, to the effect that the plaintiff might have bought something more than the bureau, as one of the drawers would not open: upon which the auctioneer said—"So much the better for the buyer;" adding, "I have sold it with its contents, and it is his." This statement was opposed by the evidence of the auctioneer, who stated, on cross-examination by the defendant's counsel, that there was one drawer which would not open, and that what he had said was, "That is of no consequence, I have sold the secretary, and not its contents." It did not appear that any person knew that the bureau contained anything whatever.

The learned Chief Justice, in summing up, told the jury, that as the property had been delivered to the plaintiff, [627] as the purchaser, he thought there had been no felonious taking; and left to them the question of damages only; reserving leave for the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff, with £50 damages.

In Michaelmas Term, Whitehurst obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.

Hill and Humfrey shewed cause at the present sittings (Feb. 10). If the testimony of the witness, Hannah Jenkins, was true, it is clear that the plaintiff had a colourable right to whatever property might be contained in the bureau, and that he was not guilty of a larceny in retaining it. It should therefore have been left to the jury to say whether or no they believed her statement. And if the Court should be of opinion, that, rejecting her evidence, the plaintiff has been guilty of a felony, there ought to be a new trial, and not a nonsuit. But assuming the account given by the auctioneer of what passed at the sale to be correct, still it is submitted that no felony was proved. On what legal ground can this transaction be said to constitute a felony? Unless it include a trespass, it is no larceny. Take the case of a carrier to whom a parcel is delivered; there the possession of the bailee being lawful, (as it was in the present case,) no subsequent misappropriation can make him guilty of a larceny. It amounts to no more than a breach of trust. So in the case of a servant who has possession of his master's property, and goes beyond his charge. To constitute larceny, the original possession must be illegal; whereas here the bureau and its contents were delivered to the plaintiff as his own property. [Parke, B. There is this fact: he opens a purse which belongs to another, which is analogous to the case of a carrier who breaks open a parcel.] In *Cartwright v. Green* (8 Ves. 405), a bureau was delivered, for the purpose of [628] repairs, to a person, who discovered money in a secret drawer, which he converted to his own use; that was held to amount to a felony, and upon that ground a demurrer to a bill of discovery was allowed. The grounds, however, of that decision are very material to the consideration of the present case. In delivering judgment, Lord Eldon said—"To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in *Hawkins*, there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases, as not being warranted

(a) The contents of the bureau are set forth in the plea.

by the purpose for which it was delivered. If a pocket-book containing bank-notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that is a felony. So if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being entrusted with it for the purpose of opening it, that is a felony according to the modern cases." In the cases mentioned by Lord Eldon there was a felonious taking, which is not the case here. [Parke, B. The present is very similar to the case of the pocket-book.] In the present case the plaintiff had a property in the bureau, whereas in those cases, the coat was merely delivered to the tailor to be repaired, and the pocket-book was deposited in the coach for the purpose of conveyance only, and in neither case did any property vest in the party. The present case differs from *Cartwright v. Green* in this respect, that there the person who had possession of the bureau had no right to open the [629] drawer, it not being necessary for the purpose of the repairs required to be done; whereas here, the plaintiff, having the property in the bureau, had a clear right to open the drawer in which the money was concealed. He could not be guilty of any trespass in so doing. Even assuming that he was bound to return the money to Tunnicliffe, which is by no means admitted, it amounts to nothing more than an omission to perform a duty. If the original possession is lawful, when is the felony committed? [Parke, B. Suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is: if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it.] Here there is a bona fide delivery to the party as his own property. How is Tunnicliffe in possession of the property found, so as to maintain trespass? It never was in fact in his possession, for he knew nothing of its existence.

Whitehurst, *contra*. A larceny is a fraudulent taking of property by a person, with intent to appropriate it to his own use. No doubt there must be a taking; and that raises the real question, viz., whether the contents of the bureau were sold with the bureau itself. According to the evidence of the auctioneer, the contents were expressly excepted; but if no mention of any thing it might contain had been made, the sale and delivery of the bureau could not be a delivery of the purse, because no person was aware of its being there. [Parke, B. There certainly was no intention to sell this property; it seems to be a mere case of finding.] There is no good ground for saying that trespass might not have been maintained here: the possession would follow the right of property. Suppose my rails are on another's land, and he finding them there, removes them to a convenient distance; that is no trespass; but if he takes them, and makes use of them on his own [630] land, the right of property draws to it the possession, and trespass may be maintained against him. In the case mentioned by Lord Eldon, of a pocket-book left in a hackney coach, the property is left in the care only of the coachman, and the right of possession still remains in the owner. And in the case of the coat sent for repair, there is no intention to entrust the tailor with the pocket-book. The present case is not distinguishable; and with respect to the intention in retaining the property, that is a question for the jury, and is to be collected from a variety of circumstances. Here the intention of the plaintiff to convert the money to his own use was clear.

PARKE, B. In this case there was clearly no bailment, because there was no intention to part with the property in question. It amounts, therefore, only to a finding, and comes within the modern decisions on that subject. It is a matter fit for our serious consideration; and we will speak to the Chief Justice before we deliver our judgment. No doubt the same evidence is necessary in the present case, as would be required to support an indictment.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. My Lord Chief Justice thought in this case that, even assuming the facts of which evidence was given by the defendant to be true, the taking of the purse and abstracting its contents was not a larceny; and that is the question which he reserved for the opinion of the Court, giving leave to move to enter a nonsuit. After hearing the argument, we have come to the conclusion that, if the defendant's case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff [631] which

ought to have been left to the jury, and which, if believed by them, would have given a colourable right to him to the contents of the secretary, as well as to the secretary itself; viz. the declaration of the auctioneer, that he sold all that the piece of furniture contained, with the article itself: and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial, and not a nonsuit.

But if we assume, as the defendant's case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary if there happened to be any thing in it, and indeed without such express notice if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny.

It was contended that there was a delivery of the secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us, that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule (3 Inst. 108), that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the [632] owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny (Russell on Crimes, 102). Under this head fall the cases where the finder of a pocket-book with bank-notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger (*Wynne's case*, Leach, C. C. 413; 2 East, P. C. 664), whom he could easily ascertain; or a tailor who finds, and applies to his own use, a pocket-book in a coat sent to him to repair by a customer, whom he must know (*Cartwright v. Green*, 8 Ves. 405): all these have been held to be cases of larceny; and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass: and it seems also from *Wynne's case*, that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.

We therefore think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury, whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colour of right to the property.

Rule absolute for a new trial.

[633] COWPER AND OTHERS v. GREEN.(a) Exch. of Pleas. 1841.—By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.

[S. C. 10 L. J. Ex. 346. Adopted, *Bateson v. Gosling*, 1871, L. R. 7 C. P. 9.
Referred to, *Crugoe v. Jones*, 1873, L. R. 8 Ex. 87.]

Assumpsit. The first count of the declaration stated, that before the making of the promise and undertaking of the defendant thereafter mentioned, and before the making of the indenture of assignment thereafter also mentioned, the defendant had

(a) This case was decided in Hilary Term (Jan. 30), but was unavoidably deferred.

become and was indebted to the plaintiffs in the sum of 440l. 0s. 5d., and a security for the payment thereof had deposited with the plaintiffs a certain indenture of lease, whereby a certain messuage and premises, with the appurtenances, situate &c., was demised to the defendant for a certain term of years therein mentioned, and had also indorsed and delivered to the plaintiffs certain bills of exchange (describing them), of which those firstly and secondly mentioned, at the time of the making of the said promise thereafter mentioned, had been dishonoured, and then remained due and unpaid in the hands of the plaintiffs: and whereas also, after the defendant had so become indebted to the plaintiffs as aforesaid, and before the making the promise by the defendant as thereafter mentioned, to wit, on the 18th day of June, 1836, by a certain indenture then made between the defendant of the first part, John Bradbury and Augustus Cherill of the second part, and the plaintiffs and other the creditors of the defendant who should duly execute the same of the third part, purporting to be an assignment of the estate and effects of the defendant to the said J. Bradbury and A. Cherill for the benefit of the creditors of the defendant, the defendant assigned to the said J. Bradbury and A. Cherill all his stock in trade and other personal estate whatsoever, upon trust, among other things, to pay the clear proceeds arising from the sale [634] thereof unto and amongst all the creditors of the defendant, in rateable proportions according to the amount of their respective debts; in consideration whereof, the plaintiffs, parties to the said indenture, did release and discharge the defendant of and from his said debt: and whereas also, before the making of the promise of the defendant as therein after mentioned, the plaintiffs had duly executed the said indenture of assignment, as parties thereto of the third part: and whereas also, heretofore, and before &c., to wit, on the first day of August, 1836, the defendant applied to and requested the plaintiffs to relinquish and give up to Messrs. J. C. Ling & Co., of &c., but for the benefit and advantage of the defendant, all right, estate, claim, and advantage whatsoever of them the plaintiffs in and to the said messuage and premises, which the plaintiffs then consented to do in consideration of the promise of the defendant thereafter mentioned: And thereupon afterwards, to wit, on &c., in consideration that the plaintiffs, at the request of the defendant, would relinquish and give up all the estate and interest that they had in the said lease of the messuage and premises aforesaid, in favour of the said Messrs. J. & C. Ling, for the benefit and advantage of the defendant, the defendant undertook and then promised the plaintiffs to pay them any deficiency that might arise to them upon his, the defendant's, aforesaid debt, after they should have received the dividend of his estate under his aforesaid assignment for the benefit of his creditors, and such other sums as they might receive for the securities they might hold. The declaration then averred, that the plaintiffs, confiding, &c., did relinquish and give up all the estate and interest which they had in the lease in favour of Messrs. Ling, whereof the defendant had notice; and that under the assignment, and upon the securities which the plaintiffs held, to wit, the aforesaid bills of exchange, they have received certain sums of money amounting to [635] 279l. 12s. 4d., and that no further dividend is payable or to be paid under the said assignment, or upon the aforesaid securities, of all which the defendant had notice: and assigned a breach in non-payment by the defendant of the balance remaining due upon the plaintiff's debt, viz. 160l. 8s. 1d. There was also a count on an account stated.

The defendant pleaded non-assumpsit, and several other pleas, of which the fourth (to the first count) was as follows:—That there never was at any time any value or consideration between the plaintiffs and the defendant moving in that behalf, nor did the plaintiffs ever give, or the defendant ever receive, any value or consideration for the making by the defendant of the said supposed promise in the first count mentioned, except the supposed consideration in the said first count mentioned. And the defendant further says, that after the depositing by the defendant with the plaintiffs of the said indenture of lease in the declaration mentioned, as a security for the repayment by the defendant to the plaintiffs of the said debt of 440l. 0s. 5d., and whilst the same was then due and payable to the plaintiffs, and before the supposed consideration for the making of the defendant's promise in the first count mentioned, and whilst the said indenture of lease was in the hands of the plaintiffs as aforesaid, and before the commencement of this suit, to wit, on the said 18th day of June, 1836, the plaintiffs, by a certain indenture sealed with their respective seals, and now shewn to the Court here, for the considerations therein mentioned, did thereby acquit, release,

and for ever discharge the defendant of and from all manner of debt and debts, sum and sums of money, bills, bonds, notes, accounts, reckonings, judgments, executions, action and actions, suit and suits, claims, demands, costs, charges, damages, and expenses whatsoever which they the plaintiffs, or either of them, their or either of their partner or partners, then had or ever had, or could, should, or might at any time hereafter have, claim, [636] challenge, or demand of, from, or against the defendant, his executors or administrators, or his, their, or either of their lands or tenements, goods or chattels, from the beginning of this world to the day of the date of the last-mentioned indenture; as by the said last-mentioned indenture, reference being thereunto had, will more fully appear. And the defendant further said, that the said debt of 440l. 0s. 5d., was (amongst others) then released by the plaintiffs to the defendants in manner and form as above mentioned. Verification.

Special demurrer, assigning for causes, that the defendant, in the said plea, neither denies the making of the promise by him as the plaintiffs have in the first count alleged, nor alleges any matter in confession and accordance thereof; neither does the defendant allege any matter whereupon the plaintiffs can take a certain and positive issue: that the defendant, in the said plea, attempts argumentatively to put in issue the legality and sufficiency of the consideration upon which the defendant made the promise in the first count alleged: that although the defendant, in the said plea, hath alleged that the plaintiffs, in and by the said indenture of the 18th of June, 1836, released the defendant of from and all and all manner of debts and demands due from the defendant to the plaintiff, and that the debt so due as in the first count mentioned was thereby released, yet the defendant hath not alleged that the plaintiffs, by the said indenture, released the interest which they had acquired in the said indenture of lease, by the same having been deposited with them by the defendant as in the first count alleged; and that the defendant, in the said plea, attempts to shew argumentatively that the said indenture of the 18th of June, 1836, operated as a release of the interest that the plaintiffs had acquired by the deposit of the said indenture of lease with them by the defendant, as in the first count alleged. Joinder in demurrer.

[637] The following points were marked for argument on the part of the defendant:—1. That the declaration is bad as disclosing a fraudulent transaction, by which the plaintiffs, after receiving the full dividend on their debt by virtue of the composition deed, were to secure a further advantage to themselves, by being paid in full, to the prejudice of the general body of the defendant's creditors. 2. That the declaration discloses no consideration for the defendant's promise, inasmuch as it is stated in the declaration that the plaintiffs released the debt for which they held the lease, and then all right of holding it on the part of the plaintiffs was gone. 3. That there also is no consideration for the said promise, on the ground that the plaintiffs were paid in full, in contemplation of law, by receiving the said dividend, all claim which they had on the said lease.

The case was argued on a former day (Jan. 25) by

Humfrey in support of the demurrer. First, the declaration is good. It does not appear that the agreement between the plaintiffs and the defendant was in fraud of the other creditors. If the creditors were made aware of it, it was good in law. There might be a good consideration for the creditors permitting another to receive more in proportion than they.

Secondly, the plea is bad. No issue can be taken upon it. What could the plaintiff reply to it? The deed stated in the plea is the very deed set out in the declaration. The plaintiff could not say there is no such deed, for he has averred it in his declaration, as part of the consideration in respect of which he sues. Suppose he took issue on the averment that there was no consideration for the defendant's promise except the supposed consideration mentioned in the declaration; that would be a wholly immaterial issue. [Parke, B. The question arises upon the declara-[638]-tion; the plea does no more than repeat at greater length the allegation of a release in the declaration.]

Erle, contra. The question in this case is, whether, a debtor having deposited with a creditor a deed as a security for his debt, and having afterwards compounded with that and other creditors, the payment of such composition is not a consideration for the giving up of the deed by the creditor. The promise alleged in the declaration is, that the defendant will pay the plaintiffs the remainder of their debt, beyond what they have received under the composition deed. Where is the consideration for that

promise? What right had the plaintiffs to retain these securities for their debt, after an absolute release by them of the debt itself? The debt is released in toto, for good consideration, viz. the payment of the composition stipulated for in the deed. [Parke, B. No doubt, if there has been actual satisfaction, the plaintiffs' claim is altogether at an end: the question is, whether a release has the same effect.] A release is just as operative to destroy the debt as satisfaction. [Parke, B. To make the declaration bad, you must say that all right and title to the possession of the securities is gone by the composition; and that the debtor could have recovered them in trover.] It is submitted that he could. If the debt had been paid, it must be conceded that he could; and if it be released for value received from a third party, is it not the same? The debt is released and gone, therefore the creditor's qualified right to hold the deed as a security for it, is gone also. Is it less so, because the consideration is a composition, which is not a satisfaction to the full amount? The legal effect of the release cannot depend on the amount of the consideration. It was possible that under the deed of composition the whole debt might have been paid; how then could the effect of the absolute release contained in the deed depend on the amount which is ultimately realised afterwards? [639] Suppose a third party had given security for the debt; if the creditor released to the principal debtor, and did not obtain his full debt, could he still hold the surety liable? There are indeed cases, running near the present, where a creditor has been allowed to resort to securities remaining in his hands, notwithstanding a release in a composition deed; but that is where he has specially reserved the right to do so: as in *Duffy v. Orr* (5 Bligh, N. S. 620; 1 Clark & Fin. 253), where the creditor added to his signature to the composition deed the words—"without prejudice to any securities whatever that I hold;" and the other creditors signed it afterwards. But the effect of a legal instrument cannot be altered by the mere understanding of the parties.

But further, the agreement for full payment of the plaintiffs' debt was a fraud on the other creditors parties to the composition deed, and therefore could not form any consideration: *Lewis v. Jones* (4 B. & Cr. 506). There are cases where a subsequent promise or security has been sued on, but that is where it has been under seal; a subsequent promise, not under seal, to pay the remainder of the debt, is nudum pactum: *Ex parte Hall* (1 Deac. B. C. 171).

Humfrey, in reply. The question is, whether the agreement contained in the composition deed is such as bound the plaintiffs to give up the securities they at that time held for their debt. The plaintiffs had a right to retain them in order to reduce their debt. If they could, by selling the lease, reduce the amount of their debt, they had a right to do so. *Thomas v. Courtney* (1 B. & Ald. 1), is an authority for the plaintiffs. There the creditors of an insolvent agreed, by an instrument not under seal, to accept in full satisfaction of their debts 12s. in the pound payable by instalments, and to release him from all demands. One of [640] the creditors who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person; and the money due thereon was afterwards paid by the acceptor. It was held that the creditor might retain the bill, the agreement for composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. It must be contended on the other side, that the instant the composition deed was signed, every security held by the plaintiffs could have been recovered by the defendant in an action of trover. It would be for the benefit of the creditors generally, that the plaintiffs should reduce their debt by means of this security, which was not intended to be given up, and therefore they have a right to retain it. [Lord Abinger, C. B. In *Thomas v. Courtney*, the Court thought there was no release of the debt itself.]

Cur. ad. vult.

The judgment of the Court was delivered on the 30th of January by

PARKE, B. The declaration in this case states, that in consideration that the plaintiffs would deliver up a lease held by them as a security for a debt due to them by the defendant, and from which it is contended the defendant had previously been released by force of a composition deed executed by the plaintiffs, he promised to pay them the balance of their debt, which should remain due after the stipulated dividend had been paid, and should not have been previously realised by other securities. To this the defendant pleaded a plea setting out the composition deed, and describing it as a general release of all debts whatever due from him to the plaintiffs from the

beginning of the world to the date of the instrument; and the objection made in the case arises on the declaration, [641] namely, that by force of that deed the plaintiffs' debt having been previously released, they were no longer entitled to hold the indenture of lease as a deposit to secure repayment, and consequently that their giving up the latter could form no consideration for a promise by the defendant to pay the balance due on that debt. On looking into the authorities, we find that the law is so. In Sheph. Touchst. p. 342, it is thus laid down:—"By a release of all debts, are discharged and released all debts then owing from the releasee to the releasor upon especialities or otherwise, all debts also due upon statutes. And therefore if the comoror himself, or his land, be in execution for the debt, and he hath such a release, he must be discharged." And Mr. Preston adds—"For, by releasing the debt, the security for the debt is released." That authority is precisely in point. Here is a release of the debt, the consequence of which is, that the party releasing has no right to hold the collateral security which was deposited with him; for, looking at the form of the release, it must not be understood simply to release the right of action on the debt, but the security also. The debt is released, and consequently as much gone in point of law as if it had been satisfied; and as the plaintiffs had no right to hold the security for it afterwards, so they had no right to make the giving up of that security the consideration of a promise by the defendant, and consequently the present action cannot be maintained. The judgment must therefore be for the defendant.

Judgment for the defendant.

[642] MEMORANDA.

In this Vacation, Mr. Justice Littledale resigned his seat in the Court of Queen's Bench, which he had occupied since Easter Term, 1824. He was succeeded by

William Wightman, Esq., of Lincoln's Inn, who was first called to the degree of Serjeant at Law, and gave rings with the motto *Æquam servare mentem*; and shortly afterwards received the honour of knighthood.

Sir Joseph Littledale was, a few days after his resignation, sworn of her Majesty's Privy Council.

REPORTS of CASES ARGUED and DETERMINED
in the COURTS of EXCHEQUER and EX-
CHEQUER CHAMBER, from Easter Term,
4 VICT., to Trinity Vacation, 4 VICT., both
inclusive. By R. MEESON, Esq., and W. N.
WELSBY, Esq., of the Middle Temple, Barristers-
at-Law. Vol. VIII. London, 1842.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF
EXCHEQUER, AND EXCHEQUER CHAMBER, HILARY VACATION, 4 VICTORIE.

IN THE EXCHEQUER CHAMBER.

RUTTER *v.* CHAPMAN. Exch. of Pleas. 1841.—A petition, which had been agreed upon at a meeting of the rate-payers of the parliamentary borough of Manchester, convened by public advertisement, and which was in fact attended by 1000, and which petition was afterwards signed by 4000 inhabitant householders of the borough, was presented to her Majesty, praying for the grant of a charter of incorporation to the inhabitants of such borough, under the provisions of the stat. 1 Vict. c. 78, s. 49. Afterwards, and before the day appointed for this petition being taken into consideration by the Privy Council, a counter petition, signed by 6000 of such inhabitant householders, was presented to her Majesty, praying her not to grant such charter. The whole number of inhabitant householders of the borough amounted to 48,000.—Held, (on error in the Exchequer Chamber):—1. That the second petition did not necessarily, in point of law, deprive her Majesty of the power to grant such charter upon the first petition: but that whether the first petition was, under all the circumstances, the petition of the inhabitant householders of the borough, so as to authorize the exercise of the powers conferred by the 1 Vict. c. 78, s. 49, was a question of fact for a jury; and that the determination of the Privy Council to advise the Crown to grant the charter upon such petition, was not conclusive of its validity.—2. The grant of such charter of incorporation is an exercise of the common-law prerogative of the Crown, although it also extends to the new corporation the powers of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, which the Crown has power to do only by virtue of the 1 Vict. c. 78, s. 49.—3. Such charter may be granted to a part only (to be defined therein) of the borough from the whole of which the petition emanated, and need not be conferred upon the inhabitant householders of the whole borough.—4. The Crown may, by its common-law prerogative, appoint, in such charter, the number, and set out the limits, of the wards in the new borough.—5. The Crown may also, by such charter, delegate to an individual the power of appointing the first members of such corporation; or may, at all events, appoint a person to ascertain the individuals who compose the class to whom the charter is granted. [Lord Denman, C. J., and Williams, J., diss.]—6. The provisions of the 5 & 6 Will. 4, c. 76, as to the machinery for the formation and revision of the burgess lists, being applicable only to then existing corporations, and to the particular period at which that act took effect, need not be precisely followed in

the case of new corporations, created by charter under the powers conferred on the Crown by the 1 Vict. c. 78, s. 49, but may be followed *cy près*. Therefore, the appointment, in such charter, of individuals named therein, to make out and revise the lists, and to act as returning officer at the first election under such charter, is good. So also, days for holding the first elections, though not agreeing with those named for the elections in the 5 & 6 Will. 4, c. 76, may be appointed by such charter.—7. Nor is such charter void, because it directs the person appointed to make out the first list, to include in it only “all inhabitant householders within the borough who shall possess the qualification required by the 5 & 6 Will. 4, c. 76,” instead of including also all persons occupying shops, &c., within the borough, and being inhabitant householders residing within seven miles thereof, according to the schedule to that act. [Williams, J., *dubitante*.]—8. The stat. 5 & 6 Will. 4, c. 76, s. 103, empowers the Crown to grant a separate court of quarter sessions, on petition of the council of any borough, “setting forth the grounds of the application, the state of the gaol, and the salary they are willing to pay the Recorder in that behalf:”—Held, that a plea, stating that the application was “by petition to her said Majesty in council, setting forth the matters in and by the said act of Parliament, intituled, an Act, &c., in that behalf required and directed,” was sufficient after verdict.

[S. C. 10 L. J. Ex. 495. See further, p. 389, *post*.]

Case. The declaration stated, that before and at the time of the committing of the grievances thereafter men-[2]-tioned, and from thence until the commencement of this suit, there were, and of right ought to have been and to be, divers, to wit, six coroners of her Majesty the Queen in, of, and for the county palatine of Lancaster, of which coroners the plaintiff, before and at the time of the committing of the grievances thereafter mentioned, and from thence until &c., was one, and, during the time aforesaid, had of right been and acted as such coroner, and taken inquisitions for our lady the Queen as such coroner, on the view of the bodies of divers persons lying dead within divers places in the said county, and amongst others within the township of Chorlton-upon-Medlock, and during the time aforesaid, of right ought to have been and acted as such coroner, and taken inquisitions within the said township, and still of right ought so to be and act, and take inquisitions as aforesaid, and during all the time aforesaid, by reason of the premises, had been and was and still is of right entitled to divers fees, perquisites, and emoluments for so doing and being: And whereas, before the com-[3]-mencement of this suit, to wit, on the 14th of May 1839, the body of one Bridget Garratty, then lying and being dead in the said township, and within the jurisdiction of plaintiff as such coroner as aforesaid, the said Bridget Garratty having heretofore, to wit, on the same day and year, died suddenly, and not from disease or in the course of nature, the plaintiff, as such coroner as aforesaid, was, before the committing of the grievances thereafter mentioned, about to take an inquisition for our lady the Queen on the view of the said body, touching the death of the said Bridget Garratty, as he was lawfully entitled to do, and, but for the committing of the grievances thereafter mentioned, would have done, and had then and there, to wit, on the day and year aforesaid, duly issued his precept for summoning a jury for that purpose, and ought to and should have been entitled to receive divers fees and emoluments for so doing as aforesaid: Yet the defendant, not then being one of the coroners of our said lady the Queen of or for the said county, or having authority to take inquisitions as a coroner within the said township, but wrongfully intending to injure the plaintiff, and to disturb and annoy him in his said office of coroner as aforesaid, and to deprive him of the same, and of the profits, fees, and emoluments belonging thereto, and derivable in respect thereof, afterwards, and after the said plaintiff had so issued his precept as aforesaid, before the commencement of this suit, to wit, on the day and year last aforesaid, and within the said last-mentioned township, wrongfully, and without lawful authority in that behalf, took an inquisition for our lady the Queen as a coroner of and for our said lady the Queen, having authority to take inquisitions as coroner within the said township, on the view of the said body so being and lying dead as aforesaid, and thereby then and there greatly hindered, disturbed, and annoyed the plaintiff in the exercise and enjoyment of the said office of coroner, and thereby prevented the said plaintiff from having and [4] receiving the fees, profits, and emoluments belonging thereto and derivable therefrom, and which

the plaintiff might and otherwise would have had and received; to the great nuisance of the plaintiff in his said office, &c.

The defendant pleaded, that heretofore, and after the passing of a certain act of Parliament passed in the year of our Lord 1837, intituled "An Act to amend an Act for the Regulation of Municipal Corporations in England and Wales" [7 W. 4 & 1 Viet. c. 78, s. 49], to wit, on the 21st day of March 1838, the inhabitant householders of the borough of Manchester, in the county palatine of Lancaster, did petition her most gracious Majesty the Queen to grant to them the said inhabitant householders a charter of incorporation; that afterwards, to wit, on the said 21st day of March 1838, her said Majesty ordered that the same petition should be taken into consideration by her said Majesty's Privy Council on the 1st day of May 1838; that afterwards, to wit, on the 23rd day of March 1838, due notice of the said petition, and of the said time when the same was so ordered to be taken into consideration by her said Majesty's Privy Council, was accordingly duly published in the *London Gazette*, more than one month before such petition was to be considered, and more than one month before the said day on which the same was ordered to be taken into consideration, as aforesaid; and that afterwards, and after more than one month after the said publication of such notice as aforesaid had elapsed, to wit, on the said 1st day of May 1838, being the said day on which the said petition had been so ordered to be taken into consideration as aforesaid, her Majesty's Privy Council did proceed to consider the said petition, and afterwards, and after the consideration thereof, to wit, on the day and year aforesaid, the said Privy Council did advise her Majesty to grant a charter of incorporation for the district comprised within the boundaries of the townships of Manchester, Chorlton-upon-Medlock, Hulme, Ardwick, Bes-[5]-wick, and Cheetham, in the said county palatine of Lancaster; which said townships, together with the townships of Newton, Harpurhey, and Bradford, comprise the boundaries of the parliamentary borough of Manchester, as the same were settled and determined by an act passed in the reign of His Majesty King William the Fourth, intituled, &c. [2 Will. 4, c. 64]; and thereupon afterwards, to wit, on the 23rd day of October 1838, her Majesty, by the advice of her said Privy Council, by certain letters patent under the Great Seal of the united kingdom of Great Britain and Ireland, the date whereof is the day and year last aforesaid, which said letters patent the defendant now brings into Court here, did grant such charter of incorporation as aforesaid. The plea then set forth the substance of the charter, by which, after reciting the stat. 7 Will. 4 & 1 Viet. c. 78, s. 49, and the facts previously stated in the plea, her Majesty did grant and declare, that the inhabitants of the borough of Manchester, comprised within the district thereinbefore described, and their successors, should be for ever thereafter one body politic and corporate, in deed, fact, and name, and that the said body corporate should be called "The Mayor, Aldermen, and Burgesses of the Borough of Manchester, in the county of Lancaster," and them, by the name of the mayor, aldermen, and burgesses of the borough of Manchester, in the county of Lancaster, into one body corporate and politic, in deed, fact, and name, did for her said Majesty, her heirs and successors, erect and constitute by those presents, and her said Majesty did grant to the said body corporate, that by the same name they should have perpetual succession, &c. &c. And her said Majesty did further will, grant, and declare, that the council of the said borough should consist of a mayor, sixteen aldermen, and forty-eight councillors, to be respectively elected at such times and places, and in such manner, as the mayor, aldermen, and councillors for the boroughs named in the schedules to the said act for the regulation [6] of municipal corporations in England and Wales [5 & 6 Will. 4, c. 76], except that the first mayor, aldermen, and councillors for the said borough should be respectively elected at such times and places, and in such manner as thereafter mentioned; and that the said mayor, aldermen, and councillors so to be elected for the said borough of Manchester, should respectively have, exercise, and enjoy all the powers, immunities, and privileges, and be subject to the same duties, penalties, liabilities, and disqualifications, as the mayors, aldermen, and councillors of the said several boroughs enumerated in the said act for the regulation of municipal corporations in England and Wales, as far as the same are applicable to the said borough of Manchester. And her said Majesty did further will, grant, and declare, that the said borough, comprised within the district thereinbefore described, should be divided into fifteen wards [naming them, and defining their limits, and the number of councillors to be returned by each].

And her said Majesty did further will, grant, and declare, that David Price, Esq., should, on the 29th day of October in the then present year, make out an alphabetical list, to be called the Burgess List, of all inhabitant householders within the said borough who should possess the qualification required by the said act for the regulation of municipal corporations in England and Wales to be possessed by burgesses of any of the boroughs enumerated in the said act, and should cause a copy of such burgess list to be fixed in some public or conspicuous situation within the said borough, during eight days before the eighth day of November in that year; and that every inhabitant householder so possessed as aforesaid, whose name should have been omitted in such burgess list, and who should claim to have his name inserted therein, should, on or before the said 8th day of November in the then present year, give notice thereof to the said David Price; and that every person whose name should have been inserted in such burgess list might object to [7] any other person as not being entitled to have his name retained in the said burgess list; and every person so objecting should, on or before the day and year last aforesaid, give to the said David Price, and also give to the person so objected to, or leave at the premises for which he should appear to be rated in such burgess list, notice thereof in writing, which said notice should specify the name of such person, the nature of the property for which he should be rated, and the street or other place in the said borough where the said property should be situated; and the said David Price should include the names of all persons so claiming to be inserted in the said burgess list, in a list, and should also include the names of all persons so objected to as not entitled to be retained in the said burgess list, in a list, and should cause copies of such several lists to be fixed in some public or conspicuous situation within the said borough, during eight days before the 23rd day of November in that year: and her said Majesty did thereby appoint Edward Rushton, Esq., barrister at law, to revise the said burgess list, as well as the list of claimants and objections, on the 28th day of November in that year, in the manner directed in the said act for regulating municipal corporations in England and Wales. [The charter then directed that the first election of councillors should be held on the 14th of December in that year; that the aldermen should be elected and assigned to the respective wards on the 15th of December, and that the mayor should be elected on the 15th of December; and appointed a returning officer, with the powers given by the 5 & 6 Will. 4, c. 76, to the mayor and assessors at elections of councillors: it then granted to the corporation a court of record for the recovery of debts, damages, or rent not exceeding 20l.] And the defendant further says, that after the passing of the said charter, to wit, on the 25th day of October 1838, the same was duly accepted and received by the said inhabitants of the said borough of Manchester, [8] comprised within the said district, and that such proceedings were afterwards had and taken upon the said charter, that the said burgess list, and the lists of claimants and objections in the said charter mentioned, were in due form of law respectively made out, fixed, published, and notified according to the said directions of the said charter, to wit, by &c., and at and during the said respective times in the said charter in that behalf specified; and the said burgess list, and the said lists of claimants and objections, were in due form of law, according to the said charter, revised at the time in the said charter in that behalf specified, by &c., in the manner directed by the said act for regulating municipal corporations in England and Wales. And the defendant further says, that afterwards, to wit, on the days in the said charter in that behalf specified, the said respective elections of mayor, aldermen, and councillors in and for the said borough, were respectively had and held according to the said charter, and in the manner thereby directed; and that on the said 14th day of December 1838, at the said first election of councillors, forty-eight persons in that behalf, duly qualified, were, according to the provisions of the said charter, duly elected councillors of and for the said borough, and did then accept the said office, and make and subscribe the declarations in that behalf required by law; and that afterwards, to wit, on the 15th day of December in the same year, sixteen persons, duly qualified in that behalf, were duly, and according to the provisions of the said charter, elected aldermen of and for the said borough, and did then accept the said office, and make and subscribe the declarations required by law in that behalf, and were rightly assigned to the said respective wards, according to the directions of the said charter; and that afterwards, to wit, on the 15th day of December 1838, at the said borough, one of the said aldermen, being a person duly qualified

in that behalf, to wit, Thomas Potter, Esq., was duly, and according to the pro-[9]-visions of the said charter, elected mayor of and for the said borough, and did then accept the said office, and make and subscribe the declarations required by law in that behalf; and thereupon and thereby the council of the said borough, to wit, then, became and was complete, and so hath always remained and continued hitherto; and the said mayor, aldermen, and counsellors, to wit, then became and were, and thenceforth always have been, the council of the said borough of Manchester. And the defendant further says, that afterwards, to wit, on the 7th day of February 1839, our said lady the Queen, upon the petition of the said council in that behalf duly made, did, in due form of law, by her certain letters patent under her seal of the duchy of Lancaster, bearing date the day and year last aforesaid, and now here brought into Court by the defendant, grant a commission of the peace for the said borough of Manchester, being within and parcel of the county palatine and duchy of Lancaster, by which same letters patent her said Majesty assigned J. F. Foster, Esq., D. Maude, Esq., and divers others their fellows, and every of them, jointly and severally her Majesty's justices to keep her peace in and throughout the said borough of Manchester; and afterwards, to wit, on the 1st day of March 1839, the said council of the said borough were desirous that a separate court of quarter sessions of the peace should be holden in and for the said borough of Manchester, and did duly signify the same by petition to her said Majesty in council, setting forth the matters in and by the said act of Parliament, intituled &c., [5 & 6 Will. 4, c. 76, s. 103,] in that behalf required and directed; and thereupon her said Majesty, to wit, on the 1st day of April 1839, was graciously pleased to grant that a separate court of quarter sessions should be thenceforward holden in and for such borough, and did accordingly, by and with the advice of her said Privy Council, to wit, on the day and year last aforesaid, by her Majes-[10]-ty's letters patent under the Great Seal, &c., bearing date the day and year last aforesaid, in due form of law grant unto the same borough, that a separate court of quarter sessions should thenceforward be holden in and for the said borough, according to the provisions of the said act to provide for the regulation of municipal corporations in England and Wales. And the defendant further saith, that the said grant of the said court of quarter sessions was, to wit, on the 2nd day of April, in the year of our Lord 1839, duly signified to the said council of the said borough of Manchester, and that afterwards, and within ten days next after the same grant had been so signified to the said council of the said borough of Manchester, to wit, on the 8th day of April, in the year of our Lord 1839, the said council of the said borough of Manchester did, in due form of law, appoint the said defendant, being a fit and proper person in that behalf, and not being an alderman or councillor of the said borough, or of any other borough, to be coroner of and for the said borough of Manchester, so long as he should well behave himself in his said office of coroner, which said office he the said defendant, to wit, then, accepted and took upon himself, and then duly made and subscribed the declaration by law required in that behalf, and then became and was, and henceforth hitherto hath been, and still is, coroner of and for the said borough of Manchester:—of all which said several premises in this plea mentioned, the plaintiff heretofore, and before the committing of the said alleged grievances, to wit, on the said 8th day of April 1839, had notice; and thereupon afterwards, to wit, a little before the said time when &c., he the said defendant, so being such coroner of and for the said borough as aforesaid, had notice of the body of the said Bridget Garratty then and there lying dead in the said township of Chorlton-upon-Medlock, in the said declaration mentioned, being the same township of Chorlton-upon-Medlock in the [11] said charter of incorporation mentioned, and being part and parcel of the said borough of Manchester so incorporated as aforesaid, and being within the jurisdiction of him the defendant as such coroner of the same borough as aforesaid; and which said Bridget Garratty had died suddenly, as in the declaration mentioned, whilst he the defendant was such coroner of the said borough as aforesaid, and within the year and the day in the said declaration mentioned; whereupon he the defendant, being and as such coroner of the said borough as aforesaid, a little before the said time when &c., did duly issue his precept as such coroner as last aforesaid, for summoning a jury for the purpose of taking an inquisition for our lady the Queen, on the view of the said body then and there lying dead, touching the death of the said Bridget Garratty; and afterwards, to wit, at the said time when &c., as and being such coroner of the said borough as aforesaid, did, in due form of law, take

an inquisition for our said lady the Queen, as coroner for our said lady the Queen in and for the said borough, on the view of the said body so then lying and being dead as aforesaid, within the said borough and within his jurisdiction as such coroner of the same borough as aforesaid, as he lawfully might and was bound to do for the cause aforesaid : which are the same grievances in the said declaration mentioned, whereof the plaintiff hath above complained against him the defendant. Verification.

The plaintiff, by his replication, after craving oyer of the charter, which was set out in hæc verba, alleged, that the inhabitant householders of the borough of Manchester did not petition her most gracious Majesty to grant to them the said inhabitant householders a charter of incorporation, and that such charter was not duly accepted or received by the inhabitants of the said borough of Manchester, in manner and form as in the plea alleged : upon which issue was joined.

The cause came on for trial before Maule, B., at the [12] Liverpool Summer Assizes, 1839. It was proved on the part of the defendant, that on the 2nd of February 1838, a requisition was presented to the boroughreeve and constables of the borough of Manchester, signed by 944 persons, requesting them, as returning officers of Manchester, to call a meeting of the rate-payers of the borough, to consider the propriety of petitioning the Queen in council for a charter of incorporation, according to the stat. 5 & 6 Will. 4, c. 76. The meeting was accordingly called by a notice published in all the Manchester newspapers, and signed by the boroughreeve and constables, as follows :—"In compliance with the foregoing requisition, we, the undersigned, do hereby convene a public meeting of the rate-payers of the borough, to be held in the forenoon of Friday the 9th instant, at half-past ten o'clock precisely, in the large room of the Town Hall, Manchester, for the purpose therein specified." The meeting was held accordingly on that day, about a thousand persons being present, and considerable pains having been taken that none but rate-payers should be admitted ; and it was decided, by a large majority of those present at the meeting, upon a shew of hands, that a petition should be presented to her Majesty for a charter of incorporation. A committee was then appointed to prepare the petition, and to procure and arrange the signatures to it ; and district committees were formed for the latter purpose in the several townships within the borough.

The petition was signed by 11,783 persons, all of whom were rate-payers, and several thousands of whom were inhabitant householders, resident within those townships of the parliamentary borough of Manchester to which the charter of incorporation was afterwards granted, as stated in the plea. On the 12th March 1838, the petition was lodged with the Privy Council ; on the 21st March an order was made by the Privy Council, that the petition should be taken into consideration on the 1st May follow-[13]-ing, and an advertisement to that effect was published in the *London Gazette*. On that day it was taken into consideration accordingly. On the 15th of August, the Privy Council made an order thereupon for the grant of a charter, and it accordingly passed the Great Seal, bearing date the 23rd October 1838.

For the plaintiff, evidence was tendered to shew that a counter petition, signed by a greater number of inhabitant householders of the borough of Manchester, and also by a greater number of those persons who would become burgesses under the operation of the charter, when granted, than those who had signed the former petition, was presented to her Majesty before the 1st May 1838. It was admitted, also, that neither of these petitions was signed by an actual majority of the inhabitant householders, or rate-payers, of the borough of Manchester, or of the district to which the charter was afterwards granted.

The learned Judge having expressed his opinion, that notwithstanding such counter petition, the Crown had power to grant a charter, upon the recommendation of the Privy Council, under the 7 Will. 4 & 1 Vict. c. 78, s. 49, upon the first petition, a bill of exceptions was tendered on the part of the plaintiff, and a verdict was taken for the defendant.

The bill of exceptions stated the evidence, and the direction of the learned Judge, as follows :—"And upon the trial of the said issue, it was given in evidence on the part of the defendant, in support of the affirmative of the said issue above joined between the parties, that a requisition, signed by many of the inhabitant householders of the said borough of Manchester, was, on the 2nd day of February 1839, presented to the boroughreeve and constables of Manchester aforesaid, by which said requisitions the said boroughreeve and constables were requested to call a meeting of the rate-

payers of the said borough of Man-[14]-chester, to consider the propriety of petitioning her said Majesty for a charter of incorporation, according to the statute in that case made and provided, and that, in pursuance of the said requisition, a public meeting of the rate-payers of the said borough of Manchester was called by the said boroughreeve and constables, and was afterwards, on the 9th day of February 1839, held pursuant to public advertisement; and that at the said public meeting many of the said rate-payers, to the number of 1000, did attend, and that all rate-payers of the said borough who chose to attend had access to the said meeting; and that, at the said meeting, a resolution was proposed, seconded, and after discussion was agreed to by a large majority of the said meeting, that a petition should be presented to her Majesty the Queen for a charter of incorporation; and that at the said meeting a certain other resolution was proposed, seconded, and adopted by the said meeting, for the appointment of a committee to prepare such petition as aforesaid; and that shortly afterwards, a petition to her said Majesty for such grant of incorporation as aforesaid was, in pursuance of the first-mentioned resolution, prepared by the said committee, and the same petition was afterwards signed by 4000 of the inhabitant householders of the said borough of Manchester, the greater part thereof being rate-payers in, and inhabitant householders of the district for which the said charter in the said plea mentioned was granted, and being persons qualified to be burgesses under such charter, but the number of such persons so signing the said petition did not constitute a majority of the whole number of the inhabitant householders, who amount to 48,000; and that the said petition, being the petition in the said plea mentioned, was afterwards duly presented to her said Majesty the Queen, and was duly lodged in the Privy Council Office, and was referred by her said Majesty to the consideration of her said Privy Council, as in the said plea in that behalf men-[15]-tioned: and it was further proved on behalf of the defendant, that the said charter in the plea mentioned was accepted, as in the said plea in that behalf is mentioned. And the counsel learned in the law of the plaintiff, then, for the purpose of shewing that her Majesty had not authority to grant the charter in question under the said petition, gave in evidence that 6000 of such inhabitant householders as aforesaid, the greater part thereof being rate-payers in and inhabitant householders of the district for which the said charter in the plea mentioned was granted, and being persons qualified to be burgesses under the said charter, and being a number not constituting a majority of the whole number of such inhabitant householders, had, after the said first-mentioned petition had been presented to her Majesty, and before the day for taking the same into consideration by her Majesty's said Privy Council, petitioned her Majesty not to grant the charter in question: Whereupon the said Baron then declared his opinion to the jury, that, notwithstanding such petition as last aforesaid, her Majesty had authority and power, on the recommendation of her Privy Council, to grant the said charter as on the first-mentioned petition, by virtue of the statute in that case made and provided, and with such direction left the case to the jury, and the jury thereupon then and there gave their verdict for the defendant: whereupon counsel for the plaintiff did then and there, on behalf of the plaintiff, except to the said opinion and direction of the said Baron on the said issue, and insisted that the facts proved were sufficient to shew that her said Majesty the Queen had no authority or power to grant such charter as aforesaid, upon the said first-mentioned petition."

A writ of error having been brought upon this bill of exceptions, the case was argued in Easter Vacation, 1840, and again (by the direction of the Court) in the following Michaelmas Vacation, by Cresswell for the plaintiff, and [16] the Attorney-General for the defendant. (a) The following is the substance of their arguments:—

Arguments for the plaintiff. First, there was no such petition to the Crown in this case as would authorize her Majesty to grant the charter of incorporation in question. Secondly, even if there was, the charter itself contains several inherent defects which render it invalid, and not in conformity with the authority given to the Crown by the Municipal Corporation Acts, 5 & 6 Will. 4, c. 76, s. 141, and 7 Will. 4 & 1 Vict. c. 78, s. 49.

I. The Crown, under the powers given by the Municipal Corporation Acts, has authority to grant charters conferring a jurisdiction more extensive than could have

(a) Counsel for the plaintiff, Cresswell, Wightman, L. Peel, Cowling, and Wilkins; for the defendant, the Attorney-General, Alexander, Crompton, and Brandt.

been granted by virtue of its common law prerogative; giving an authority to levy taxes on the subject, and interfering in other respects with his common-law rights. Such statutes, and the charters granted under them, will therefore be construed strictly: *Cockburn v. Hurvey* (2 B. & Ad. 800), *Buckeridge v. Flight* (6 B. & C. 49).

The 141st section of the stat. 5 & 6 Will. 4, c. 76, provides, that "if the inhabitant householders of any town or borough in England or Wales shall petition his Majesty to grant to them a charter of incorporation, it shall be lawful for his Majesty, by any such charter, if he shall think fit, by the advice of his Privy Council, to grant the same, to extend to the inhabitants of any such town or borough, within the district to be set forth in such charter, the powers and provisions in this act contained: Provided nevertheless, that notice of every such petition, and of the time when it shall please his Majesty to order that the same be taken into consideration by his Privy Council, shall be published [17] by royal proclamation in the *London Gazette*, one month at least before such petition shall be so considered." The 7 Will. 4 & 1 Vict. c. 78, s. 49, extends this provision to towns and boroughs not corporate, and renders it unnecessary that the publication in the *Gazette* should be by royal proclamation. Under this enactment, there ought to be, in order to warrant the grant of a charter, a petition, representing the collective voice of the inhabitant householders of the borough, and such petition ought, at least, to proceed from a majority of those who take any part either for or against the petition, if not from an actual majority of the inhabitant householders. Here it was proved that the petition against the grant of a charter was signed by a much larger number of persons who were inhabitant householders, and also qualified to be burgesses under the act of Parliament, than the petition in favour of such grant. The petition for the charter is in these cases substituted for the acceptance of the charter after it is granted; for as the powers given by the charter are to be exercised over persons who are not incorporated, they could exercise no option as to rejecting or accepting it when granted; and it was necessary, therefore, that, before they were made subject to its powers, they should have a voice in the determination whether they should be so made subject or not. Now, with reference to ordinary charters, it has always been held that the Crown had no power to incorporate any persons against their will. In *Kyd on Corporations*, vol. i. p. 65, it is said—"The grant of a charter is utterly void, unless accepted by a majority of those to whom it is addressed;" and several authorities are cited. In 2 Goldsb. 100, it is said to have been adjudged, that "the inhabitants of a town cannot be incorporated without the consent of the major part of them; an incorporation without their consent is void." In *Bagge's case* (Roll. Rep. 224), Coke, C. J., says—"Auri le disant que il voilt avoider le charter [18] de 43 El. ne fuit aucun cause a remover luy; car moy semble tiel novel charters sont void, et moy semble que novel corporations, novel offices, et novel . . . voient overthrowe cest relme; auri peradventure cest pattend fuit procure per aseun persons del eorporation, et le greinder parte n'assent al ceo, e donque eco ne lie le corporation; quod fuit concessum per Dod. que urge cest reson auri, et dit que aseun private persons avoint procure un novel charter pur le towne, et le towne puis ceo refuse." Where, indeed, a charter is directed to an indefinite as well as to a definite body, it may be the law that a majority of those who interfere in favour of the acceptance, is sufficient; in such case the voice of the majority would be in law the collective voice of the whole body. And after the members of the definite body have accepted the charter by a certain number, a good corporate meeting may be held, and then the voice of the majority present at that meeting being the voice of the whole meeting, their acceptance is in law the acceptance of the body to whom the charter is addressed, all being considered to be present. Vin. Abr. Corporations (G. 3). But the law recognises none but a majority: there is no doctrine of a reasonable number in such cases. So, in the election of churchwardens, who are elected by the inhabitants in vestry assembled, all are considered as being present in the vestry, all having the power to come if they choose, and then the majority of those who actually are present represent and bind the whole. So, if a church-rate is to be made, which is by the "inhabitants," all need not vote, but a majority of those who do vote must vote for it, and then it is a rate made by the inhabitants, all being in point of law considered present at a meeting: *Norris v. Staps* (Hob. 212), *Rogers v. Darenant* (1 Mod. 194), *Chamberlain of London's case* (5 Rep. 63), *Jeffery's case* (id. 66), [19] *Reg. v. Sutton* (10 Mod. 74), *Rex v. Varlo* (Cowp. 248), *Campbell v. Maund* (5 Ad. & Ell. 865; 1 Nev. & P. 558). Therefore it is, that when

a poll is demanded, the election commences with it, and everything anterior ceases to be of the substance of the election: *Anthony v. Seger* (1 Hagg. Cons. Rep. 13). In all cases, therefore, whether they be the acts of indefinite bodies incorporated, or only of parties exercising quasi corporate functions for the time, a majority must vote in order to bind, and that will bind, not because it is the voice of so many, but because it is in law the voice of the whole. Suppose, instead of sending up these two petitions, the parties who signed them both had all attended a public meeting convened on the subject, and 4000 had voted that they should petition for a charter, and 6000 that they should not: what force and effect would the petition of the 4000 have had in such a case? It would have been the petition of those 4000 persons, but clearly not the petition of the inhabitant householders. The petition of the 6000 would surely be at least as much so. That is in substance the same case as the present. It never could have been the intention of the legislature, that a charter should be granted with such extensive powers over the inhabitant householders of the borough, where the majority were clearly indisposed to have it. It is not a case where they could exercise that option afterwards, because the charter is not addressed to the same persons who petition: the inhabitant householders are not incorporated at all. This mode of signing petitions is only a more certain mode of indicating the voice of the majority, there being no mode of convening a public meeting at which to express the will of all the inhabitants. In *Rex v. Hughes* (7 B. & Cr. 708; 1 Man. & R. 625), where there was a meeting of the indefinite corporate body, to determine whether they would accept the charter or not, but, by reason of the riot and violence at the meeting, [20] many of them were prevented from expressing their will, it was held that they might express it otherwise; and a paper being signed by which they signified their acceptance of the charter, and, adding the signatures on that paper to the names of those who voted at the meeting, it made an actual majority of the whole indefinite body; this was held to be a good acceptance. Here, there was no person who had authority to call a general meeting for the purpose; and the act of Parliament itself specifies the mode in which the will of the inhabitants is to be made known to the Crown, namely, by petition. How then are the dissentients to make known theirs? Either they must make it known by a counter petition, or those who do not make it known must be taken as dissentients. If the latter be the rule, then the petition, to warrant the grant of a charter upon it, must be signed by an actual majority of the whole body; if the former, then the publication in the *Gazette* may be considered as a notice to all who are interested in the matter, that if they do not express their voice against the grant by the day named therein, they may in law be considered as concurring in that petition. If, therefore, those who have petitioned on the one side and on the other are to be taken in law as expressing the voice of the whole body, then the counter petition, being signed by the majority, must represent the whole body, and the petition is against the charter, and there is no petition of the inhabitants for it, but only a petition of 4000 persons residing and inhabiting houses within the district.

11. The next objection is, that the charter is not granted to the district from which the petition emanated. The petition is stated to have been from the inhabitant householders of the borough, that is, the parliamentary borough of Manchester: the charter is granted to the district comprised within the boundaries of certain townships, which, together with the townships of Newton, Harpurhey, and Bradford, comprise the boundaries of the parliamentary borough. If this be good, the Crown might equally grant [21] a charter to a district within which not one of the petitioners resided or had any property. Unless the charter is to be granted to the district whence the petition emanates, there is no limit to the power of the Crown in this respect. [Patteson, J. The words of the act, "within the district to be set forth in the said charter," must have some meaning.] They only mean that the charter must define the limits of the borough; but it ought to define such limits as will comprise the whole of that district from which the petition emanated. The charter must define the limits, because otherwise the seven miles, within which the burgesses may reside, cannot be measured. All corporations must be of some place; and where the inhabitants are incorporated within a certain district, that place ought to be defined: Vin. Abr. Corporations (D. 13). The statute does not say, that, upon a petition from a town or borough, a charter may be granted to the inhabitants of any part thereof, but to "the inhabitants of such town or borough." It might well be that the inhabitants of particular townships would not desire to be incorporated by themselves.

III. There are also various objections to the charter upon the face of it. First, it appoints different days, for the municipal elections in the first year, from those prescribed by the Municipal Corporation Act. The Crown, indeed, had power, under the 140th section of that act, to alter the days of elections in the first year (1835); but that was for the special reason assigned in the preamble, viz. that, by reason of the delay in the passing of the act, its provisions could not in that year be carried into effect on the days originally appointed. But that section is subject to an express proviso, that nothing therein contained shall authorize the Crown to appoint any days or times other than those specified in the act, for any matters required to be done after the expiration of that year. This charter, therefore, ought in this respect to have followed the terms of the statute.

[22] Secondly, the Crown had no power itself to direct by the charter the division of the borough into wards. The 39th section of the 5 & 6 Will. 4, c. 76, provides for this being done, with respect to the boroughs named in the schedule (A.), by a barrister, to be appointed for that purpose by the senior judge of assize then in commission. The division into wards is a most important matter with reference to all municipal elections, and it is most essential that it should be so done as fairly to distribute throughout the borough persons of different political opinions: moreover, it is a permanent regulation, which cannot be altered but by statute. Therefore it is, that the act of Parliament gives no power to the Crown to do it, even with the advice of the Privy Council, but merely gives a veto upon the judgment of the barrister. But here the Crown assumes to itself to divide the borough into wards, and to prescribe their limits and boundaries. This was wholly unnecessary; the Crown might have called upon the judge of assize to name a barrister for the purpose. So also, the assignment of the number of councillors to each ward, which by this charter is done by the Crown, is by the act of Parliament to be done by the revising barrister, exercising an unbiassed judgment, and giving to each ward such a number of councillors as will fairly represent the numbers and the property in the district.

Thirdly, there are several important variations in the mode directed by the charter for the making out of the burgess lists, from that prescribed by the act of Parliament. In the first place, the franchise is different, inasmuch as the charter makes the burgess list to consist only of the inhabitant householders within the borough, who shall possess the qualifications required by the act; whereas the 5 & 6 Will. 4, c. 76, s. 9, gives the franchise also to inhabitant householders duly qualified, residing within seven miles of the borough. This charter, therefore, cuts off from the right of election a great proportion of those who, [23] according to the act of Parliament, would be entitled to exercise the franchise. It is well known that a large number of the wealthier occupiers of property in a commercial town reside beyond the limits of it. Again, the list is to be made out, not on the 5th of September, as directed by the statute (s. 15), but on the 29th of October. Further, it is to be made out, not by the overseers, who have the custody of the rate books, and know who are the rated occupiers of property, but by a person named David Price. But he need not have taken upon him this duty; how could the Crown compel him to make out the lists in proper form? Moreover, there is no provision, as in the statute, for his delivering the list to the town clerk or any other officer, for the purpose of keeping copies of it for inspection; nor is there the convenience of a separate list for each township; but any person wishing to search it must look through all the enormous list for the whole borough of Manchester, of which one copy only is directed to be fixed "in some public or conspicuous situation within the borough," during eight days. Again, the lists of claimants and of parties objected to are not required to contain the particulars which by the statute are made essential parts of them. Then, as to the revision of the lists: nothing is said as to what is to be done with them when revised, whereas the act of parliament requires them to be delivered to the town clerk, who is to cause them to be copied into one general alphabetical list. There ought to be some place of deposit provided for the lists, and some security for those whose rights and franchises depend upon them; but here there is none. Nor is there any express provision that the lists, as revised by Mr. Rushton, shall be deemed the burgess roll of the burgesses entitled to vote. If there be no good list of burgesses, there can be no good election. Besides, what authority is there to compel the parties named in the charter to do any of the acts which they are directed to do, or what punishment could be inflicted if [24] they omitted to do them, or did them negligently or imperfectly? Further,

according to the statute, the Crown had no power to establish a court for the purpose of revising the lists. The court of the revising barrister is not one which proceeds according to the course of the common law, but its powers depend altogether upon the statute. The Crown has no power to constitute such a court, with authority to decide upon a franchise: Com. Dig. Court, 1.

IV. Lastly, as to the appointment of a coroner. The plea states, that, after the grant of the charter, a commission of the peace was granted, directed to the persons therein named; and that, after that, a court of quarter sessions was granted. The 62nd section of the Municipal Corporation Act gives the power of electing a coroner:—"Be it enacted, that the council of every borough in which a separate court of quarter sessions of the peace shall be holden as is hereinafter provided, shall, within ten days next after the grant of the said court shall have been signified to the council of such borough, appoint a fit person, not being an alderman or councillor, to be coroner of the borough." The provision as to the court of quarter sessions is found in s. 103, which enacts, "that the council of every borough which shall be desirous that a separate court of quarter sessions of the peace shall be or continue to be holden in and for such borough, shall signify the same by petition to his Majesty in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay the recorder." The defendant is bound to make out by his plea, that the grant of quarter sessions was a valid grant. That grant could only be made, provided such petition were presented as the statute requires. The council are bound to set out in their petition all such matters as the statute makes necessary: unless, therefore, the plea shews that the petition did set forth such matters, it is insufficient. And it is submitted, that the averment that the council "did duly signify the same by petition to her [25] Majesty in council, setting forth the matters in and by the said act of Parliament, intituled &c., in that behalf required and directed," is not sufficient. If the petition itself had been set out it would have been a matter of law for the Court to decide, whether it set forth that which the act requires or not. If, therefore, the plaintiff had traversed this averment in the plea, that would have been traversing matter of law; and the defendant cannot, by inserting the word "duly," get rid of the necessity of setting forth the petition, in order that the Court may see, on the face of it, whether it contained the matters requisite to be stated or not. [On this point the following authorities were cited:—1 Wms. Saund., 186 d.; *Abbot of Strata Mercella's case* (9 Rep. 24 a.); *R. v. Croke* (Cowp. 30); *R. v. Mayor of Lyme Regis* (1 Dougl. 79); *Everard v. Paterson* (6 Taunt. 625); *Williams v. Germaine* (7 B. & C. 468; 1 Man. & R. 394); *Oldroyd v. Crampton* (4 Bing. N. C. 24; 5 Scott, 258); *Lloyd v. Wood* (5 Ad. & Ell. 228; 6 Nev. & M. 822).

Arguments for the defendant. This is an action against the defendant, treating him as a wrong-doer for holding an inquest as coroner within the limits of the borough of Manchester, to the prejudice of the plaintiff as one of the coroners of the county of Lancaster: and what the defendant has to shew is, that he was not a wrong-doer in holding that inquest, because he was lawfully appointed coroner for the municipal borough of Manchester. And unless there has been a misdirection on the part of the learned Judge, or the plea is a nullity, so that there ought to be judgment for the plaintiff notwithstanding the verdict, the defendant is entitled to the judgment of the Court.

I. Now, although it is clear that the Crown, by virtue of its prerogative, could create such a corporation as is established in Manchester, it must be admitted that there would be no power in the town council to appoint the [26] defendant coroner for the borough, in derogation of the right of the county coroner, unless by virtue of the powers conferred by statute upon the town council.

The first question therefore is, whether, upon this point, there has been any misdirection of the learned Judge, by reason of which the bill of exceptions ought to prevail. The only averments of the plea which are denied by the replication are the averments that the inhabitant householders of the borough of Manchester petitioned her Majesty to grant to them a charter of incorporation; and that the charter granted by her Majesty was accepted by them. All the other allegations of the plea, as to the reference of the petition to the Privy Council, their adjudication thereon, the grant of the charter and the elections under it, the grant of the sessions, &c., are admitted on the record. Nor is it denied that the defendant was duly elected and appointed coroner by the town council, provided they had authority by law so to do.

Further, it is clear, and was not disputed at the trial, that the charter was accepted by the inhabitant householders of the borough to whom it was granted. The only question of fact which remains in issue therefore is, whether the inhabitant householders of the borough of Manchester did or did not petition the Crown to grant to them a charter of incorporation. Now, except the counter petition, no evidence was adduced or tendered on the part of the plaintiff: and unless the Crown were prevented, after a petition lodged in favour of a charter, by the presenting of a counter petition more numerous signed, but not signed by a majority of those to whom the charter is addressed, from acting upon the advice of the Privy Council, and granting a charter upon the first petition; unless the Privy Council had no jurisdiction under such circumstances, and their office were merely ministerial, to tell the amount of signatures to each petition, without any means of verifying their genuineness, or the qualifications of the petitioners,—then it is submitted that the [27] evidence of the counter petition could not affect the power of the Crown to grant a charter with the powers conferred by the statute. [The learned counsel here read the evidence for the defendant, as stated in the bill of exceptions.] Now what better means could be taken than those which the defendant proved to have been adopted, for the purpose of ascertaining the general wish of the majority of the inhabitant householders of the borough? Can it then be said, that an absolute majority of the whole inhabitant householders of the borough—which would require 24,000 at least—should be petitioners? And if not, can it be contended that the mere fact of a counter petition, signed by one individual more than the original petition, after its being lodged in the Council Office, was sufficient to tie up the hands of the Crown, and prevent the grant of a charter? The direction of the learned Judge, to which exception is made, was no more than this—“that the Crown had the power of granting the charter notwithstanding the counter petition;” it being left to the jury, upon the whole of the evidence, to say whether there had been a petition by the inhabitant householders of the borough, praying that a charter might be granted. The case for the plaintiff is, that the presentation of the counter petition was, in point of law, an answer to the defendant's case, shewing that the Crown had no power to grant the charter on the first petition, and upon which the Judge was bound to direct a verdict for the plaintiff.

Now it is submitted, that, upon the proper construction of the 5 & 6 Will. 4, c. 76, s. 141, or of the 1 Vict. c. 78, s. 49, the counter petition had no such effect in point of law. [Bosanquet, J. The evidence for the plaintiff leaves it uncertain whether the counter petition was presented to the Crown after the reference of the first petition to the Privy Council, or not.] That is so. Now it is insisted for the plaintiff, that the act of Parliament ought to be rigidly construed, inasmuch as it is of a penal nature, [28] giving the power to impose burthens on the subject. But the borough rate is for the benefit and protection of the inhabitants; and abundant guards are provided against the abuse of the power of taxation. The statute is in truth altogether remedial; it was intended by the legislature for the benefit of those who were to be governed under the new system of municipal administration; and the Court will endeavour to give full effect to the intention of the legislature, and, if necessary, for this purpose rather to put a liberal than a strict construction upon the statute. And the question now is only this, whether the counter petition was in itself an absolute bar to the power of the Crown to carry into effect the intention of the legislature. The argument must go to this extent, that it would be an absolute bar if it had only a single signature more than the original petition. Now the provision of the statute amounts to this—that if the Crown shall be pleased, in the exercise of its common-law prerogative, to grant a charter on the petition of the inhabitant householders, then the Crown shall have the statutable power of conferring upon the inhabitants the powers granted by this act of Parliament, which cannot be granted by the prerogative. The petition of the inhabitant householders is undoubtedly a condition precedent to the exercise of the statutable power of conferring the additional authority. The common-law charter, upon which the statutable power is to be superinduced, must be granted upon the petition of the inhabitants, and by the advice of the Privy Council. These are the only conditions imposed by the statute: there is no proviso, that in case of a counter petition being signed by a greater number, the Crown shall have no such power. It might be, that between the time of the presenting of the original and the counter petition, there might be an influx of inhabitants into the town, so that, although the original petition was at the time the

petition of the actual majority, at the time of the counter [29] petition that number had ceased to be the majority: can it be said that in such case the Crown would be barred of its power thereby? But it is said (assuming it to be open on this bill of exceptions), that the defendant has not made out even a *prima facie* case for considering the original petition to be the petition of the inhabitant householders of the borough, it being signed only by 4000 out of 48,000. But is there any ground for saying, that it must be signed by an actual majority? Is it even necessary that it should be signed at all? Suppose there had been a meeting of all the inhabitant householders, who had unanimously agreed on the desirableness of a charter, and instructed the chairman to sign a petition for it to the Crown in their name; that charter having been granted, accepted, and acted upon, could it be contended that all the acts done under it were unlawful and void, because the petition was only so signed? If this objection can be made by the defendant, it may be made by any rate-payer, and at any distance of time. But if a majority must sign, of whom must it consist? Are women, minors, paupers, convicts, to sign? And how are the Privy Council to know the absolute population of the borough? They are upon their responsibility to advise the Crown, whether the petition in favour of the charter is really and *bonâ fide* to be considered the petition of the inhabitant householders of the borough. It is very doubtful, whether, in point of law, a majority is necessary even for accepting a charter; but, at all events, it is clear that a majority need not join in the act of acceptance: *R. v. Amery* (1 T. R. 588); *R. v. Hughes* (7 B. & C. 708; 1 Man. & Ryl. 625); *Vin. Abr. Corporation* (G.). No doubt, the Crown cannot force a charter upon the inhabitants of a town; and when granted upon a petition, it may be refused: but here the charter was accepted, and has been acted upon for several years. And even if the petition of a majority were necessary, yet after the Privy Council have advised the grant, [30] and the charter has been granted and accepted, it is too late to object that the petition was insufficiently signed. But further, if the objection could now be made, there was abundant proof from which the jury might come to the conclusion that the majority of the inhabitant householders of the borough did concur in the petition. There was a public meeting convened by advertisement issued by the authorities of the town, a resolution by a large majority of those assembled, and a petition presented signed by 4000 persons, and subsequently an acceptance of the charter granted thereupon. If, as is contended, a charter must be accepted by a majority, such acceptance is cogent evidence from which a jury might infer that a majority concurred in petitioning for it. If it be otherwise, then, notwithstanding that acceptance, there is no valid town council, no valid grant of quarter sessions, no good borough rate, and all the acts of the several functionaries of the borough may be questioned and invalidated at any distance of time; nay, every felon transported by any Recorder of Manchester may sue him for trespass and false imprisonment, and shew that all the proceedings were *coram non iudice*, because there was not a majority of the inhabitant householders who joined in the petition for the charter. It never could have been the intention of the legislature that that question should be, *toties quoties*, on every such occasion, submitted to juries, who might come to different conclusions in different cases, it being necessary, moreover, in every case to enter upon a complete scrutiny of the signatures on both sides, which would occupy months and even years. It is submitted, therefore, that after the grant of a charter upon a petition of the inhabitant householders, duly referred to the Privy Council, who have adjudicated upon it, and after the acceptance of the charter granted thereon, it is no longer open to any party to enter into the relative numbers of those who signed that and the counter petition, and to contend that the petition upon which the [31] Crown, under the advice of the Privy Council, has acted, is not a genuine petition of the inhabitant householders of the borough.

II. The next objection is, that the charter is not granted to the whole of the Parliamentary borough. But the act of Parliament appears cautiously to have provided for the contingency, that it might appear to the Crown expedient that the whole of the district from which the petition emanated, should not be included within the municipal borough, and therefore to have expressly given a power to define the districts within which the functions of the corporation should be exercised. The object was, that whether the petition came from a borough, or from a town having no defined limits, it should be in the discretion of the Crown to point out the limits for the municipal borough. If that precaution had been wanting, it would have

depended entirely on the will of the petitioners what should be the limits of the borough. There might be a rural part of a parish or township, which it would be very inexpedient to comprehend within the limits of a municipal borough. It would be highly unjust that the occupier of a large farm should be rated for the police or the lighting of the town. Or it might be more expedient that so large and populous a district as the whole Parliamentary borough of Manchester should not be under the government of one town council, and that it should be left to a subsequent charter to erect the three excluded townships into a separate municipal borough for themselves. If the charter must necessarily be granted to the whole district from which the petition comes, the words "within the district to be set forth in such charter" have no effect. Suppose there were an outlying part of a parish, disjoined entirely from the rest of the parish, which formed part of the town, and the inhabitants of that parish joined in the petition, would the charter be bad (so far as to the statutable powers being added to it) if that outlying part were not included in [32] the district defined by the charter? It is granted subject to the power of rejection, if injury be done by exclusion of any part of the borough.

III. Next, as to the supposed discrepancies between the charter and the act of Parliament. The whole of these objections appear to proceed upon this fallacy, that the corporation to which these statutory powers were to be given, was created by virtue of the stat. 5 & 6 Will. 4, c. 76, under a new power thereby conferred upon the Crown. But the charter was granted by the common-law prerogative of the Crown; and there is nothing in it which might not be conferred by that prerogative, except only the power of making rates and of appointing a coroner. It is laid down in all the books of authority, that all corporations must be created by the Crown, unless they are created by act of Parliament, and that those which exist by prescription are supposed to exist by charter from the Crown, which has been lost by time and accident: 1 Bl. Comm. 474; Vin. Abr. Corporation (B.); Bac. Abr. Corporation (D.). And the Crown may communicate this power to a subject: *Sutton's Hospital case* (10 Rep. 33 b.). There it was resolved, that "when the king by his charter reserves as well the nomination of the persons as the name of the incorporation to a common person, who shall be the founder, there he ought to name the parties, and declare by what name they shall be incorporated: and when the common person hath done it, and declared it in writing, according to his authority, then they are incorporated by the king's letters patent and not by the common person, for he is but an instrument, and the king makes the corporation in such case, in the same manner as if all had been comprehended in the letters patent themselves; for it is true that none but the king alone can create or make a corporation, as it is held in 49 Edw. 3, c. 4, s. 4, or 49 Ass. 8; but *qui per alium facit*, [33] *per se ipsum facere videtur*." It would have been wholly impossible that the charter should create a corporation precisely according to the forms prescribed by the 5 & 6 Will. 4, c. 76: there were by that statute various acts to be done before the members of the previously existing corporations, which could not be made to apply to the case of a corporation commencing *de novo*.

The first objections relied upon are, that the borough of Manchester is divided into wards by the charter itself, instead of by a barrister appointed by the Judge of assize; and that the number of aldermen and councillors are mentioned in the charter, instead of being reserved to be decided by the barrister. But it was impossible that the mode of warding the borough, which is prescribed by the 5 & 6 Will. 4, c. 76, s. 39, should be applied here, because that provision applies only to the first year after the passing of the act, viz. 1835. So, the 20th section, which gives the Judge power to appoint the barrister to revise the lists, applies only to the boroughs wherein the old corporations existed, and has not at all in contemplation any of the new corporations which might be erected under the 141st section of the act. After the 30th of September, 1835, the power of the Judge for this purpose was gone. It is said the charter might have required the revision to be made by a barrister, to be named by the Lord Chief Justice. But it can make no difference whether this is to be done by a person named directly by the Crown, or by a person named by the nominee of the Crown. The Crown clearly had power by its prerogative to define the limits of the wards, and to assign to each its number of councillors.

Next, it is objected, that the charter excludes from the franchise inhabitant householders, resident within seven miles of the boundaries of the borough, occupying

rateable property within the borough. There is no ground for this objection. The alphabetical list of burgesses which is to [34] be made out by David Prie, is to be a list "of all the inhabitant householders within the said borough, who shall possess the qualifications required by the act." Transposing a few of the words, this evidently means—"all the inhabitant householders, who shall possess within the said borough the qualifications required by the act," which clearly comprehends those who reside within seven miles, because they possess within the boundaries mentioned in the act the qualifications required by it. So, "every inhabitant householder so possessed as aforesaid"—i.e. possessed of the qualifications required by the act—has the power, if omitted from the list, of making a claim. It is to all those persons that the grant is made by the charter, and they are all clearly entitled to the benefits of it.

Again, it is said that the mode of revision pointed out by the charter is contrary to the rules of the common law; that the Crown cannot create a new court to administer justice contrary to the common law. But the court of the revising barrister is not a court to decide upon life, liberty, or property, but only to decide whether certain facts are established, to entitle a particular individual to a franchise claimed by him. According to the case of *Sutton's Hospital*, the charter would have been good even if it had said that all should be burgesses who should be named by Mr. Rushton.

Another objection is, that by the charter there is not a burgess roll, because there is no provision for making a fair copy of the revised lists. The statute could not have been followed strictly in this respect, because there was here no existing mayor or town clerk: but it is done in substance; a record is made, by the lists revised and signed by Mr. Rushton, by reference to which it is at once ascertained who are and who are not burgesses. Suppose, in any borough, the town-clerk were to omit making a fair transcript of the lists revised by the mayor and assessors, [35] and handed over to him; could it be said there was no burgess roll?

Next, it is objected that the dates at which the various acts are by the charter required to be done, are not the same as those prescribed in the act of Parliament. But an identity of dates is no condition precedent to the exercise of the power given to the Crown by the 141st section. It was impossible that the charter, from the beginning, could in all these respects follow the act of Parliament, but it contains nothing inconsistent with the due exercise of the powers conferred by the act.

IV. Lastly, it is said that the plea is defective in substance, so that there ought to be judgment for the plaintiff non obstante veredicto. The objection is, that the plea ought to have set forth the petition upon which the grant of a court of quarter sessions was made, in order that the Court might see whether it contained all the matters required by the act of Parliament or not, and therefore whether the grant was rightly made; and that a traverse of the allegation of the plea as it stands, would have been a traverse of matter of law. But it is submitted that it would have been sufficient merely to state in the plea the fact of the grant of quarter sessions, and that the precedent matters would be assumed to have been rightly done. If it be necessary to set forth the petition, it may as well be contended that it is necessary to go still farther back, and aver the notice for holding the meeting of the council at which the petition was agreed to. To shew a regular grant of quarter sessions, it is surely sufficient to set out the letters patent under the great seal. But even if it be necessary that it should be averred that there was a petition, there is a sufficient averment for that purpose. The plea states that the petition set forth "the matters in and by the said act of Parliament in that behalf required and directed." That is sufficient by relation to the act of Parliament itself, which shews what those matters are. Besides, there is no [36] traverse on the petition; and it may be doubted whether this is a material allegation, which could be traversed, or whether it is not immaterial and superfluous: but if it be, the defect, if any, is cured by the statute of jeofails; 1 Saund. 227, n. (1). [The learned counsel then referred to and distinguished the cases cited on this point for the plaintiff.]

The Court took time to consider the case; and the learned Judges differing in opinion, they now (Feb. 22nd, 1841) delivered their judgments seriatim.

COLTMAN, J. The first question for consideration in this case is, whether there was such a petition by the inhabitant householders of the borough of Manchester as is required by the statute 7 Will. 4 & 1 Vict. c. 78, s. 49. It appears from many authorities, that to make a corporation of common law, the consent of the parties

incorporated is necessary; *Bagge's case* (1 Roll. Rep. 224; 2 Brownl. 109), *Dr. Askew's case* (4 Burr. 2200); and the statute in question ought to be construed with reference to this provision of the common law, and in requiring as a condition a petition by the inhabitant householders, it must be understood to mean such a petition as can fairly be considered as representing the will of the majority of the inhabitant householders. But admitting this to be so, it was contended on the argument in this case, that the question whether there was a sufficient petition or not, was one which the Privy Council had jurisdiction to decide, and that their judgment upon it is conclusive. It can hardly be doubted that the Privy Council would have laid before them reasonable grounds for inferring that the petition did represent the will of the majority; and probably it is with a view to that object, amongst others, that a month's notice is directed to be given in the *Gazette* [37] of the day on which the petition is to be considered, so that all persons dissenting may have an opportunity of testifying their dissent: still the proceedings of the Privy Council in this matter can hardly be considered as of a judicial nature; their duty is rather to give advice in a matter of police and government, than to ascertain in a judicial course the rights of litigant parties. Their decision, therefore, cannot be considered as conclusive of the fact of a proper petition having been presented.

In this case, however, the jury have found the fact for the defendant, that the majority of the inhabitant householders did petition, and the verdict cannot be impeached, unless the Judge misdirected the jury in the point excepted to.

It is not open to the party objecting to the summing up of the learned Judge, to take any other objection to it than that which he took at the trial. This rule, which is one well recognised in practice, flows from the terms of the statute itself on which the bill of exceptions is founded.

By that statute it is enacted, "when one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which if they will not allow, if he that alleged the exception do write the same exceptions, and require that the justices will put to their seal for a witness, the justices shall so do; and if one will not, another of the company shall. And if the King upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written with the seal of a justice put to it, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal. And if the justice cannot deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed." Independently of the express words of the statute, there is this reason why the party should be bound to take the objection [38] he relies on at the time of the trial, because exceptions taken at the trial are taken at a time when any wrong impression on the mind of the Judge may be corrected, and the jury rightly informed before they deliver their verdict.

The exception taken in the present case is in these terms:—"The counsel for the plaintiff excepted to the direction of the said Baron, and insisted that the facts proved were sufficient to shew that her said Majesty the Queen had no authority or power to grant such charter as aforesaid." The point insisted on, therefore, is, that the facts proved did conclusively, and as matter of law, shew that the Queen had no authority to grant a charter; and the plaintiff ought to succeed or to fail, according as the Judge was right or wrong in overruling this proposition thus contended for. It appears to me that the learned Judge was right in overruling the proposition so submitted to him, for the circumstances proved led to no conclusive inference either way, but were fit to be submitted to the jury, for them to determine on the whole matter, whether the proof supported the allegation that the inhabitant householders did petition. If that point was not left properly to the jury, that might have furnished ground for an exception, but it would be an exception quite of a different nature from, and inconsistent with, that which was actually taken.

The bill of exceptions, therefore, cannot avail the plaintiff; but it is still open to him to contend that the plea is bad, and his objections to the plea rest, in the first place, on alleged defects in the charter granted by the Crown; and secondly, on the alleged insufficiency of the mode of pleading the petition by the borough council to the Crown for a grant of a court of quarter sessions.

The objections which have been made to the charter rest mainly on an assumption, that in the constitution of any new borough, to which the Crown may think fit to

extend the powers and provisions of the act for regulating muni-[39]-cipal corporations in England and Wales, the first election of officers must take place exactly in the mode appointed for the first elections in the boroughs enumerated in the act.

But it is to be observed, that the act contains no provision to this effect: it authorizes the Crown, in the most general terms, to extend to the inhabitants of the borough petitioning, all the powers and provisions of the act, but gives no directions as to the mode in which those powers and provisions are to be conferred; and on examining the machinery for conducting the first election in the enumerated corporations, we find that that machinery is inapplicable to corporations first constituted at any period subsequent to the year 1835. If no corporation subsequently erected can have extended to it the powers and provisions of the Municipal Act, unless the first elections are conducted in strict conformity with the act, the clauses in the statute giving power to the Crown to that effect, will be found to be incapable of being put in execution.

The most important act preliminary to the election of officers in the new boroughs, is the proper constitution of a burgess list; but no burgess list can by possibility be made out in strict conformity with the provisions of the Municipal Corporation Act. That act (s. 20) contains a special provision for revising the burgess list, applicable to the year 1835; and in all future years the list is to be revised by the mayor and assessors. But who are the assessors? They are officers annually elected by the burgesses; so that the due revising of the burgess list presupposes the existence of assessors, and the existence of assessors presupposes the due revision of the burgess list:—and this original defect, if it be a defect, will equally apply to subsequent elections as to the first election; for, if the revision of the first list of burgesses is defective, the election of assessors by that list will be equally defective, and the subsequent revision of the lists in a future year, by officers defectively [40] appointed, will partake of the original inherent vice of their appointment. In construing an act of Parliament, it is our duty, I conceive, to adopt any possible construction rather than to hold that it is incapable of being carried into effect; and as the statute in question gives power to the Crown to extend to the inhabitants of any town, &c., the power and provisions of the Municipal Act, without specifying at what time or in what way it is to be done, it does by implication give to the Crown all necessary powers for that purpose, of which the power to make reasonable regulations for conducting the first election of municipal officers appears to me to be one.

But it may be fit, in a case so important, to consider in succession the objections which were relied on.

The first objection was, that the charter was not granted to the persons who petitioned for it, but to a part of them only, excluding the rest. The question turns on this, whether the act, in authorizing the Crown to extend to the inhabitants of the town or borough, within the district to be set forth in the charter, the powers and provisions of the act, does not expressly authorize the incorporating of a less district than the whole of the town or borough, considered with reference to its ancient limits.

It seems to me that this is the true construction of the act, and that such construction is most in analogy with the provisions of the 5 & 6 Will. 4, with respect to the boroughs specified in that act. By the 7th section of that act, the boundary of the boroughs specified in the first section of the schedules A. and B., are for the purposes of the act to be the same as limited by the act of 2 & 3 Will. 4, c. 64; the boundaries of the other boroughs are to remain as they were then taken to be, till altered by Parliament. By the 8th section, every place included within the metes and boundaries of any borough, and none other, are to be part of such borough.

From the provisions it appears, that it was no part of the [41] policy of the Municipal Corporations Act, that for municipal purposes the ancient boundaries of the town or borough should be adhered to; and it is quite in harmony with these provisions, that, in constituting the new corporations, power should be given to the Crown to limit boundaries different from the ancient boundaries of the town; and such, as it seems to me, is the proper effect to be given to the words of the act, "within the district to be set forth in the charter."

A second objection was, that the days appointed for the election of officers, upon the first constitution of the new borough of Manchester, are different from the days appointed for the first election of officers in the boroughs specified in the act.

But I am unable to see anything in the act which restricts the Crown to any particular time for calling the new corporations into existence; it seems to be immaterial, with reference to the objects which the act has in view, at what time the corporation is first put into a state of activity. I do not see that the time of the first election can in any appreciable degree affect the elections, or vary the rights of the electors.

A third objection was, that the Crown, in dividing the new borough into wards, had not followed the course indicated by the statute 5 & 6 Will. 4.

To this it seems to me a sufficient answer, that the Crown, by virtue of its inherent power at common law, might appoint the number of wards into which any borough should be divided, and limit the number of aldermen for each ward; and there is nothing in the act of Parliament to shew that a corporation so constituted is not one to which the Crown is authorized to extend the powers and provisions of the Municipal Corporations Act.

A fourth objection is, that the burgess list was not properly made up.

This objection is two-fold; first, as it regards the person [42] by whom the lists were made: 2dly, as it regards the persons who are to be placed on the list. Now, as regards the person by whom the lists are to be made out, I have already stated my reasons for thinking that her Majesty had power to appoint a person to make out the burgess list.

As regards the persons who are to be placed on the list, the objection is, that the list, as directed to be made up by Price, excludes some persons who ought to be admitted to vote at the election of the council of the borough, namely, householders residing out of the borough, but within the distance of seven miles, and occupying shops, &c. within it: and it is contended that the charter is void in consequence, or, if not void in toto, void as to the extent of creating a corporation to which the powers and provisions of the Municipal Corporations Act can be extended. Now, as the express intention of the sovereign, in granting the charter, is to create such a corporation, we ought not readily to adopt any construction of the terms of the charter which will defeat this intention. It is an established rule, in construing the King's charters, "That if two constructions can be made of the King's charter, and by force of one construction the grant may, according to the rule of law, be adjudged good, and by another it shall by law be adjudged void, then for the King's honour, and for the benefit of the subject, such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant." Case of the *Churchwardens of St. Saviour's* (10 Rep. 66 b.). By parity of reasoning, if one construction will defeat the express intention of the charter, and the other construction will support it, we ought to adopt the latter, and reject the former.

By the words of the charter, Mr. Price is directed to make out an alphabetical list of all inhabitant householders within the said borough who shall possess the qualification required by the act for the regulating of [43] municipal corporations: and this means, as it is contended, inhabitant householders occupying houses within the borough, and possessing the other qualifications required by the act, and does not extend to any other class of persons, though possessing the requisite qualifications.

But we ought not to look to this part of the directions given to Mr. Price, apart from what is afterwards found in the charter relative to the same matters; namely, the provisions with respect to the list of claims, and for revising the lists. As to the list of claims, it is provided that every inhabitant householder so possessed as aforesaid, (that is, every inhabitant householder who shall possess the qualification required by the act), whose name shall have been omitted in the burgess list, and who shall claim to have his name inserted therein, shall give notice thereof.

Now it is observable, that the persons authorized to make claim are not confined to inhabitant householders occupying houses within the borough, but may include all inhabitant householders possessed of the qualifications required by the act.

Again, Mr. Rushton is directed to revise the burgess lists, and the lists of claimants and objections, in the manner directed by the act for regulating municipal corporations in England. Now to see what he is to do, we must refer to the statute 5 & 6 Will. 4, c. 76, s. 18.

By that section, the mayor is to cause the burgess lists, and the lists of claimants and objections, to be brought before him, and the mayor shall insert in the burgess lists the name of every person who shall be proved to the satisfaction of the Court to be entitled to be inserted therein, according to the provisions of the act: provided

that no person's name shall be inserted, unless notice shall have been given as required by the act.

Now, comparing these provisions of the charter with each other, and with the act of Parliament, it cannot, I think, be doubted, that the intention of the charter was that all [44] persons should be entitled to vote at the first election under the charter, who are possessed of the qualification required by the Municipal Corporations Act; and as it cannot be supposed to be the intention that Price should make out a defective list in the first instance, in order that by a circuitous process the names omitted in Mr. Price's list may be inserted in the revised list by Mr. Rushton, we must, in order to make the different parts of the charter consistent, understand the words "inhabitant householders within the said borough who shall possess the qualification required by the said act for the regulation of municipal corporations in England and Wales, to be possessed by burgesses of the boroughs enumerated in the said act," as embracing all persons who are inhabitant householders within the meaning of the Municipal Corporations Act, and possessed of the other qualifications required by the act; that is to say, every male person being an inhabitant householder, either within the borough, or within seven miles of it, and possessing the other qualifications required by the act.

A fifth objection was, that no one is appointed by the charter to make out a burgess roll. To this it was answered, that the burgess roll is a mere transcript of the burgess list and lists of claimants and objections; that the making it out is a mere ministerial act, and that it might with propriety be made out by Mr. Hyde, as incidental to his office as returning officer: but if none were made out, although the want of it might be productive of some inconvenience in conducting the election, I do not see any sufficient ground for saying that no good election can take place for want of it.

A sixth objection was, that the charter is void at common law, because Mr. Rushton is authorized by it to hold a court which does not proceed according to the rules of common law, and that he proceeds by examination upon oath, and decides upon a franchise.

[45] To this it was answered, and I think rightly answered, that the court held by Mr. Rushton is not a court for deciding the rights of litigant parties, but is in the nature of a commission or court of inquiry, to ascertain what particular individuals fill a certain character, so as to entitle them to a certain benefit, which the Crown is by that charter proposing to confer on them *de novo*. It has not been unusual with the Crown to grant commissions for purposes of inquiry, with a power to administer an oath, nor have such commissions ever been deemed to be illegal.

It has been further objected, that the charter is void at common law, because the corporators are in effect nominated by Mr. Price and Mr. Rushton, and not by the Crown; but with every respect for those who entertain this opinion, I cannot see how this objection can be held to be valid, without overruling the case of *Sutton's Hospital*, and the other cases there cited, and I am not aware that the authority of those cases has ever been questioned.

It remains only to advert to one other objection. The plea contains an allegation, that the council of the borough of Manchester were desirous that a separate court of quarter sessions of the peace should be holden in and for the said borough of Manchester, and did duly signify the same by petition to her said Majesty in council, setting forth the matters in and by the said act of Parliament, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," in that behalf required and directed. And it was urged, that the petition ought to have been set out with more particularity, in order that the Court might judge whether it contained what the law required. I will not stop to inquire whether this objection would have availed upon a special demurrer, for the defect, at most, can amount only to an insufficient pleading of an allegation substantially averred, and such insufficient pleading is aided after verdict by the statute 32 Hen. 8, c. 30.

[46] COLERIDGE, J. This case has necessarily raised so many points for consideration, upon each of which, in the view I take of them, it has become my duty to express an opinion, that I shall endeavour to compress my reasons in regard to each within as short a compass as I can; especially in regard to those upon which we are, generally speaking, agreed, and which appear to me to present less difficulty. And the general nature of the case, with the manner in which the points arise, being sufficiently known,

I may omit any preliminary matter, and proceed at once to consider the points in their order.

The objection to the learned Judge's direction is two-fold :—first, that it withdraws from the consideration of the jury a question of fact, treating it as a question of law ; and secondly, that even if properly considered a question of law, the direction was in point of law erroneous. Upon the first point, the case is shortly this. The issue for the jury was on the fact of a petition by the inhabitant householders of the borough of Manchester. To prove the affirmative, the defendant had given evidence of a petition and proceedings thereupon ; to prove the negative, the plaintiff had proved a counter petition, signed by larger numbers : both signed by less than the majority of the whole, and both under the respective circumstances stated on the record. But the Judge, instead of leaving it to the jury to draw the conclusion of fact, whether or not the inhabitant householders had petitioned, from this conflicting evidence assumed that the first petition was in itself valid, so as to satisfy the statute, and the language of the issue ; and then told the jury, that the counter petition did not destroy that validity. Upon the second point the contention is, that a counter petition, as to which no fraud is alleged, presented before the day on which the first was to be taken into consideration by the Privy Council, and proceeding from much larger numbers than the first did, at once and necessarily destroys the effect of the first, [47] so that it could no longer be such a petition as the statute requires, and as the language of the issue must be taken to import. To this assertion, so broadly made, I cannot assent : all the circumstances attending the two petitions, and not merely the relative numbers of signatures, were, in my opinion, to be considered ; and therefore, if the Judge were called on to pronounce on that circumstance alone, and to affirm that simply by reason of it the first petition had lost its validity, it seems to me that he was quite right in refusing to do so.

In the view, therefore, which I take of the bill of exceptions, the first of these objections is that which it is important to consider ; does the case, as I have stated it, truly represent what appears on the face of the bill ? has the Judge withdrawn from the consideration of the jury a question of fact, and in effect determined for them, that the petition proved by the defendant was the petition of the inhabitant householders of Manchester, within the meaning of the issue raised ? This will be the first point : the second, is this fault, supposing it to exist, distinctly pointed at by the exceptions taken ? for it must be admitted as clear, that unless it be, we are not at liberty to take notice of it.

These are obviously questions of construction on the language of the bill ; and I express my opinion upon them with more than usual distrust of its correctness, because my own mind has fluctuated much in the course of considering them, and I am aware how many of my learned Brothers have a confident opinion the other way. But after the best consideration I can give it, I am obliged to say that I think the objection ought to prevail.

The statement of the evidence in the bill naturally begins with a reference to the issue : and if any expression which follows be in itself ambiguous, I think it must, on the ordinary rules of construction, be construed with reference to that issue ; and I apprehend that to the language [48] of a bill of exceptions, the ordinary rules of construction must be applied : there should be no straining either to support the ruling of the learned Judge, nor to point out the exception to it. The defendant was to prove that the inhabitant householders had petitioned ; and in order to make this out, the bill states that he gave in evidence the various proceedings in the borough, up to the signing of a petition by 4000, a number less than a majority of the whole body of inhabitant householders, and the presentation of that petition to the Queen, and her reference of it to the Privy Council. Thus far the statement applies itself directly and in terms to the issue ; then, after stating that acceptance of the charter had been proved, the bill introduces the plaintiff's evidence thus : "The counsel for the plaintiff then, for the purpose of shewing that her Majesty had not authority to grant the charter in question under the said petition, gave in evidence a petition by 6000 inhabitant householders, less than a majority of the whole, to her Majesty, not to grant the charter, and that this was presented to her Majesty before the day appointed for taking the first petition into consideration. Here the language of the issue is departed from ; but bearing the issue in mind, what interpretation must we put upon the words ? How could it be shewn by this evidence, that her Majesty had not

authority in law to grant the charter on the first petition, except by the inference of fact to be made from it, that the first was not in truth the petition of the inhabitant householders? With any other object than this, the evidence would have been wholly irrelevant to the issue; the issue was not upon her Majesty's authority to grant the charter upon the petition, and that authority might have been wanting, although a petition had been duly signed and presented; but upon the fact of such petition. Construing, then, these words by the ordinary rules, I consider them equivalent to saying, that the evidence was adduced to disprove the issue, and shew that [49] no petition had been presented by the inhabitant householders. By the same rule I construe the language which follows, stating the learned Judge's direction: that "notwithstanding such last petition, her Majesty had authority and power, on the recommendation of her Privy Council, to grant the said charter as on the first petition, by virtue of the statute." I must assume the issue to have been present to the mind of the learned Judge, and that his direction was intended to be relevant to it; then it seems to me, that the necessary meaning of his language is, that notwithstanding the plaintiff's evidence of a counter petition, the petition proved by the defendant was a petition within the meaning of the plea, and therefore such as was necessary in order to her Majesty having authority to grant the charter. It is unnecessary to go so far as to say that his language affirms absolutely the validity of the first petition; for, if he only took on himself to determine that the second petition did not take away or affect its validity, he determined a question of fact, which was one among the particulars for the jury to consider, in regard to the whole issue before them.

I come then to the conclusion, that there was a misdirection. It is said that this is helped by the words which follow, "and with that direction left the case to the jury." This I cannot understand: whether any thing else was said to them, or what that was, we are not informed, and are not at liberty to guess. I should have thought the ordinary and correct mode of reading the words was, that he left the case to the jury with that direction;—that is, left them to find their verdict with that instruction, and that alone, upon that point.

It only remains to consider, whether this error, if it be one, is excepted to by the bill. The bill first states in general terms, that the plaintiff's counsel excepted to the direction, and then expands that in language exactly following the language of the direction,—insisting that the [50] facts proved were sufficient to shew, i.e. were in reason sufficient to convince the jury, that her Majesty had no power to grant the charter upon the first petition. The exception then adapts itself to the language of the direction, and its terms must receive the same construction: it directly affirms what the direction had denied. If there was any error, therefore, in the direction, the exception must have hit it.

Upon these grounds, therefore, I am of opinion that the plaintiff in error is entitled to a *venire de novo*.

There remain, however, objections to be considered, both as to the charter and the plea: and those which apply to the former may be subdivided into those which go to the authority of her Majesty to grant such a charter as this, and those which are more properly matter of detail. The first of these, which strikes at the root of the charter, is, that whereas the petition was from a whole borough, consisting of nine townships, the charter is granted to six only of the nine. Strong reasons are suggested, of expediency and inconvenience, for and against this limitation; but we have only to consider the power of the Crown to make it; and it seems to me that there are words in the statute 1 Vict. c. 78, s. 49, on which this limitation may be supported. By the first part of the section, it would certainly seem that a petition from the town or borough, and a grant of a charter to the petitioners, are both of them conditions precedent to the extension of the statutory powers by the charter; and certainly I do not feel it easy to hold that the body incorporated, and the body to which the statutory powers are to be extended, must not be the same. But these words follow:—"extend to the inhabitants of any such town or borough, within the district to be set forth in such charter, &c." These words must have some meaning; and it is suggested that they are inserted, because it was necessary for many of the objects of the statute, that the borough incorporated [51] should be described by metes and bounds in the charter. But if the grant must in all cases necessarily be to the whole town or borough petitioning, I do not see the necessity for the charter

going beyond the language usually inserted in charters at common law, if I may use such a term by way of distinction. But these words do not seem applicable to such descriptions, nor is it probable that they would have been inserted, if no more was meant than this. I think, therefore, that they must be understood as giving the Queen a power to limit the district within which the statutory powers, extended to the corporation by the charter, were to be exercised; and if so, the district need not be commensurate with the whole petitioning town or borough. And it is observable, that in the first part of the section, the words are not "grant to them," but "grant the same," i.e. a charter of incorporation; leaving the precise objects of the grant to be defined according to the words which follow.

The two objections which next occur, and which are to details in the charter, I may conveniently take together; and the principle on which I dispose of them will apply to several of the same kind. They are, that the Queen has taken upon herself to appoint days for the elections of the first mayor, aldermen, and councillors, different from the days specified in the 5 & 6 Will. 4, c. 76, for the first elections under that act, and also has herself divided the borough into certain described wards, instead of leaving that to be done by a barrister, as under the act last mentioned. The answer to both these objections is the same. The statute of 1 Viet. c. 78, s. 49, does not destroy the common-law power of the Crown to create municipal corporations, but enables the Crown, under certain conditions, to extend statutory power and provisions to corporations which it may create. Both the matters here objected to are within the Crown's own power. The Queen might have named the first mayor, aldermen, and councillors, or [52] might have directed them to be elected by the body whom she incorporates; and in the latter case, she might have named the day for the election. She could not in the present instance have named the same days as specified in the act for the first elections to be made under that act, for they had passed; but if she could, and had done so, it would still have been a nomination of the days by the royal power, and not under the statute; a voluntary adopting of the statutory day, not a necessary compliance with its provisions. The same remark applies to the division into wards.

I come now to an objection, founded on those clauses of the charter which relate to the formation and revision of the first burgess list; and this again is twofold, first, that the Queen, delegating to Mr. Price and Mr. Rushton to determine who are to be the first burgesses, which burgesses are in effect to elect the first mayor, aldermen, and council, has in fact delegated to Price and Rushton to make and call into existence the corporation, and that such delegation was illegal: the second object applies to the particular instructions, according to which Price and Rushton are to perform the duty imposed on them.

The first of these, in itself a question of great importance, is made of still greater by the special ground on which it is rested. It seems not very strongly contested, that the Crown, in erecting a corporation, may not give to an individual (the founder, for example, who is to endow it), the power to name the officers who are to govern it, or the individuals who are first to compose it; for this, *The Sutton's Hospital case* (10 Rep. 33 b.), and *Ramsay's case*, there cited, (p. 27), were alleged in the argument as sufficient authority; and they seem to be so: but it was said these were cases of private foundations, and were wholly distinct in principle from the present, a case of municipal incorporation, for the government of a large portion of the liege subjects of the Crown. In this case [53] it is said that the Crown cannot constitutionally divest itself of its authority, or decline from its duty, by delegating to other irresponsible agents the nomination of the first corporators. Perhaps the strictly legal answer to this objection may be deemed too artificial to be satisfactory on a constitutional question; the answer, I mean, which is to be found in *The Sutton's Hospital case*, that when the person to whom the duty is delegated has performed it, the individuals named do not come in under him, and derive nothing from him, but all from the charter and the Crown. Yet, if this principle be a sound one in the case of a private corporation, I cannot see why it should not apply to a public corporation equally. It may be a matter of discretion in what instances the Crown may be advised to act upon it; but as in all cases of a public corporation the Crown must act really on the information and by the agency of others, even where in form it acts directly by itself, and this necessity is the more apparent and pressing, the more extensive the incorporation is to be, I own it seems to me that no mode can be

suggested more free from objection, than that which has been adopted in this instance, of defining the qualification, first, which the corporators are to have, and then leaving it to some selected individuals to determine who those are who possess it. Mr. Price, in the present case, has no arbitrary power given to him, as was entrusted to the founders in the two cases cited; the rule is laid down for him, according to which he is to determine, and if he first, and Mr. Rushton secondly, admit or reject without being authorized by the rule, any other corporator or injured individual will have their remedy in the Court of Queen's Bench. I may further observe, as the question, whether a course be constitutional or not, admits the argument of experience, that this delegation is only made for one turn: whatever of evil there may be in it is limited in the present instance to the first burgess list; after that time, the course pre-[54]-scribed by the statute of William must be adopted. It seems to me, therefore, that this objection cannot be supported.

I pass on to the second objection, that the rule by which the burgess list is to be formed, according to the charter, is incorrect, and such as the Crown had no power to lay down. The objection presented at first great difficulty, but, upon consideration, it appears to me not insurmountable.

The 1 Viet. c. 78, s. 49, empowers the Queen, on the petition of the inhabitant householders of any borough for a charter, if by the advice of her Privy Council she should think fit to grant the same, to extend to the inhabitants of such borough all the powers and provisions of the 5 & 6 Will. 4, c. 76.

One of the provisions of the 5 & 6 Will. 4, is (by s. 9), that every male of full age, &c. occupying a house, warehouse, shop, &c., within the borough, during, &c., and also during the same time having been an inhabitant householder within seven miles of the borough, shall, if duly enrolled, be a burgess of the borough, and member of the body corporate.

Such petition having been presented from Manchester, the Queen, by the charter, incorporates the inhabitants of the borough of Manchester, comprised within six townships out of nine, altogether forming the parliamentary borough, and the petitioning body; and she declares, that that body corporate, by that name, shall have and exercise all the powers, &c. enjoyed by the boroughs named in the 5 & 6 Will. 4, c. 76, in the same manner, and subject to the same provisions, as if Manchester had been named in the schedule to the act. It is to be observed, that the charter seems to follow the statute of Victoria, in the indiscriminate use of the terms "inhabitant householders" and "inhabitants"; reciting a petition from the former, and a grant to the latter.

Then, in order to frame the first list of burgesses, i.e., [55] as I understand it, the list of those who shall be the original members of the body corporate, the Queen appoints David Price to make out a list of all inhabitant householders within the said borough, who shall possess the qualifications required by the 5 & 6 Will. 4, c. 76.

It is clear upon this statement, that David Price could not include in the list of burgesses a man otherwise qualified, occupying a warehouse, &c. within the six townships, but being an inhabitant householder out of them, and within seven miles. From the original incorporation, therefore, will be excluded a class of persons, who by the 5 & 6 Will. 4, c. 76, are made members of every corporation in the schedule of that act.

Two Questions arise; 1st, can the Queen make such an incorporation, and at the same time avail herself of the 1 Viet. c. 78, s. 49; in other words, is this a defect in the original scheme, which vitiates the charter; 2dly, what persons will it be the duty of the town-clerk and mayor, &c. to enroll on the burgess list under any succeeding formation and revision of it? The answer to the second may affect the answer to the first question, and therefore should be first ascertained.

Now assuming the body to have come into existence *de facto*, and the regular day to have come round for making the new burgess list, I conceive the town-clerk could only have looked to the 9th section of the first act, and must have put on the list all claimants entitled under that section. It would no more have been an objection to A. B., that he had been properly omitted by Mr. Price in the former year, i.e. that he had not been an original member of the body corporate, than it would have been to any householder within seven miles of an old scheduled corporation, otherwise qualified, that by the original charter of that corporation he was not one of the body corporate. The cases, in fact, would be the same. Edward I. (let me suppose)

incorporates the inhabitant householders, [56] or persons possessing any other prescribed qualification, within the city of B. The statute 5 & 6 Will. 4 says, that all persons occupying a shop within the borough, and being an inhabitant householder within seven miles, shall be burgesses. So here, her Majesty grants a charter to the inhabitant householders within the borough, possessing certain qualifications; the statute 1 Vict. c. 78, enables her to extend, and she has extended, the provisions of the same 5 & 6 Will. 4 to the persons so incorporated: then, as soon as the burgess list comes to be made out afresh under the latter statute, it will take in all persons having the same qualifications, who occupy shops, &c., and are inhabitant householders within seven miles of the borough.

If, then, this be a defect in the charter, it is not one of perpetual duration; it will not keep in permanent existence a corporate body, enjoying the powers given by the statute, but not constituted according to its provisions.

But is it any defect at all? They who assert that it is, seem to assume that the body corporate, as it comes into existence by the charter, must be in all respects, as to its component parts, the same before the provisions of the statute are extended to it as after; and this assumption seems made, because the extension must be by the charter itself; whence it is taken for granted, that the incorporation, and the taking effect of the extension, must be concurrent in time. But do the words of the 1 Vict. c. 78, s. 49, require this? or does the closest analogy which can be had recourse to, the case, namely, of scheduled corporations, make it reasonable to construe them so? The words themselves import an incorporation first; a body brought into existence, and then an extension to that body corporate, by a power beyond that of the prerogative, of something which the mere act of incorporation did not and could not give it. The case, moreover, of an old corporation was in many instances precisely this—that by the 9th section of 5 & 6 Will. 4, c. 76, a new class of members, not [57] contemplated by the original charter, became ingrafted, and acquired the corporate franchises.

Let me put this case—that upon the petition in question the Queen had incorporated the whole petitioning borough, and had made every inhabitant householder by name a burgess; and then, in the very terms of the 49th section of 1 Vict. c. 78, had extended the provisions of the 5 & 6 Will. 4, c. 76, to the burgesses so named and incorporated; on this supposition the very same difficulty would have existed which I am now considering; yet, as she would have clearly done, in the first step, no more than her prerogative warranted, and in the latter exercised neither more nor less than the powers given her by the statute, could the objection have availed? Does it not follow, that in a new corporation, the first list of burgesses may be confined to the inhabitant householders within the borough, though others may come in afterwards, when the burgess list comes to be re-made under the statute?

Hitherto I have assumed, that upon the statutory, or rather second and subsequent revisions of the burgess list, the inhabitant householders within seven miles must be included; this also is part of the assumption of the objectors, and it is a necessary part of the objection. But is this a necessary construction of the words of the 49th section, substantially inserted into the charter? The Queen grants to the body corporate, i.e. the inhabitant householders within the district, “to have and exercise all the powers, authorities, immunities, and privileges which are now held and enjoyed by the several boroughs named in the said act, in the like manner, and subject to the same provisions, as fully and as amply, to all intents and purposes, as if the said borough of Manchester had been included in the schedule to that act annexed.” These words may be satisfied, by extending to the body corporate, the object of the grant, all such powers, &c. as are applica-[58]-ble to an existing body corporate, and there is no necessity for holding, may, there may be some difficulty, some force put upon the words, in holding, that they include powers, &c. by which a new class of members is to be added at a subsequent period to the corporate body. It is unnecessary to affirm what is the true construction of the words; if the new class must be admitted, the difficulty is not serious in law; if it must not be, the difficulty does not exist in fact. On the whole, therefore, I conclude that the objection to the charter, founded on the formation of the first burgess list, ought not to prevail.

Lastly, it is urged that the constitutional power is exceeded by that part of the charter which appoints Mr. Rushton to revise the burgess list; inasmuch as the Crown has thereby erected a court not proceeding according to the common law, which can only be done by the legislature. If this objection were founded in fact, and the conse-

quence were to follow, that the first burgess list had been revised (for the objection only applies to the revision) by an officer exercising unconstitutional powers, I am not prepared to say that the charter would thereby be wholly vacated; but I do not think it necessary to examine this point, because it seems to me that the objection does not exist in fact. The charter merely directs Mr. Rushton to revise the list "in the manner directed in the said Act for regulating Municipal Corporations." These are very general words: they direct him to discharge the duty cast upon him with attention to a model that was then well known, and which, so far as he could legally do it, would be convenient for him to follow; but there is nothing which compels him to do anything illegal, and we must not force words beyond their necessary import for the sake of making them objectionable.

I believe no objection to the charter remains now unconsidered, which does not range itself with one or other of those disposed of. In going through them, I have [59] unavowedly run to greater length than I intended or wished, and therefore I have omitted purposely other arguments which had occurred to my mind, leading to the same conclusion. Upon the whole, I have satisfied myself, as completely as I could hope to do on a subject so full of various points, and presenting so many real difficulties, that no defect has been made out in the charter which would justify me in holding it void.

Still, however, there remains an objection urged against the plea; that in alleging the petition from the town council for a separate court of quarter sessions, it only avers that it set forth "the matters in and by the said act, &c. in that behalf required and directed," without stating in detail the particulars. This objection must now be considered as if it arose on general demurrer, and if the pleading be good in substance, cannot avail. I do not go through the numerous cases cited on either side in this part of the argument. The question seems to me to be one of principle. I have always understood it is no substantial objection to an issue, that it raises for the jury a question mixed up of law and fact. The issues most frequently raised are such, and from the nature of things must be such. I have also always understood, that where particulars going to form a conclusion of fact are to be found in any other part of the pleadings, or in a public act of Parliament, of which the Court must take judicial cognizance, it is not a defect in substance, if those particulars are not set out in detail in the pleading which relies on them, but alleged by way of reference; for that which is so referred to is in substance alleged. All that can be alleged against that averment falls within these two rules. It does not content itself with stating that the council duly petitioned, which would certainly not be enough, for that would call on the jury to decide what was a proper petition; but it says that the petition contained all the particulars which the statute requires and directs. Here is an issue to be found by a [60] comparison of the allegations of the petition with the requirements of the statute. The Judge is to direct the jury as to the latter, subject to exceptions and revision by a court of error, if he misinforms them: they are to examine for themselves as to the former; and their verdict will be compounded of both. I see no difficulty in traversing such an averment, and therefore I think the objection falls to the ground.

WILLIAMS, J. This was an action on the case for disturbing the plaintiff in his office of coroner for the county of Lancaster.

The defence, in substance, is that the defendant did the act complained of in execution of his duty as coroner of the borough of Manchester, to which office the defendant claims to have been duly appointed. The plea states, that after the passing of the 5 & 6 Will. 4, c. 76, and 1 Vict. c. 78, "the inhabitant householders of the borough of Manchester petitioned the Queen to grant to them the said inhabitant householders a charter of incorporation; that notice of the petition being taken into consideration by the Privy Council was published in the *London Gazette*; that it was taken into consideration by the Privy Council, who advised the Crown to grant it, and that it was granted accordingly in the manner therein stated, and accepted by the said inhabitants of the said borough, comprised within the district therein specified; that the town council petitioned the Queen for a separate court of quarter-sessions, which was granted, whereupon the town council appointed the defendant coroner for the said borough.

The replication sets out upon oyer the charter of incorporation, and grant of a separate court of quarter sessions, in extenso; and then states, "that the inhabitant

householders of the borough of Manchester did not petition her most gracious Majesty to grant to them the said inhabitant householders a charter of incorporation, and that such [61] charter was not duly accepted and received by the inhabitants of the said borough of Manchester” modo et formâ; upon which issue was joined.

And, upon the trial of that issue, a bill of exceptions was tendered to the direction of the learned Judge, which raises the first question for our consideration; the second being, whether, as the whole record is brought before us, the title of the defendant, as coroner of the borough of Manchester, does thereupon appear to be duly established in point of law.

With a view of coming to a correct decision upon the first question, it is necessary to advert, with particularity, to the precise state of the case before the learned Judge; what evidence was tendered before him, and in what manner; what was his direction, and the nature of the exception thereto. Now, from the bill of exceptions it appears, after some preliminary statement of a requisition to the boroughreeve and constable of Manchester to call a meeting of the “rate-payers,” to consider the propriety of petitioning the Queen for a charter, of a meeting having been held, and a committee appointed to draw one up—“that a petition was signed by 4000 inhabitant householders, the greater part being rate-payers and inhabitant householders of the district mentioned in the charter, the same not being a majority of the inhabitant householders, the whole number being 48,000; that such petition was presented, and referred to the Privy Council, and the charter granted and accepted as in the plea alleged.” The bill of exceptions then states, that the plaintiff gave in evidence—“that 6000 such persons as aforesaid, after the first petition had been presented to her Majesty, and before the day for taking it into consideration by the Privy Council, petitioned her Majesty not to grant the charter in question;” whereupon the Judge declared his opinion to the jury, that “notwithstanding such petition as last aforesaid, her Majesty had authority and power, on the recom-[62]-mendation of her Privy Council, to grant the said charter as on the first-mentioned petition, by virtue of the statute in that case made and provided, and with that direction left the case to the jury. Whereupon the counsel for the plaintiff excepted to the said opinion and direction of the said Judge on the said issue, and insisted, that the facts proved were sufficient to shew that her Majesty had no authority or power to grant such charter as aforesaid, upon the first-mentioned petition.”

And upon this first question, as there was a total disagreement, in the course of the argument, as to what actually was the direction of the learned Judge, I think it right to state at the outset, that I entirely agree in the opinion with (I believe) the whole of my learned Brothers, that we are bound to look at what appears from the record to have been propounded to the learned Judge at the trial, his direction thereon, and the precise exception thereto, without noticing any other facts or circumstances whatever. It was, indeed, contended by the plaintiff’s counsel throughout, that the direction in substance was, that proof of the first-mentioned petition, under the circumstances above set forth, did ipso facto, as a matter of law, satisfy and establish the affirmative of the issue cast upon the defendant; and if such had appeared from the bill of exceptions itself to have been the direction of the learned Judge, my conclusion would have been very different from that at which I have now arrived; because I am quite satisfied, that the fact of a petition having been presented to the Queen, upon which there is a precise issue, if required to have been so submitted, ought to have been decided by the jury, and by none other whatsoever; and for such purpose, that the first-mentioned petition, with the accompanying circumstances, ought to have been submitted to their consideration.

But from the bill of exceptions I cannot collect that any request was made to submit such question to the [63] jury, and refused by the learned Judge, and that therefore there was an exception to his opinion. On the contrary, we find that the exception was, (not that the learned Judge had taken upon himself to decide as a matter of law, but) “that the facts proved (or, in other words, the second petition by the larger number) were sufficient to shew that her Majesty had no authority or power to grant such charter upon the said first-mentioned petition;” whereas, in my opinion, such second petition, of itself and without more, necessarily had no such effect; and that is all that, from the bill of exceptions, the learned Judge appears to have decided. I cannot therefore say that anything wrong was done. But now, having heard the judgment of my Brother Coleridge, I beg leave to say, that if I had

thought (as he does) that the question as to the direction of the learned Judge, as objected to by the plaintiff's counsel in argument, had been raised, I should have arrived at the same conclusion.

I come now to the second question, which is, I believe, admitted on all hands to be one of equal importance and difficulty.

By the 7 Will. 4 & 1 Viet. c. 78, s. 49, it is enacted, that if there be such a petition as has been before noticed, it shall be lawful for the Crown to grant a charter to any town or borough, and to extend to its inhabitants, "within the district to be set forth in such charter," all the powers and provisions of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76. From which it appears, that the Crown is thereby enabled to create a corporation with larger powers than would be within the competence of its unaided prerogative. I allude, of course, to the power of taxing, which, under the latter act, may be resorted to in aid of the borough fund, if requisite. Therefore, although the general power of the Crown to create corporations has been in no degree questioned,—but the contrary; yet, for the purpose of creating such a corporation as is described [64] in the said 49th section, and also in the charter itself, it was requisite it should be such a one as would admit of having the said powers and provisions of the Municipal Corporation Act engrafted upon it. And this, in my opinion, has created the difficulty,—arising from the question whether such purpose has been effected by legal means,—a difficulty, I must add, which the two very learned and able arguments addressed to us have not had the effect of removing.

The charter itself (which I now throughout assume to have been founded on a valid petition), in conformity to the remarks just made, professes to rest, for its authority, upon the prerogative of the Crown and the provisions of the Municipal Corporation Act, and not upon the former only. It then proceeds to incorporate the inhabitants of the borough of Manchester, within certain limits (to be hereafter more particularly noticed), under the title of the mayor, aldermen, and burgesses of the borough of Manchester, in the county of Lancaster, with the same powers and provisions as the boroughs named in the Municipal Corporation Act, as fully as if it had been included in the schedule to the same. After some regulations, not material to the present purpose, it directs, "that David Price, Esq., do, on the 29th of October in the present year, make out an alphabetical list of all inhabitant householders within the said borough, who shall possess the qualifications required by the said Municipal Corporation Act to be possessed by burgesses of any of the boroughs enumerated in the said act. And, in order to understand the importance of the duty thus devolved upon David Price, it is necessary to consider the object and use of the said burgess list. It is, in one word, to determine who are to compose the great body of the corporation, all persons not upon that list being actually excluded from it: a copy of the said list is, by the 15th section of the 5 & 6 Will. 4, to be open for inspection in the manner prescribed; [65] and by the 22nd section, such list, when revised, is to be the roll, to determine who are to vote at certain elections therein specified. Of the extensive nature of the inquiry some judgment may be formed, when it is recollected that, by the 9th section of the said act, persons possessing certain property may be enrolled, though living, not within the borough, but within seven miles of it, if they have been rated and paid to the relief of the poor within a certain time. Again, aliens may not be enrolled, nor persons who have received parochial relief within a time limited. These particulars are enumerated for the purpose of shewing that the duty deputed to Price is nothing like ministerial or formal; but that, for its due execution, much labour and inquiry are obviously indispensable. I come now to his means:—By the 15th section of this Municipal Corporation Act, the overseers are directed to make out the burgess list, and they, it must be admitted, have the means of doing it. They, by reference to authentic documents of their own making, or at least in their custody, can prepare such a list possessing the requisite qualification. By the assessment of the inhabitants to the relief of the poor, they do know who has a right to be placed on the list, as being rated and having paid to the relief of the poor. But as to Price, it is not so with him. He cannot be acquainted with the particular cases of 48,000 individuals; he must seek for information from others, or from reference to books in the possession of the parochial authorities. Yet I can discover no provision to empower him to command the attendance of a single person, or the production of a single book or document. Nor do I see how Mr. Price is compellable to act if he should have

declined the duty. Nevertheless, under such circumstances, no control is left in the Crown,—no power of adoption, or rejection, or modification; the deputation is absolute and complete. It has however been contended, (and from the reception which it has met with, I must presume that [66] there is much weight in the argument), that, although it be true “that none but the king alone can create a corporation,” and although this be, as I believe it is undoubtedly, one of the most important branches of the prerogative, the deputation in question may be defended upon the principle, that the king may permit a subject to name the persons and powers of the corporation when created, for that the king still does it, inasmuch as “qui facit per alium, per se ipsum facere videtur,”—a homely maxim, in my opinion, to apply to such a subject, however applicable to cases of agency in ordinary transactions between A. and B. It is true, that in *Ramsey's case*, reported at length in 10 Rep. 27, where it was held that the words of the letters patent were sufficient to create a chantry “secundum ordinationem per R. Ramsey fiendam,” it was also held that the nomination of the first chaplain to pray for the souls of Ramsey and his wife might well be by the said Ramsey, and not by the king; and that in the case of *Sutton's Hospital* (reported in the same book, and in which *Ramsey's case* is given at length), the said hospital having been incorporated by letters patent, it was decided that the authority deputed thereby to Sutton might well be sustained. It is to be observed, that in the passage in Blackstone, to which we were referred (1 Bla. Comm. 474), it is said that a contrary doctrine had formerly prevailed. But, independent of this, I cannot think that in *Ramsey's case*, in which the purpose was purely private, and for which a consideration had been paid, the nomination of the first chaplain, or in the case of *Sutton*, where a charitable purpose was intended, (so declared in the letters patent), and everything to execute that purpose was to be done upon the estate, and (as the letters patent repeatedly recite) “at the only costs and charges of the said Sutton,” the nomination by him of the first master, bears any resemblance to the authority deputed in the present instance. I must say, that I am not satisfied with the correctness of the in-[67]-ference attempted to be drawn from these authorities,—and I am aware of none other. I cannot discover the similarity between those cases and the present, in which a great political measure is contemplated, affecting interests so various and extensive,—the prerogative of the Crown and the public welfare. If, indeed, the proceeding, which I have been considering, had been preliminary, and there had been any subsequent adoption by the Crown, the case, in my opinion, would have been widely different. Seeing, however, that the creation of corporations is an undoubted branch of the royal prerogative, I think that the delegation of a discretionary power (for such, for the reasons I have before given, I must consider this to be)—a power, too, of such importance and magnitude as to have the effect of bringing the corporation into practical existence, trenches upon the prerogative, and is an abridgment of it, and that the charter itself is, therefore, illegal and void.

This being the result of the best opinion I have been enabled, upon consideration, to form upon this part of the case, I do not consider it needful to occupy time by examining the revising powers confided to Mr. Rushton. Nor shall I advert, seriatim, to the objections which were made in argument, not before noticed, because I have not felt, as to any of them, (and amongst the rest I include the form of the allegations in the plea, already noticed by two members of the Court) an insuperable difficulty. There is one exception, however, in respect of the objection which was made to the limits of the corporation, as defined by the charter, and the persons to whom the privileges of the corporation are thereby made to extend. By the 49th sect. of 7 Will. 4 & 1 Vict. c. 78, it is enacted (as has already been observed), that the charter, thereby to be granted, is “to extend to the inhabitants of any town or borough within the district to be set forth in such charter.” And accordingly, the charter does define, with great precision, the boundaries of the borough of Manchester, and declares [68] “that the inhabitants of the borough, comprised within the limits thereinbefore described, and their successors, shall be one body politic and corporate,” under the name and title before mentioned. And the limits before described are “the district within nine townships therein enumerated, which (it is added) comprise the boundaries of the parliamentary borough of Manchester, as the same were settled and determined by an act passed in the 2nd and 3rd years of his late Majesty, intituled ‘An act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in England and Wales, in so far as respects the Election of Members to serve in

Parliament.'” But by the 9th section of the Municipal Corporation Act, it is provided that persons who, at a time, and subject to certain restrictions, therein specified, and before alluded to in the observations made upon a former part of this case, “have occupied any house, warehouse, counting-house, or shop,” if duly enrolled as prescribed, shall be burgesses of the borough and members of the body corporate, if, during such occupation, they shall have been inhabitant householders of the said borough, or within seven miles of the same. Except, therefore, such inhabitant householders as are last mentioned, who have resided not in the borough, as expressly defined by the charter, though within seven miles from it, can be deemed “inhabitants of the borough,” they are virtually excluded from the incorporation, though by the said 9th section, in terms, entitled to it.

It is true that Lord Coke, in his reading upon the Statute of Bridges, explains that the word “inhabitants” may have different meanings, and may be applicable to persons differently circumstanced, and particularly as to the actual residence. The meaning of the word, in each case, must, however, be determined in a great degree by the subject to which it is applied. In the present instance, the word is used in reference to a certain district, carefully and specifically defined. And, so considering it, I much [69] doubt (and I do not think it necessary to say more upon this point) whether the word “inhabitants,” in this charter, can be properly understood as applicable to persons resident out of the limits of the borough itself, so limited and prescribed. And if not, persons entitled by law are excluded by the charter, and, for that reason also, I should think it would be void.

Upon the whole, I am of opinion that there should be judgment for the plaintiff in error.

PATTESON, J. In this case two questions arise. First, whether the direction of the learned Judge before whom the cause was tried was correct or not. Secondly, whether, upon the whole record, the title of the defendant as coroner of the borough of Manchester is made out. If the latter of these questions be decided in the negative, the former will become immaterial; but as it appears to me that the latter question ought to be decided in the affirmative, it is necessary to consider the former question also.

The defendant's plea states, that, after the passing of the 1 Vict. c. 78, the inhabitant householders of Manchester did petition the Crown to grant to them, the said inhabitants, a charter of incorporation; also, that notice of the petition being taken into consideration by the Privy Council was published in the *London Gazette*, that it was taken into consideration by the Privy Council, who advised the Crown to grant it, and that a charter was accordingly granted to the inhabitants of the borough of Manchester, with the exception of the townships of Newton, Harpurhey, and Bradford. It then sets out the charter, and states that the same was duly accepted and received by the said inhabitants of the said borough of Manchester, comprised within the said district; and proceedings were taken under it to bring the corporation into active existence. It then states that the town council were desirous that a separate court of quarter sessions of the peace should be holden in and for the said borough, and did duly signify the same [70] by petition to her said Majesty in council, setting forth the matters in and by the said act of Parliament, intituled “An Act to provide for the Regulation of Municipal Corporations in England and Wales,” in that behalf required and directed. That her Majesty thereupon granted such separate court of quarter sessions, after which the town council appointed the defendant the coroner for the said borough. The replication sets out upon oyer the charter of incorporation, and the grant of a separate court of quarter sessions; it then proceeds, “which being read and heard, the said plaintiff says, that the inhabitant householders of the borough of Manchester did not petition her most gracious Majesty to grant to them the said inhabitant householders a charter of incorporation; and that such charter was not duly accepted or received by the inhabitants of the said borough of Manchester, in manner and form as in the said plea is alleged.” The defendant joined issue, and the jury found for the defendant, in the terms of the issue.

Upon this state of the record, the second question arises. But in order to raise the first question, the bill of exceptions must be looked to.

It states that the defendant gave in evidence and proved, that a requisition signed by many of the inhabitant householders of the borough, was presented to the borough-reeve and constables of Manchester, to call a meeting of the rate-payers of the said

borough, to consider the propriety of petitioning her Majesty for a charter. That a public meeting of the rate-payers was held ; that 1000 attended, and a large majority agreed to petition, and appointed a committee to draw it up : that it was drawn up, and signed by 4000 inhabitant householders, the greater part being rate-payers and inhabitant householders of the district mentioned in the charter ; but that those who signed were not a majority of the inhabitant householders, who amounted in number to 48,000. That the petition was presented to her Majesty, and referred to the Privy Council, as in the [71] plea mentioned ; and further, that the charter in the plea mentioned was accepted as in the plea alleged.

The bill of exceptions then states, that the counsel for the plaintiff, for the purpose of shewing that her Majesty had not authority to grant the charter in question under the said petition, gave in evidence that 6000 of such inhabitant householders, the greater part being rate-payers and inhabitant householders of the district mentioned in the charter, after the first petition had been presented to her Majesty, and before the day for taking it into consideration by the Privy Council, petitioned her Majesty not to grant the charter in question : Whereupon the Judge declared his opinion to the jury, "that, notwithstanding such petition as last aforesaid, her Majesty had authority and power, on the recommendation of her Privy Council, to grant the said charter as on the first-mentioned petition, by virtue of the statute in that case made and provided, and with that direction left the case to the jury. Whereupon the counsel for the plaintiff excepted to the said opinion and direction of the Judge on the said issue, and insisted that the facts proved were sufficient to shew that her said Majesty the Queen had no authority or power to grant such charter as aforesaid upon the said first-mentioned petition."

The assignment of errors somewhat differs in language from the bill of exceptions, but perhaps not materially ; and at all events this Court of Error is bound to look to the exceptions actually tendered, and to decide upon them only. Very different constructions were put upon these exceptions by the counsel for the different parties, in the argument. For the plaintiff it was contended, that they shew the Judge to have directed the jury, that not only the second petition did not necessarily invalidate the first, but that the first was in itself good, and was in point of law the petition of the inhabitant householders of Manchester ; whereas the plaintiff insisted that the jury were to determine the issue upon all the evidence. [72] For the defendant, on the contrary, it was contended that the direction of the Judge amounted only to an opinion that the second petition did not necessarily invalidate the first, which might, notwithstanding that second petition, be the petition of the inhabitant householders of Manchester, and give her Majesty power and authority ; but that he left that question to the jury, and did not tell them that in point of law it was the petition of the inhabitant householders : whereas the plaintiff insisted that the second petition was alone sufficient in point of law to invalidate the first.

If the plaintiff's construction be correct, I should be of opinion that the learned Judge's direction was wrong. The parties in this cause have put themselves upon the jury by an issue, not whether a petition purporting to be that of the inhabitant householders was presented, but whether the inhabitant householders did petition ; whether that which was done was their act ; and it seems to me that the facts proved by no means converted this issue into an issue of law. I apprehend that the petition of 5000 persons out of 48,000 may, under certain circumstances, be fairly considered as the petition of all ; but that is a question for the jury under all those circumstances. Again, I apprehend that a counter petition, more numerous signed, but still not by a majority of the whole number, may or may not shew, according to a variety of accompanying circumstances, that the first petition cannot fairly be considered as the act of the whole ; but still it is for the jury to determine that question.

It was indeed argued, that the decision of the Privy Council, in advising her Majesty to grant the charter, was conclusive to shew that the inhabitant householders had petitioned. But I cannot at all agree to that position, looking at the 49th section of the 1 Vict. c. 78. I entertain no doubt that the existence of a petition by the inhabitant householders is assumed as the foundation of a [73] reference to the Privy Council ; and that the legislature did not intend them to determine whether there was such a petition or not, but to advise her Majesty whether to grant the prayer of a petition assumed to exist. Doubtless they were intended to hear objections to it, otherwise the giving notice in the *London Gazette* of the time of their taking it into

consideration would be utterly useless: and I do not at all mean to say that the circumstances under which the petition was drawn up might not well influence them in their advice to her Majesty; but the language of the section entirely satisfies my mind, that the legislature did not make them the tribunal to determine conclusively upon the sufficiency of the petition.

I see, therefore, no tribunal which can determine such a disputed question of fact, but a jury; and as the parties have put themselves upon the jury, I should think the direction of the learned Judge wrong, if it had the effect of withdrawing that question from the jury, and if exceptions were taken to it on that ground. But in the present case, looking to the bill of exceptions only (which is all that I am at liberty to look at for this purpose), I am of opinion that the fair construction of the exception is, not that the Judge withdrew the question from the jury, but that he left it to the jury, with the opinion and in the way contended for by the defendant; and further, that what the plaintiff insisted on was, not that the whole question should go to the jury, but that the Judge should direct them that in point of law the second petition was sufficient by itself to invalidate the first, which if he had done, he would in my opinion have undoubtedly directed them wrong. Upon the whole, therefore, it seems to me that the direction of the Judge was substantially right; and at all events, that if it did withdraw the question from the jury, and so was wrong, the exceptions do not point out that objection, and the plaintiff is not at liberty to avail himself of it.

[74] I come now to the second question, which arises upon the whole record, and is one of great importance and of much difficulty.

The act of Parliament, 1 Viet. c. 78, s. 49, enacts that if the inhabitant householders of any town or borough shall petition for a charter, it shall be lawful for her Majesty (if she should think fit, by the advice of her Privy Council, to grant the same,) to extend to the inhabitants of any such town or borough, within the district to be set forth in such charter, all the powers and provisions of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76. This is not in derogation or abridgment of the power of the Crown to grant charters of incorporation at common law, which it may still do without any petition; but it is to enable the Crown, in case of any such petition, to extend to any new corporation, when created, the powers of the Municipal Corporation Act, some of which, as for instance the taxing the inhabitants by a borough rate, may not have been grantable by the Crown at common law. The act does not profess to enable the Crown to grant charters, but only, if it shall think fit to grant them upon petition, to extend to the grantees, by those charters, certain powers and provisions.

Upon this second question, it must be assumed that there was a petition, as the jury have found; therefore the extension to the new corporation of the powers and provisions of the Municipal Corporation Act is good, if the charter of incorporation be itself good, either at common law or under the act in question, and is in such terms, and of such a nature, that the powers and provisions of the Municipal Corporation Act are applicable to it. An objection, indeed, arises connected with the petition, which it will be proper to notice in this place. It is said that the charter is void, because it is granted to a different body of persons from those who petitioned for it. The petition must be taken to be by all the inhabitant house-[75]-holders of the borough of Manchester, whereas the charter is granted to the inhabitants of the borough of Manchester, with the exception of three townships.

First observing that this would be no objection at common law, because no petition at all is required at common law; and also observing, that by this record it appears that the body to whom the charter is granted, who jointly with the others were petitioners, have duly accepted and received the same, I am of opinion, that even if the power to grant the charter depended, as I admit that the power of extending it does, upon the act of 1 Viet. c. 78, the charter is in this respect fully warranted by that act.

The act requires that the inhabitant householders of the borough should petition; that means, of course, of the whole borough; a petition from the inhabitant householders of part of the borough, expressly for a charter to them, exclusive of the other inhabitant householders of the borough, would not be sufficient to satisfy the words of the act. It then empowers the Crown, by such charter, to extend the powers of the Municipal Corporation Act to the inhabitants of any such borough, within the district to be set forth in such charter. The word "inhabitants" here appears to me to mean inhabitant householders, otherwise the act itself has provided, that the petition shall

be by one body, viz. inhabitant householders, and has then assumed that the charter will be granted to the same description of persons, and then provided that her Majesty may, by the same charter, extend the provisions of the Municipal Corporation Act to another body, viz. the inhabitants generally, whether householders or not—a construction of the act which, I confess, seems to me to be unwarrantable. What then is the meaning of the words “within the district to be set forth in such charter?” Surely they are not words of enactment, that the charter shall set out the boundaries of the whole borough, but words of description, following as they do the words “inhabitants of such borough,” and must mean to empower [76] the Crown to extend the Municipal Corporation Act to the inhabitant householders of the whole borough, or of such part of it as shall be within the district to be set forth in such charter. I do not feel the weight of the observation, that if so, the Crown might grant to a small portion, who had not joined in the petition at all; for if it did, that portion need not accept the charter: nor of the observation, that if all petitioned, and the charter were granted to a small portion only, it would be contrary to the real wish of all, or at all events prejudicial to those omitted. If it were contrary to the wishes of all, including those to whom it was granted, the grantees would not accept it; and if not, and they do accept it, I do not see how those omitted are prejudiced by having a corporation near them: they are not placed under the power or control of that corporation, nor affected by it, any more than persons at a distance. I cannot think that the legislature intended to oblige the Crown to incorporate all the inhabitants who should petition, and yet to enable the Crown to extend the Municipal Corporation Act to a part only of such corporation, so that half, for instance, of the corporation should be under the provisions of the 5 & 6 Will. 4, c. 76, and the other half not. It would be impossible to govern a borough with such a corporation. Nor can I think that the words “within the district to be set forth in such charter,” placed where they are, relate merely to the defining the limits of the respective jurisdictions of the county and borough magistrates. I see no way of giving the words a reasonable construction except that which I have already stated, and as empowering the Crown to extend the Municipal Corporation Act to part of the inhabitant householders; and as it seems to me impossible that the persons who are incorporated, and those to whom the Municipal Corporation Act is extended, should not be the same, I think that the Crown may, under the 49th section of 1 Vict. c. 78, upon a petition from all the inhabitant householders, incorporate [77] a part, and extend the Municipal Corporation Act to that part.

The next, and apparently most formidable objection, is, that the Crown has by this charter delegated its authority in a manner not warranted by law, viz. by directing David Price to make out a burgess list, or, in other words, to declare who shall be the corporators. Assuming that the Crown cannot delegate to a subject the right of creating a corporation, a point upon which I should wish not to be concluded by anything here said, let us consider whether what has here been done amounts to any such thing. The charter grants and declares in terms, “that the inhabitants (thereby meaning the inhabitant householders) of the borough of Manchester, comprised within the district hereinbefore described, and their successors, shall be for ever hereafter one body politic and corporate,”—and so goes on in the usual form; and adds—“and be for ever hereafter persons able and capable in law to have and exercise all the powers, authorities, immunities, and privileges which are now held and enjoyed by the several boroughs named in the said act for regulating municipal corporations in England and Wales, in the like manner, and subject to the same provisions, as fully and as amply, to all intents and purposes whatsoever, as if the said borough of Manchester had been included in the schedule to that act annexed.”

By these clauses, the corporation is created; the indefinite body of whom it is composed are pointed out, viz. the inhabitant householders; and the provisions of the Municipal Corporation Act are extended to it, whereby, amongst other things, certain qualifications are required in the inhabitant householders, to entitle them to be on the burgess roll. These are the acts of the Crown itself; no subject interferes or is concerned in them. All the rest of the charter is but machinery, as it were, to set in motion the corporation so created, and machinery contrived, as near as circumstances would admit, after the model of that [78] in the Municipal Corporation Act, which, being applicable only to corporations already existing, could not be in every particular adopted in such a case as the present.

It cannot be denied that the Crown might have set out in the charter itself a list

of all the inhabitant householders within the said borough, who should possess the qualifications required by the Municipal Corporation Act, and might have named the first mayor and aldermen, and councillors. Instead of this, the clause is inserted, directing David Price to make out a list of all the inhabitant householders so qualified, which list Edward Rushton, Esq., barrister-at law, is to revise. These gentlemen are not to exercise any choice or predilection of their own,—not to select and nominate who shall be corporators or burgesses; but to make out a correct list of those who have been already made so by the act of incorporation; and if any persons claiming to be put on that list had been improperly omitted by them, they would, I conceive, have been entitled under the 24th section of the same act, 1 Vict. c. 78, to apply to the Court of Queen's Bench for a mandamus, in order to their insertion in the list; or if any had been improperly inserted, they would have been liable to be removed by *quo warranto*. I am not now considering whether the powers given to those gentlemen are sufficient with reference to the Municipal Corporation Act, or whether the list to be made out and revised by them embraces all the persons it ought to embrace; but whether, assuming the charter to direct such a list to be made as would be made under the Municipal Corporation Act, there has been an illegal delegation of the power of the Crown; and it seems to me that the very circumstance of their duty being confined to making a list of persons already incorporated by a general description, containing certain qualifications, and not being discretionary as to the selection of some one of many persons so qualified, is sufficient to shew that they are not delegated to create a corporation in [79] any sense. It is not necessary to go so far as to the seventh resolution in *Sutton's Hospital case*, but what is there laid down seems to me to be very applicable to this case, even if there had been such a discretionary power confided to Mr. Price or Mr. Rushton. It is there said, "When the king, by his charter, reserves as well the nomination of the persons as the name of the incorporation to a common person, who shall be the founder, there he (that is, the common person) ought to name the parties, and declare by what name they shall be incorporated; and there many times, although it be superfluous, he uses these words, *fundo, erigo, &c.*, or such like; and when the common person has done it, and declared it in writing according to his authority, then they are incorporated by the king's letters patent, and not by the common person, for he is but an instrument, and the king makes the corporation in such case, in the same manner as if all had been comprehended in the letters patent themselves; for it is true that none but the king alone can create or make a corporation, as it is held in 49 E. 3, 4 a., 49 Ass. 8; but *qui per alium, facit per seipsum facere videtur*." It is true that that was a private corporation, and not a municipal one as here; but the same principle appears to me to govern both, although in the latter case much greater caution may be requisite in the application of it. For these reasons, it seems to me that what has been done here cannot properly be said to be a delegation of the power of the Crown at all, or if it can, that it is a perfectly legal and justifiable delegation.

Several other objections were taken to this charter, all founded on the supposition that it is a charter granted under the powers given to her Majesty by the act 1 Vict. c. 78. Perhaps it would be sufficient to answer that the charter is not so granted, though the incorporating of the provisions of the Municipal Corporation Act is under those powers. The objections are, that the steps directed [80] by this charter to be taken in the first election of mayor, aldermen, and councillors, and in the formation of the burgess list, are not conformable to the Municipal Corporation Act, either in respect to the times when the elections are to take place, nor to the persons who are to preside, nor to those who are to make out and revise the lists, and in respect to other particulars. One general answer may be made, viz. that the provisions of the Municipal Corporation Act cannot be strictly pursued in the first instance in the formation of a new corporation, for many of them pre-suppose an existing body; that this charter does in most parts of it follow the provisions of that act, as near as circumstances would permit; that it is nowhere contradictory to them, and that being a charter granted by the Crown under the authority which it has at common law, the variances which are pointed out cannot be of any consequence, unless they contravene some rule of the common law. This is the general answer; but there are two objections which require more particular discussion. First, that this charter does not include persons having shops in the borough, and residing within seven miles, and so is contradictory to the Municipal Corporation Act. Secondly, that it creates a court

for the revising barrister, with powers different from those of the common law, which the Crown had no power at common law to do.

The first of these objections arises upon the clause in the charter, which directs David Price to "make out an alphabetical list of all inhabitant householders within the said borough, who shall possess the qualifications required by the said act for the regulation of municipal corporations in England and Wales, to be possessed by burgesses of any of the boroughs enumerated in the said act." It is said that this clause does not include a class of persons mentioned in the 9th section of the 5 & 6 Will. 4, c. 76, the words of which are,—“every male person of full age, who shall have occupied any house, warehouse, counting-house, [81] or shop within any borough, and also during the time of such occupation shall have been an inhabitant householder within the said borough, or within seven miles of the said borough.” It is contended, in answer to this objection, that the words of the clause in the charter are not to be taken in their strict sense, as descriptive of only one class of the inhabitant householders mentioned in the 9th section of the act above cited, but in conjunction with the following words—“who shall possess the qualification,” &c., and that they fairly mean an alphabetical list of all inhabitant householders connected with the said borough, who shall possess the qualification required. That such may have been the intention of the clause in the charter is very probable, considering that the charter expressly extends the powers and provisions of the Municipal Corporation Act to the newly created corporation; but such a construction appears to me to amount, in truth, to striking out the words “within the said borough” altogether, which, I apprehend, cannot be done. It was argued, that those words might be transposed, and the clause read as if it was, “to make a list of all the inhabitant householders possessing the qualification required by &c., within the said borough;” but this would be contrary to all rules of construction, and would give the clause a totally different sense from what the words fairly import. It was further contended, that although Mr. Price might not have power to insert the names of the persons in question in the burgess list, Mr. Rushton, the revising barrister, might have done so. This seems hardly possible, because the revising barrister’s power extends only to the correcting that which has been improperly done; and if the persons in question were properly omitted by Mr. Price, they could not be considered as having any rightful claim, which would authorize the revising barrister to put them upon the list. The same observation applies to any remedy by mandamus, which is given only to those who are improperly omitted.

[82] If the words of this clause of the charter do not authorize the insertion of the names of persons occupying shops, &c., within the borough, and being inhabitant householders out of it, but within seven miles of it, then the first burgess list must necessarily have differed from that directed to be made under the Municipal Corporation Act; neither, perhaps, could this be avoided. But it is only the first burgess list which would so differ. The charter incorporates the inhabitants of the borough, and extends to them the provisions of the Municipal Corporation Act. Then when the time came for the burgess list to be made out under the provisions of that act, doubtless the persons in question would be included, as being entitled to be on the list by the joint operation of the charter and the act, although they were not on the first burgess list, owing to the imperfection of that list, whether necessarily arising from the state of things, or accidentally from the mistaken wording of the charter. The imperfection is not of a permanent nature, existing in the creation of the corporation; for, as I have already attempted to shew, the corporation was created before the burgess list was formed, and that list is no part of its creation: but the imperfection is confined to the first list, and does not render the charter inconsistent with or incapable of having the provisions of the Municipal Corporation Act incorporated in it, and therefore does not vitiate it.

As to the second objection, it arises upon the 18th, 19th, and 20th sections of the Municipal Corporation Act, which require the mayor and assessors to hold a court for revising the lists every year after the first, and a barrister to revise the first list in the place and stead of the mayor: then the clause in the charter provides that Mr. Rushton shall revise the first list in the manner directed in the act; therefore, it is argued, he is a court, and as he does not proceed according to the rules of the common law, the Crown cannot of its own authority create such a court. [83] Now, in the first place, the right to extend the powers and provisions of the Municipal

Corporation Act to this new corporation already created, would justify the Crown in creating the barrister's court; and the appointment of the barrister by the Crown instead of the Judge of assize would not vitiate it, inasmuch as it was not possible that the Judge pointed out by the act should in all cases name the barrister, therefore he must be named in some manner *cypres*. But even supposing the first revision to have been by a person who was not legally constituted a court, and supposing that neither he nor Mr. Price could be compelled to do what the charter directs them to do, or punished for doing it improperly, and that they were not furnished with powers sufficient to enable them to do with certainty that which they were directed to do, still this record shews that this charter has been accepted by the persons incorporated, that it has been acted upon, that a burgess list has been made, and elections have taken place under it: and I apprehend that it does not lie in the mouth of a mere stranger, as this plaintiff is, to take objections to the mere form of proceedings, although he may shew positive illegality in the charter. Nor do I see how the Crown could have given to any other persons, not even to those who are pointed out by the Municipal Corporation Act, any powers greater or more effectual than those given by this charter to Mr. Price and Mr. Rushton.

This brings me to the last objection, viz. that it is not shewn by the record that there was a sufficient petition by the town council for a separate court of quarter sessions.

The allegation is, that their petition "set forth the matters in and by the said act of Parliament, intituled, &c., in that behalf required and directed." This allegation is not traversed; and indeed the objection is, that it is not traversable; that it is too general; and that the contents of the petition ought to have been set forth.

This is a question of special pleading, as to which several [84] authorities were cited, but none of them, as it seems to me, are directly in point. I cannot see why this allegation might not have been traversed in the terms of it. It would then have been an issue, as many are found in records every day, composed partly of fact, partly of law; of fact, as to the actual contents of the petition; of law, as to their sufficiency. However, at the most, the allegation is but a defective statement of the petition, not a statement of a defective petition, and should have been made the matter of special demurrer, and if it be insufficient pleading, is cured by the statutes of jeofails.

Upon the whole, therefore, I am of opinion that there is no error upon this record, and that the judgment of the Court below ought to be affirmed.

BOSANQUET, J. The questions in this case are two:—1st, whether the direction of the learned Judge is exceptionable. 2nd, whether the plea is good; which involves the further question, whether the charter set forth in the plea is valid.

With respect to the matter of the bill of exceptions, it may be convenient to make some observations before I come to the terms of the exception stated on the record.

I think that the petition first presented was, at the time of its presentation, sufficient to give authority to the Queen to refer it for consideration to the Privy Council. It purported to be the petition of the inhabitant householders of the borough of Manchester, who are the persons required by the Municipal Corporations Act to petition; it was signed by 4000 persons, the majority of whom were rate payers, as well as inhabitant householders: it was not got up clandestinely; and if there was any irregularity in the mode of convening the petitioners, the acceptance of the charter granted in pursuance of the petition was a sufficient adoption of the petition itself.

The presentation of another petition, after the first had [85] been referred, signed by a greater number of inhabitant householders than those who signed the first, cannot, of itself, annul the authority derived from the first; the petitioners in the second, though somewhat more numerous than the petitioners in the first, not amounting to more than one-eighth of the inhabitant householders of the borough. There are no words in the Municipal Corporation Act which require that the petition should be signed by a majority of the whole. No means are prescribed for ascertaining the will of the majority of the inhabitant householders previously to the presentation of a petition; and it could scarcely be contended, that if the first petition, signed by 4000 persons, answering the description contained in the statute, had been the only petition, the Queen would not have had authority to act upon such a petition, though the number who signed such petition should be less than the majority of the whole body of inhabitant householders. In this case, neither the first nor the second petition was signed by a majority of the whole body; and if the presentation of the second petition

in this case could have the effect of suspending the authority of the Queen to take the prayer of the first into consideration, it appears to me that the petition of five persons, or of one person, would have the same effect; and that, although the petitioner or petitioners should take no further step beyond the mere presentation of the petition; a proposition, in my opinion, too unreasonable to be entertained.

The presentation of a petition does not give authority to the Queen to grant a charter obligatory upon the whole body of the inhabitants, without their consent by acceptance of the charter when granted. If such charter be contrary to the wish of the majority, they may withhold acceptance; but if the charter be accepted, the petition on which it is founded must be taken to have been acquiesced in by the majority of the the whole body, notwithstanding the intermediate presentation of a second petition.

[86] The notice required by the act to be given at the day when a petition which has been presented is to be taken into consideration by the Privy Council, imports that those who object to the prayer may be heard in opposition to it—affords full opportunity to all persons interested of being heard against granting a charter altogether, and of objecting to every particular clause of it. No such opportunity appears to have been sought; and if the charter has been accepted by the body at large, I think that any objection now made on the part of that body, founded on the presentation of a petition, would come too late. It is necessary, therefore, to examine the precise exception to the direction of the learned Judge, which has been put on the record.

The plaintiff, in his answer to the defendant's plea, avers that the inhabitant householders of the borough of Manchester did not petition her Majesty to grant to them a charter of incorporation, and that such charter was not duly accepted or received by the said inhabitants of the said borough, *modo et formâ*, upon which issue is joined. In support of the affirmative of the issue, the defendant gave in evidence the circumstances attending the signature and presentation of the first petition, and the reference thereof by the Queen to the Privy Council; and further proved that the charter in the first plea mentioned was accepted as mentioned in the plea. The plaintiff's counsel, for the purpose of shewing that the Queen had not authority to grant the charter under the said petition, gave in evidence the circumstances attending the signing and presentation of the second petition, praying her Majesty not to grant the charter in question. "Whereupon the learned Judge declared his opinion to the jury, that, notwithstanding such petition as last aforesaid, her Majesty had authority and power on the recommendation of her Privy Council to grant the said charter; and with that direction left the case to the jury; whereupon the counsel for the plaintiff excepted to the said opinion and direction of the Judge on [87] such issue, and insisted that the fact proved was sufficient to shew that her Majesty had no authority to grant such charter upon the said first-mentioned petition." It appears then, upon the record, that the acceptance of the charter was proved; and in considering this case, it is to be taken as a fact substantiated by sufficient evidence, and not subject to be disputed. Such being the case, the Judge was of opinion, that notwithstanding the second petition, the Queen had authority to grant the charter upon the first; but the plaintiff's counsel insisted that the fact proved was sufficient to shew that the Queen had no such authority. The facts proved were, the two petitions and the acceptance of the charter. And such being the case, I think it plainly appears that the question upon which the Judge decided was simply this, whether, the first petition having been presented and referred, and the charter granted in pursuance of it accepted, the presentation of the second petition shewed that the Queen had no authority to grant it. The Judge pronounced his opinion, that notwithstanding such petition, she had authority, and with that direction left the case to the jury; which direction appears to me to have been correct, for the reasons already given.

2nd. Several objections have been made to the legality of the charter set forth in the plea. The first is, that it is granted to different persons from those who petitioned for it. But it appears that the grant is made strictly in conformity with the act of Parliament, upon the petition of the inhabitant householders, to the inhabitants, the former being by the act required to petition, and the latter pointed out as the persons to whom the grant is to be made.

It is further objected that the petition professes to be that of the inhabitant householders of the whole of the borough, and that the grant is made to the inhabitants

of a limited district only; but this objection is fully answered by adverting to the terms of the act of Parliament, which requires the petition to be made by the inhabitant house-[88]-holders generally, but authorizes the Queen to make the grant to a limited district within the borough, to be specified in the charter. I cannot construe the act so as to import that the grant of incorporation is to be made to the inhabitants of the whole borough, but that the powers and provisions of the act may be granted to the inhabitants of a more limited district.

The next head of objection is, that, in granting the charter, the various provisions of the Municipal Corporation Act with respect to times and modes of proceeding have not been pursued. But there is no provision in the act which requires that this should be done. All the matters contained in that act related to corporations then in existence, whose constitutions were to be altered by authority of Parliament, in carrying which object into effect it was necessary that all the provisions prescribed should be strictly adhered to.

But when a new corporation is to be erected by the authority of the Crown, the constitution of such new corporation originates in the will of the Sovereign: subject however to the assent or dissent of the new corporations by their acceptance or non-acceptance thereof. And such a grant, made by the known prerogative of the Crown, requires no petition from any particular description of persons, as a condition precedent to its validity.

It has been contended, however, that the Queen has exceeded the powers which she derived from her common-law prerogative, as well as those conferred on her by the act of Parliament, in delegating her authority to others, in matters respecting the selection of persons who are to constitute the burgesses of the corporation, particularly David Price, who is empowered to make out the burgess list, and Edward Rushton to revise it. Now I take it to have been long settled by law, that the Queen, in erecting a corporation, may name, of her own authority, all the officers and all the corporators, or may empower a subject to do so in [89] her stead. And although no one but the Queen can make a corporation, yet when it is made under her authority, it is deemed in law to have been made by herself.

"When the king," says Lord Coke in the case of *Sutton's Hospital*, 10 Rep. 33, "reserves as well the nomination of the persons as the name of incorporation to a person who shall be the founder, then he ought to name the parties, and declare by what name they shall be incorporated; and when he hath done so in writing according to his authority, they are incorporated by the king's letters patent, and not by the common person; for he is but an instrument, and the king makes the corporation in such case, in the same manner as if all had been comprehended in the letters patent themselves. It is true," he adds, "that none but the king can make a corporation, as it is held 49 Ed. 3, 4, 29 Ass. 8; but qui per alium facit, per seipsum facere videtur." So it is said in Bro. Abr. Prerogative, 53:—"Nota, the king by his charter may by express words grant to a corporation or commonalty to make another corporation or commonalty." Again, in Jenkins, Centuries, 88, p. 270, it is said—"only the king can make a corporation; but, presently after, 'the king may give power to name a corporation, and where it is named it is the king's corporation.'"

In Com. Dig., Franchise (F. 5), citing 1 Roll. Abr. 512, it is said that a subject may choose the person, invent the name, &c., for the king; also, the king by charter to the East India Company may enable them to constitute such persons as shall be incorporated: ib. In Bacon's Abr. Corporations (B.), it is said,—"The king, by virtue of his prerogative, is the only person that can erect either an ecclesiastical or lay corporation; yet the king may grant power to a common person to name the corporation, and the persons of whom it is to consist; but when he has done so, the corporation does not take its essence from the common person, but from the king."

I am not aware that the proposition laid down in these [90] authorities has ever been disputed since the 2nd Hen. 7. Blackstone, vol. 1, p. 474, says, "The king, it is said, may grant to a subject the power of making corporations, (Bro. Abr. tit. Prerog. 53; Vin. Abr. Prerog. 88, pl. 16), although the contrary was formerly held, (Year Book, 2 H. 7, 13), that is, he may permit the subject to name the persons and powers of the corporations at his pleasure; but it is really the king that erects, and the subject is but the instrument; for though none but the king can make a corporation, yet qui facit per alium facit per se. In this manner the Chancellor of the University of Oxford has power by charter to erect corporations, and has actually

often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students." The same doctrine will be found in Kyd on Corporations, 50. No distinction is made in these authorities between ecclesiastical and lay, eleemosynary and municipal corporations. I refer to these authorities for the purpose of shewing in what broad terms the authority of the Crown to delegate the nomination of corporations and corporate officers has been recognised. But it is not necessary to rely upon them to their full extent in this case; for no discretionary power of choice or appointment is given either to Mr. Price or to Mr. Rushton. The constitution of the corporation and the qualification of the burgesses are fixed by the charter; and these persons are only required to make a list of those who have such qualifications. It is to be observed, that no method of proceeding is pointed out by the 5 & 6 Will. 4, c. 4, or 1 Vict. c. 78, for setting the corporation in motion: these acts simply provide, that it shall be lawful for her Majesty, under the advice of her Privy Council, to extend to the inhabitants of any town or borough, within the district to be set forth in such charter, the powers and provisions in the act contained; and I know of no mode by which the Crown can confer [91] them except by charter. If the Crown be authorized to grant the powers in question (which without the authority of the act could not have been done), must it not by necessary inference be authorized to prescribe the means by which they are to be made effective? provided at least that the means adopted are not at variance with those which might be resorted to in a common-law charter of incorporation. Many of the regulations of the Municipal Corporation Act are inapplicable to a new corporation. David Price is appointed to make out the burgess list instead of the overseers, who, under the Municipal Corporation Act, are required and compelled to make out such list, but these officers would not be compellable to make out a burgess list for a new corporation. For the purpose, therefore, of securing the attainment of the end contemplated by the act, the Crown has nominated a person, of whose willingness to undertake the duty it may be assured: Edward Rushton is appointed to revise the burgess list instead of a revising barrister appointed by the senior Judge of assize; no power to any Judge to appoint such a barrister being given by the act, after the year which had elapsed at the grant of this charter. And to have given authority to any other person to appoint a revising barrister, would be at least as objectionable as a direct appointment by the Queen herself.

It has been contended, indeed, that if the act of Parliament be defective in prescribing the proper means of carrying its object into effect, the object cannot be effected; but the more reasonable interpretation of the act in such case appears to be, that where no particular means are prescribed, the Crown may proceed to accomplish the object by the same means which it is authorized by the common law to employ in conferring the usual powers upon a new corporation, namely, by letters patent under the Great Seal.

The principal objection to the appointment of Mr. Price and Mr. Rushton appears to be, that although all persons [92] qualified to be burgesses by the Municipal Corporation Act are entitled to be inserted in the burgess list, power is given to Mr. Price in the first instance, and finally to Mr. Rushton, which enables them to include in such list persons not qualified, or to exclude persons duly qualified. If this be an objection in principle, it is a principle which, in the absence of express directions, has been adopted by analogy to the Municipal Corporation Act, for the purpose of facilitating the exercise of the franchise in the first instance, instead of leaving the claims and objections to be contested before the returning officer.

The improper admission or rejection of a person as a burgess may indeed, in the first instance, result from the mistake or misconduct of the person appointed to prepare and to revise the burgess list, and the same may be said of the provision of the Municipal Corporation Act. But such mistake or misconduct would not preclude any person duly qualified from asserting and obtaining admission, or prevent any unqualified person from being excluded, by proceedings instituted for that purpose in the Court of Queen's Bench.

The last material objection made to the charter is, that it omits to give authority to Mr. Price to insert in the burgess list the names of inhabitant householders within seven miles of the borough.

The charter grants and declares, that the inhabitants of the borough of Manchester, comprised within the district described, shall be incorporated by the name of the

mayor, aldermen, and burgesses of the borough of Manchester, and be able and capable in law to have and exercise all the powers, authorities, immunities, and privileges now held and enjoyed by the several boroughs named in the act 5 & 6 Will. 4, c. 76, in the like manner, and subject to the same provisions, as fully and amply to all intents and purposes whatsoever, as if the said borough of Manchester had been in the schedule to that act annexed.

The term "inhabitants" embraces all persons occupying [93] property and rated within the borough; for occupation without residence is sufficient to make a man an inhabitant; 2 Inst. 702, *Jefferies' case* (5 Rep. 67), *Bates v. Winstanley* (4 M. & Selw. 437); and such inhabitants are entitled to all the privileges enjoyed by the corporations of boroughs in the Municipal Corporation Act.

By that act, 5 & 6 Will. 4, c. 76, s. 9, every male who shall for a certain time have occupied any house, warehouse, counting-house, or shop within the borough, and also during such occupation shall have been an inhabitant householder within the said borough, or within seven miles of such borough, shall, if duly enrolled, be a Burgess of such borough, and member of the body corporate, provided he has been rated for the premises so occupied, and paid rates. And persons occupying and paying rates for property in the borough of Manchester are entitled to the same privileges.

Now, by the Municipal Corporation Act, the inhabitants occupying shops are not entitled to the privileges of burgesses, unless they are also householders within the borough, or within seven miles of it: in which last case they, the inhabitants of shops within the borough, are entitled to the character of burgesses of the borough.

In like manner, under the charter, the inhabitants occupiers of shops within the district are not entitled to the character of burgesses, unless they are inhabitant householders within the borough or seven miles of it: and if they are, then they are entitled to the same privileges as the members of the corporations mentioned in the act.

It is objected, however, that the charter only directs Mr. Price to make out a list, to be called the Burgess List, of all inhabitant householders within the borough who shall possess the qualification required by the said act, omitting any mention of inhabitant householders within seven miles of the borough.

[94] But I do not think this omission affects the validity of the charter.

The circumstance of being an inhabitant householder within seven miles of the borough, does not alone confer any right to the character of a Burgess: unless he occupy and pay rates for a house, warehouse, shop, or counting-house within the borough, he cannot have the qualification required by the act.

It plainly appears, both from the 15th section of the act, and from the schedule D. No. 1, for making out the Burgess list, that the property required to be specified by the overseers in such list, in respect of which persons are entitled to be enrolled, is property occupied in some parish within the borough for which the overseers are appointed.

By the Municipal Corporation Act, the overseers of every parish, wholly or in part within the borough, are required to make out a list, according to schedule D., of all persons entitled to be enrolled according to the provisions of the Municipal Corporation Act, in respect of property within such parish, the form of which list begins as follows:—

List of Burgesses of the Borough of _____, in the Parish
or Township of _____.

| <i>Christian Name and Surname of each Person at full length.</i> | <i>Nature of Property rated.</i> | <i>Street, Lane, or other Place in the Parish or Township where the Property is situated for which he is now rated.</i> |
|--|----------------------------------|---|
| Ashton, John | Shop | No. 23, Church Street. |

The overseers, therefore, are not required to mention in the list any house out of the borough, which the party may hold at the same time with the shop occupied and rated within the borough. There is no column in the [95] form for the insertion of such house, although the party mentioned as occupying a shop would not be able to support a claim to the character of burgess, unless he also held a house within the borough, or within seven miles of it. If a rated shopkeeper hold a house within the borough, it will be mentioned; but the overseers of parishes within the borough can have no official knowledge of houses situate in parishes without the borough, which may be inhabited by persons paying rates within it; and it would have been quite unreasonable to impose upon them the duty of finding out such houses.

The act of Parliament, then, is equally silent with the charter upon the point which is made the subject of objection. Both require a statement to be made of the qualification within the borough; that is, of any house, warehouse, counting-house, or shop, occupied and rated within the borough. But if there be no house held by the party within the borough, and his claim to the character of burgess depends upon his holding a house without the borough, in addition to it his occupation of rated property within the borough, that circumstance might, I apprehend, be established before the revising barrister by the party claiming, in the one case as well as in the other.

It appears to me, that if property be occupied within the borough, of the description which would entitle the occupier to be a burgess, in case he be at the same time a householder within seven miles of the borough, the overseer might be required to insert his name in the list, according to the form in schedule D.; but neither the act nor the charter requires that any mention should be made in such list of a house without the borough, either by the overseer or by David Price. Such being the case, I cannot think that the validity of the charter can be impeached for want of directing something to be done, which was not required to be done under the Municipal Corporation Act.

Still it may be said, that as Mr. Price was required by [96] the charter to make out a list of the inhabitant householders within the borough, a person who occupies a rated warehouse, counting-house, or shop, within the borough, but holding a house out of it, would not immediately derive all the advantages from Mr. Price's list which he might derive from that of the overseers, made under schedule D. of the Municipal Corporation Act. But such his omission in Mr. Price's list, though it might occasion to him the trouble of preferring a claim to establish his occupation of a rated shop within the borough, as well as his holding a house without the borough, would not deprive him of his right to the franchise, which he takes under the charter and act of Parliament combined. He might prefer his claim; and if he established it before the revising barrister, he would be placed upon the roll.

One other objection which has been made is, that the plea does not aver the existence of a gaol, the state of which is required to be set forth in the petition for a court of quarter sessions, and that the grant of such court is therefore illegal; and as the office of coroner cannot legally be granted except upon the application of the court of quarter sessions, the grant of that office in the present case is illegal.

The plea, after stating the grant of a commission of the peace, avers, that afterwards the said council were desirous that a separate court of quarter sessions should be holden for the borough of Manchester, and did duly signify the same by petition to her Majesty in council, setting forth the matters in and by the act required and directed in that behalf. No objection is taken in the replication, by allegation or demurrer, of the want of a gaol, and that the state of it was not set forth in the petition; but the plaintiff takes issue upon the presentation of a petition by the inhabitants, and the acceptance of the charter. By thus pleading over, I think that he has sufficiently admitted that the matters required by the act were set forth in the [97] petition, including the state of the gaol, and that if the non-existence of a gaol was intended to be insisted upon, the objection should have been made by the pleadings.

For these reasons, I am of opinion that the judgment of the Court of Exchequer should be affirmed.

TINDAL, C. J. This case, which in form is an action by one of the six coroners for the county palatine of Lancaster against the defendant, for a disturbance in the plaintiff's office of coroner of the county, in substance involves the question of the validity of the charter of incorporation granted to the inhabitants of the borough of Manchester.

And the objections which have been taken against the judgment of the Court below, which was in favour of the defendant in the original action, may be classed under three distinct heads: first, an objection against the direction given by the learned Judge to the jury at the trial of the cause: 2ndly, objections against the validity of the charter itself; 3rdly, against the pleading of the defendant's title to the office of coroner of the borough; and I shall proceed to state the opinion which I have formed on these several points in their order, upon the best consideration I can bring to this difficult and doubtful case.

The first objection rests upon the consideration, that in order to enable the Queen to grant a valid charter of incorporation under the statute 1 Vict. c. 78, s. 49, there must be a petition of the inhabitant householders of the town or borough for that purpose; and that the fact of such petition being or not being presented, was a question for the jury upon the issue raised on the record; and the objection taken is, that the learned Judge did not permit that question to be decided by the jury, but in effect determined it himself as a matter of law.

But whilst I agree entirely in the proposition, that the presenting of a petition in the manner pointed out in the act, by the inhabitant householders of the town or borough, [98] is made by the act a necessary preliminary to the exercise of the power given thereby to her Majesty: which is not merely a power to grant to inhabitants a charter of incorporation, for the common-law prerogative was quite sufficient for that purpose; but a statutory authority to extend to the inhabitants, when incorporated, all the powers and provisions of the act for the regulation of municipal corporations, the creation of some of which would not fall within the compass of the common-law prerogative; and whilst I agree also, that the question whether such petition was presented in the manner required by the act, is a question of fact for the jury, and is not to be considered as concluded by the determination of the Privy Council, or by their recommendation to the Crown that the charter should be granted; it appears to me that such question of fact was virtually submitted to the jury on the present occasion; or if it was not, that the exceptions tendered to the learned Judge are not sufficiently definite and precise to raise the intended objection.

The plaintiff in his replication denies that the inhabitant householders of the borough of Manchester did petition the Queen to grant to them a charter of incorporation; on which denial, issue is joined. The evidence laid before the jury was, that at a meeting of the rate-payers called together by public notice, consisting of 1000 persons, a petition to her Majesty was resolved upon by the majority there present, which was afterwards signed by 4000 inhabitant householders; and that after this petition had been presented to her Majesty, and before the day for taking the same into consideration, 6000 of the inhabitant householders had petitioned her Majesty not to grant the charter; it being also admitted that the aggregate number of inhabitant householders who were entitled to express their opinion, if they had thought proper, was 48,000. Under these circumstances, did the inhabitant householders petition or not, was the question? and the learned Judge, on [99] being appealed to, stated his opinion to be, that notwithstanding the second petition, her Majesty had authority and power, on the allowance of her Privy Council, to grant the charter as on the first petition.

Now this opinion cannot, as it appears to me, be held to be a mis-statement of the law, unless it can be laid down as an abstract proposition, that after a petition has been resolved upon at a public meeting properly convened, by a majority there present, its whole force and efficacy is to be neutralized and destroyed by a counter petition, subsequently signed by a larger number than those who signed the first, but not constituting the actual majority of the aggregate number of inhabitant householders. No authority is cited for this, as an abstract proposition of law, and it seems to me to be not sustainable on any reasonable ground. The first meeting having been convened together by public notice, may fairly be treated as a meeting representing the inhabitant householders, at which all were present to express their opinion, and those who absented themselves from such meeting may not unreasonably be considered as consenting to be bound by the majority of those who attended. The struggle of opinion, whether a petition should be presented or not, would appear to be justly decided by the issue of the first meeting, at which meeting, if it had been thought desirable for convenience, or greater certainty, an adjournment might have been made and a poll taken, at which the absentees might record their opinion, upon the general

principles which govern the proceedings in popular assemblies. Such expedient, however, was not resorted to; the meeting closed with a petition; and I know of no rule of law by which a subsequent petition by any number, short of the majority of the whole number of the inhabitant householders, must be held necessarily to destroy the efficacy of the first. When the circumstances under which the second or subsequent petitions were carried, are left, as on this occasion, [100] a complete blank upon the evidence, it would be both inconvenient and dangerous to draw such an inference, as a necessary legal conclusion. It is not merely from the majority in point of number between those who sign the petition for the charter, and those who sign the counter petition against it, that the opinion of the actual majority of the inhabitants can be safely inferred. We must take into account the relative publicity of the meetings at which the respective petitions were resolved upon, and the circumstances attending the signature of each. It therefore appears to me, in point of law, that the second petition did not of itself necessarily take away her Majesty's authority and power to attend to the recommendation of the first petition, which is substantially the opinion expressed by the learned Judge; and if he did not lay down the law incorrectly, the exception to such direction, which can only apply itself to the law delivered by the Judge, falls to the ground. Whether her Majesty was authorized or not, under the circumstances given in evidence, to grant the charter, appears to me not to be a question of law, but a question of fact to be decided by the jury, and that their decision should be governed by the evidence in the cause of the origination of the two conflicting petitions, and the circumstances attending their completion. And the exception in the case does not insist that the Judge refused or declined to leave that fact to the jury; indeed, the opinion which he gave does not necessarily take it from them; but the exception is, that he ought to have told the jury, that, after the second petition had been presented, her Majesty had no authority or power to grant the charter, which direction, if it had been given, I do apprehend, for the reasons before advanced, would not have been consistent with the proper exposition of the law, but would have been directly the reverse.

The second class of objections which have been urged against the validity of the charter, apply themselves to the [101] shape and frame of the charter itself; and do in effect resolve themselves into these:—1st, that it appears the charter is not granted to the same persons who were the petitioners; 2ndly, that the charter contains various provisions, which are neither consistent with those directed by the legislature, nor with the common-law prerogative of the Crown. With respect to these objections, it should be observed, in the first place, that it is obvious, from the consideration of the statute itself, that the legislature intended to provide for the case where new corporations might be brought into existence after the passing of the act: in which case the intention was, that if her Majesty thought proper, the several provisions of the Municipal Corporation Act might be extended to such new corporations. It is further to be premised, that the machinery by which those provisions were carried into effect, in the case of the ancient boroughs enumerated in the schedule of the act, had become inoperative and inapplicable from lapse of time. And lastly, that all the common-law rights of the Crown, with respect to granting of the franchise of a corporation, still remained in full force, and unimpaired by the act. Bearing these principles in mind, in passing our judgment on the steps which have been actually pursued in the granting of the present charter, the Courts of law must never lose sight of the object which the legislature had in view, and are bound to see that such object shall be carried into effect, unless it appears that, by the means which have been employed, some legal or constitutional principle is violated. If any step has been taken, which necessarily involves in it the breach of any legal principle, undoubtedly the charter must be held to be void; but if the means adopted, although not those which are pointed out by the statute, nor indeed such as most closely follow it, yet involve only a question of more or less convenience, and not the opposition of any legal principle, the charter, as granted, ought to be supported. For we must never forget [102] the rule laid down by Lord Coke, that if the king's charters will bear a double construction, one which will carry the grant into effect, the other which will make it inoperative, the former is to be adopted.

Now the first objection raised upon the face of the charter itself is this, that the petition for the charter was by the inhabitant householders of the borough of Manchester at large, but that the charter is not granted to such petitioners, that is, the

inhabitant householders of the nine townships whereof that borough consists, but to the inhabitant householders of six of the townships only comprised within the limits of that borough. I have felt, for some time, great doubt upon this point; but upon the whole, I have satisfied myself that the sound construction of the words in the 49th section of the stat. 1 Viet. c. 78, (which are the same with those in the 141st section of the statute 5 & 6 Will. 4, c. 76), is, that the Crown has the power to incorporate the inhabitant householders of such district of the borough which petitions for the charter, to which district the provisions of the former act are by the charter directed to extend; or, in other words, that it was meant by the legislature that the limits of the newly created corporation, and the limits to which the powers of the statute should be extended, should be identically the same. For it would introduce great difficulty, if not inconsistency, in the working of the charter, if the charter of incorporation included the nine townships, and the powers of Municipal Corporation Act were extended to six only; upon that construction, the inhabitants of the three excluded townships would be corporators under the charter, but never could become burgesses on the list. Such sense, therefore, must be put upon the words in the statute as will carry its object into effect, which object was, that newly created boroughs might, if the Crown saw fit, be in the same position, as nearly as circumstances would allow, as the boroughs named in the schedule; and no other construe-[103]-tion can attain that object, unless it be considered that the Crown might limit the grant of incorporation to the inhabitants within the same district to which the extending of the powers of the act is directed to reach. This is no more than an exercise of a common law power in the Crown to grant the corporate franchise to any part of a district, the inhabitants of the whole whereof had joined in their petition, leaving the grantees to accept the charter or not, when granted, at their discretion.

The second objection apparent on the face of the charter is, that the new borough has been divided into wards, not under the authority or according to the provisions of the former act, but under the authority of the Crown itself, from whom the charter emanated. But to this it appears to me a sufficient answer, that the division by the revising barristers, which, under that act, was to be completed by the 9th of November, 1835, was incapable of application to the present charter, which was not granted till the year 1838; and as the Crown at common law might undoubtedly divide the borough into such wards as it thought fit, this division by the Crown did of necessity come into operation, and supply the place of the division by the revising barristers, in order to prevent the power given by the act from becoming altogether dead and inoperative.

The third and fourth objections are urged against the formation of the burgess list; it being alleged in the first place, that the authority given to David Price to make out a burgess list is illegal, being a delegation of the authority of the Crown to make a corporation, which is inconsistent with the provisions pointed out in the Municipal Corporation Act, (s. 20), which ought to have been as closely followed as practicable. On which objections it is admitted, that the precise powers chalked out by the act, could not be pursued to the letter. There were no means of compelling the overseers to return lists—no power of defraying their expenses—no revising barrister [104] could be called for—his power to revise the lists being confined to the lists of the year 1835. It is further incontestable, that at common law the Crown might have nominated the burgesses in the charter itself. And taking into consideration these two admitted principles, I cannot perceive the illegality of the step that has been taken. This is not a general power given by the Crown, enabling David Price to place upon the roll or to reject whomsoever he thought fit, arbitrarily; it is a ministerial power only, “on or before the 29th of October, to make out an alphabetical list of all inhabitant householders within the borough, who possess the qualification required by the act;” and further “to make out a list of claimants and objections,” which list is afterwards to be revised by Mr. Rushton before the 28th of November. Some plan or scheme must be devised to carry the intention of the act into effect as to newly created corporations, where the provisions therein given, as to the old corporations, ceased to be applicable from lapse of time. And I cannot see that there is anything illegal in this substitution: inconvenience there may certainly be, but such as, being amendable on the 5th of September in the following year, is not of a permanent nature. And the short answer to these particular objections appears to me to be, that this is not, as it is alleged, a delegation of authority from

the Crown to make a corporation, for the inhabitant householders were already incorporated by the Queen; but that the making up an alphabetical list of burgesses is merely a ministerial act for the sake of convenience.

And as to the objection, that the directions given to Mr. Price required him to insert those only "who were inhabitant householders within the said borough, who shall possess the qualification required by the said act," whereas by the 9th section of the act, not only the inhabitant householders, but every one "who occupied any house or shop within the borough, and was at the time an inhabi-[105]-tant householder within seven miles of the said borough," had the right to be put upon the burgess roll; it must be observed, that any person possessing that qualification, if he was refused to be put upon the list by Mr. Price, would have entered his claim, and such claim would have been revised by Mr. Rushton; and at the last the utmost inconvenience would have been the remaining without his franchise until the 5th of September following, when the whole difficulty would have been set right by the new lists made out by the revision of the mayor. And the question at last is, whether the charter is to be held a void charter, on account of this defect in the directions for making out the first burgess list? I cannot think, upon legal principles, this consequence does, or ought to follow.

The only remaining objection is that which arises on the face of the record. It is objected that the petition itself is not set forth as it ought to have been, in its precise terms, and further, that there is no allegation that the facts therein alleged are true, one of which facts, namely, the state of the gaol, was, as it is contended, an essential condition to the power given to the Crown, by the 103rd section of the act, of granting a separate court of quarter sessions to the new borough. Admitting that the plea might have been informal, in not setting out upon the face of it the particulars of the petition, the utmost that can be said is, that it would have been bad upon a special demurrer; for, as the plea now stands, the allegation therein, that "the petition did set forth the matters in and by the said act of Parliament in that behalf required and directed," might have been traversed in the same terms by the plaintiff, and an issue tried thereon. And as to the truth of the several facts contained in the petition, in the present action, which is not a proceeding between the Crown and the corporation, to repeal the letters patent upon the ground of mis-recital or mis-information to the Crown, but an action by a third person, if such false statement can be taken advantage of at all, upon which I think there is considerable doubt, the mode by which it ought to have been raised would have been by an allegation of such falsehood on the part of the plaintiff in his replication; but the plaintiff has, by pleading over to another point, admitted the statement of the facts in the petition to be correct, and waived the objection. Many cases were cited in argument, which have been determined on the statutes of jeofail, where stronger objections than the present have been held to be cured.

Upon the whole, therefore, I think, although I admit the case to be involved in difficulty, that the plaintiff is not entitled to recover, and therefore that the judgment which has been given for the defendant in the court below, must be affirmed.

LORD DENMAN, C. J. In this great case, so important to the future administration of civil and criminal justice over one of the most populous districts in England, the jurisdiction to which it is to belong, the authority by which it is to be taxed,—and which case must give the rule for the future government of numerous other districts of nearly equal importance, it is by no means wonderful that the Judges have not been able to take the same view of all the points arising, notwithstanding the assistance of two most learned and able arguments, and their own frequent conferences upon them. We have all felt the desire to give effect to an act of Parliament passed for great purposes: to scan with all respect the proceedings which the Crown has been advised to take in applying it; and to avoid, if possible, the necessity of disturbing a course of practice, which, as we discover from the record itself, has been for some time in active operation. But not even to these objects can any of us be justified in sacrificing the deliberate conviction of his own judgment.

I think it right, in the outset of my observations, to state, [107] that I cannot regard the present plaintiff as a stranger to the erection of this corporation, in the proper sense of that word. He is a coroner of the county palatine of Lancaster, and has the power of exercising the authorities of that freehold office over every part of that county, including the town of Manchester, unless they have been to that extent

superseded by the good appointment of another coroner for that district; and has a right to call for proof that such appointment was made; which depends on the question, whether the town council of Manchester has well petitioned for a court of quarter sessions, as that must depend on the earlier question, whether the charter itself has been legally granted.

The first leading point is, whether the direction of the learned Judge is accurate.

Issue having been joined on the fact whether the inhabitant householders of Manchester petitioned her Majesty to grant them a charter of incorporation, and whether such charter was duly accepted and received by the inhabitants of the borough, the facts given in evidence by the defendant, in support of the affirmative, were, that a requisition, signed by many of the inhabitant householders, was (Feb. 2) presented to the boroughreeve and constables, requesting them to call a meeting of the rate-payers, to consider the propriety of petitioning her Majesty for a charter of incorporation according to the statute; that a public meeting of rate-payers was called, and held accordingly on the 9th of February, pursuant to a public advertisement. That the rate-payers, to the number of 1000, did attend, and that all rate-payers had access to the meeting. That a resolution was proposed, and after discussion carried by a large majority of the meeting, that such petition should be presented. That a resolution passed for appointing a committee to prepare such petition. That shortly afterwards, such a petition was signed by 4000 inhabitant householders of the borough of Manchester, the greater part thereof being rate-payers and inhabitant householders [108] of the district for which the said charter was granted, and being persons qualified to be burgesses under the charter; but the number of those signing was not a majority of the whole number of inhabitant householders, who amounted to 48,000. That the petition was duly presented to her Majesty, and duly lodged with the Privy Council, and referred by her Majesty to the consideration of her Privy Council, and that the said charter was accepted as in the plea mentioned. It was then proved on the plaintiff's part, "for the purpose of shewing that her Majesty had not authority to grant the charter under this petition, that 6000 of such inhabitant householders had, after the presentation of the former petition, and before it was taken into consideration by the Privy Council, petitioned her Majesty not to grant the charter in question:"—whereupon the Judge declared his opinion, that notwithstanding such petition as last aforesaid, her Majesty had authority and power, on the recommendation of her Privy Council, to grant the charter on the first-mentioned petition, by virtue of the statute in such case made and provided, and with that direction left the case to the jury. To this direction the exception was taken by the plaintiff's counsel in these terms: That the facts proved were sufficient to shew that her Majesty had no authority to grant such charter as aforesaid, on the first-mentioned petition. The argument here urged on behalf of the plaintiff in error is this:—"The learned Judge took upon himself to tell the jury, as his opinion in point of law, that the petition of the 4000 who signed it after the public meeting, was such a one as to give the Crown authority to grant the charter, whereas it gave no such authority; for the charter ought to be granted to the inhabitants on a petition from the inhabitant householders, and has been granted without such petition. Certain householders indeed call a vestry, but of what description of persons? A third description, who may possibly be neither inhabitants nor householders; [109] they had no power to bind even the minority, much less the absent and immense majority; nor do they profess to bind them, merely determining that a petition shall be presented after being prepared by a committee; when so prepared, it is the petition, not of the meeting, but of those who signed it, in number 4000, or one-twelfth of all whom the act recognises as qualified to petition for this object. That the petition of 6000 inhabitant householders against granting the charter, though subsequent, not appearing to have been obtained through any fraud or contrivance (indeed the date, as well as the circumstances under which it was adopted, was left in obscurity), was stronger evidence that the inhabitant householders were averse to the charter, than the petition of the 4000 that they desired one: and that if a mere balance of numbers, denuded of all circumstances, authorized the Judge to direct the jury in point of law at all, it could only warrant him in telling them the very contrary of what he laid down."

The answer given for the defendant was, that the Privy Council has already decided this question, being a court of competent jurisdiction for that purpose (as

appears by the provision for publishing notice of all such petitions a month before they are taken into consideration), and impliedly giving judgment that the inhabitant householders (i.e. a majority of them) had petitioned, by advising her Majesty to grant the charter prayed; but that, if the fact were still open to inquiry, the evidence was sufficient to justify the verdict. For it was denied that the learned Judge had laid down the law upon the point, or that the evidence appearing could be assumed as the whole evidence on the trial; and the jury being thereby satisfied that the petition of the 4000 had truly expressed the sense of the inhabitants, his decision was confined to instructing them that the dissent even of a larger number could not undo what they had effectually done. In reply, [110] the plaintiff's counsel contended that no judicial power whatever is conferred on the Privy Council in this respect; that that body is only required to advise on the expediency of granting a charter; and though they would not recommend unless they were well convinced that a majority in fact desired the charter (for which reason, and to prevent unfair practices, the month's notice might reasonably be required), yet no judicial power to ascertain the fact can be discovered in the act of Parliament, or created merely by implication. It was in addition observed, that the defendant himself, acting on the best and highest opinions on the law, had taken issue, not on the decision of the Privy Council, but on the foot of the petition proceeding from the inhabitant householders, while it does not appear that the petition of the 6000 was even considered by the council, or that the Crown had been advised to bring it under their notice. I must confess, that to me the plaintiff's argument on this point appears well founded, and that I see nothing in the case that can make the mere fact of a charter being granted an estoppel against the plaintiff's controverting any fact essential to its validity.

The other answer to this exception required us to consider the meaning to be ascribed to the learned Judge's direction, which I have just now read. Does it import that the jury had formed, or were required to form, a judgment whether the earlier petition was, on a fair review of all that passed, the petition of the inhabitants; and that, if they thought so, the subsequent proceeding could not affect it? or must we understand that the direction was given upon the fact proved with respect to the two petitions? I cannot say that I have yet divested myself of serious doubt on this point, or that I feel by any means satisfied that the jury must not have supposed themselves to be directed in point of law, to come to their conclusion. This would appear to be wrong; for though the proceedings at Manchester might have been such as to give conclusive validity to the [111] petition of the smaller number, and make the opposition inoperative, I, as a jurymen, should rather think that the facts established by the evidence fail to make out such a state of things. But it was denied that the bill of exceptions properly pointed at this discussion; and upon the whole, observing the object with which the counter petition was tendered, and the language of the exception, I conclude that the fair meaning of the direction is this:—Supposing the petition of the 4000 to have given power to grant the charter, that of the 6000 did not revoke it; while the defendant's counsel contended that it did revoke it, and did not require the opinion of the jury to be taken on the fair effect of the whole evidence; and if the exception had assumed this form, it is not impossible that the case would have been so submitted, and the verdict might have corresponded with this view.

A second objection taken to the validity of the first petition, strikes me as ranging rather under the objections to the charter itself, which are now to be considered. It does not profess to incorporate the same persons who petitioned for it, or are empowered by the act to petition. Those are, the inhabitant householders of the borough of Manchester, consisting, as it appears, of nine townships, while the charter is granted to the inhabitants of six only of those townships. Thus it may happen that every inhabitant householder who sets his name to a petition for a charter, may be excluded from its benefit when granted; and that the minority who objected may all have come exclusively from that parcel of the district to which it is granted. But we cannot suppose the Crown to grant, or the Privy Council to recommend a grant, which would produce these great incongruities; nor is it likely that such a charter would be accepted by the inhabitants. The proper question appears to me to be, whether the authority of the Crown is properly set in motion by the petition presented; and I think it is, if the inhabitant householders, [112] i.e. a majority of them in the borough as it existed at the time of petitioning, have made the application required by the statute. The Crown is then in its charter to set out the boundaries of the projected district, a power

which cannot be exercised without that of omitting some parts from the incorporated borough.

Several objections then follow to the charter as granted from the difference between its provisions and those of the act of the 5 & 6 Will. 4, in respect of, first, the days of election; second, the division of the borough into wards; third, the number of councillors to be returned for each ward; fourth, the mode of making out the first list, which is confined to residents within the borough; fifth, the appointment of Mr. Price to make out lists, instead of the parish officers; sixth, that of Mr. Rushton to revise them, instead of a barrister appointed by the senior Judge of assize; and some others of the same description.

But the mere variance between the charter and the act is no sufficient objection to the former, unless the Crown is deprived of the power of making any charters, except in conformity with the provisions of the Municipal Reform Act, a proposition which was asserted as admitting of a doubt, but in support of which no reasons were addressed to us, and which appears to us wholly unfounded. Such variance would clearly have no effect on a charter good at common law; but a serious doubt has arisen, whether this charter would have been good at common law, founded on the delegation of the powers of the Crown to individuals named in the charter.

It is a general rule of law, that corporations can be created by the Crown, and by no other authority. This rule is as ancient as the law itself, and supported by numerous authorities,—was acted upon by all the Judges in Lord Coke's time, in the great case of *Sutton's Hospital*, though supposed to have been materially modified by their decision. There the charter incorporating the founders may be said to have been left in blank for the person who was to be master of the intended hospital, and was to be named by Sir T. Sutton, the founder, who had granted large estates for the erection of the school and hospital of the Charter House. To this extent the Crown's substitution of another for itself, in nominating one member of a corporation, was held good; and on this authority it has sometimes been said, though not by any judicial authority, that another, thus empowered by the Crown, may lawfully create a corporation. This doctrine was rested on *Ramsay's case*, where the charter in like manner incorporated a person, under the title of a chaplain, to pray for the founder's soul; and the first was not named by the Crown in the charter, but was to be appointed by the founder. If these two cases are taken as establishing the doctrine of a right generally in the Crown, to enable a private subject to make a corporation, they seem to be quite irreconcilable with the general rule above mentioned. But can they be really brought within the same principle or reason of the law, which applies to the erection of municipal bodies? In them the Crown gave perpetuity to charitable trusts of a private nature, to which the pious founders devoted their own funds, and which could be effected by the constant application of those funds, and in no other manner. In the case of *Sir T. Sutton's Hospital*, the heir at law sought to retain the lands given under a private act of Parliament, and some bought afterwards, setting aside the charter of incorporation, by which they were all vested in the governor of the Charter House. Ten objections were made by him to the charter. They are stated by Lord Coke, and most of them characterized as unfit to have appeared at the bar, and not worthy of an answer. The eighth, however, was taken to the nomination of the master (who was to be a governor, *i.e.*, a member of the new body corporate). It was said to be void for two reasons: [114] one, that he was nominated at will, when he ought to have a freehold; also, that the hospital itself ought to have been actually founded when the nomination was made. In answer to this, Lord Coke cites *Ramsay's case*, before mentioned, and states the objection to have been overruled, "for Sutton had liberty at his will and pleasure, and when he is nominated, he is master by force of the letters patent, and is now as if he had been named in the letters patent themselves." But allowing this to the fullest extent, in reference to matters of such a description, can they be drawn into precedents for charters of the great importance that attaches to that now before us, by which the rights of the Crown itself may be permanently affected, the representation of the people in Parliament involved, and the enjoyment of their property by every man in the kingdom transferred from the known powers of the constitution to a local government?

The Crown has, in fact, in this instance (if by law it may) deputed to Mr. Price the making of the list, and to Mr. Rushton its final settlement, without check or control, and the list which they may so make and settle is the material out of which

the body corporate is to be moulded. Is there any example of such a mode of creating a municipal body? Would it be lawful for the Crown to declare that such persons as A. and B. might select should be the council, or to create as aldermen or mayor those who should thereafter be bound by A. and B. to possess some particular qualification? This is very different from the Crown appointing individuals to make preliminary inquiries, and acting through responsible advisers on information thus obtained. It might in this manner nominate any one of the constituent parts, or the whole body corporate; but if it should merely confirm beforehand the nomination to be made, thus losing all control over the operation, and blindly making itself an instrument in the hands of another, one of the most important acts of state, and most [115] nearly touching the public welfare, would be performed without any responsibility, or any means of applying a remedy, or even of inflicting punishment, however ill, through corruption or negligence, the work were done, or even though the persons clothed with these great powers should decline to exercise them at all. No mandamus could compel them to undertake the duty; and I should have thought, with great confidence, but for the opinion which I have heard this day expressed by two of my learned Brethren, that no writ known at present to the law could have interfered with the exercise of their powers, whether styled discretionary, ministerial, or judicial, by these voluntary agents. One great objection to permitting the Crown to denude itself of the privilege and trust of determining by whom corporate rights are to be enjoyed, is the impossibility of enabling any subject to ascertain, by legal means, the description of individuals contemplated by the charter. And here the precautions taken by the Municipal Act are well deserving of remark. In order to ensure intelligence and impartiality in the selection, the necessary duties are cast on those officers to whom the state of things must be known, and on others who are appointed in a manner likely to secure those qualities. Under the superintendence of such persons, courts are established, with power to compel attendance and administer oaths binding in law. Mere disobedience of the act would indeed alone expose offenders to punishment. No such consequences can belong to a charter from the Crown.

I cannot escape from this objection, by the aid of an argument which has occurred to some of my Brethren, which is certainly very ingenious, and, I must presume, just. The charter is said to contain good incorporating words in the outset, by which its leading object is effected, and the municipal body formed; and though defective means are afterwards created for ascertaining who are entitled to be the members, that gift must stand, and the [116] questionable provisions may be rejected. But I think the gift is not to the inhabitants at large, but to such persons as the individuals named may declare to be entitled; the description of them is as much a part of the incorporating clause as if it was actually there. If this were otherwise, the persons incorporated might be found altogether different from those whose names would occupy the lists produced by the combined operations of Mr. Price and Mr. Rushton. On the whole, I am bound to say that this objection appears to me to be fatal to the charter.

The community is, indeed, free to accept or reject the proffered charter, and the acceptance of this charter is found as a fact. It is, however, clear that the acceptance, however complete, merely concludes the bargain with the Crown, and cannot remove any defects inherent in it, which render it invalid as a legal instrument. Indeed, no question on the legal validity of a charter could ever arise, unless it were in fact accepted.

This is altogether a different matter from cases in which the Crown has incorporated the inhabitants of a town, and given them the power to elect their officers; for the body corporate, being once formed, can, by the common law, do all the acts necessary for the performance of its corporate functions. But, under the present charter, the formation of the body corporate is not the act of the Crown, but of some one whom the ministers of the Crown have selected. The extreme facility of abuse would be an argument of no small weight against the legality of this proceeding. The total want of an analogous precedent strikes me as another. Many of the objections raised and enumerated in the earlier part of what I have said, would probably be removed by considering that the charter does not profess to follow the statute, and may be good by common law; but on this point of delegation, according to my views, the common law itself creates insurmountable difficulty.

Another objection to the validity of the charter arises [117] from comparing the

description of burgesses which it contains, and which is also to be named under it by Mr. Price, with that of the same class as given in the Municipal Corporation Act, sec. 9; the former being confined to the inhabitant householders, the latter extending to all persons occupying rated tenements, who may reside within seven miles of the borough. I am disposed to think that this objection ranges itself with those already stated to the particular contents of the charter, and that if it can be supported as valid by the common law, the corporation, being once formed, even though imperfectly, before the first set of elections, might be susceptible, in all succeeding years, of that constitution which the Municipal Act provides for corporations in general.

On the last objection, that the facts necessary to enable the town council to appoint a coroner are not properly set forth in the replication, I agree with the opinion already expressed by all the other Judges, and concur so completely in the reasons stated by my Lord Chief Justice, that I cannot persuade myself to consume more time by stating them as I had prepared them.

Upon the whole, I have to state my opinion, that the charter is invalid in law, for the reasons already assigned; but as a majority of the Judges differ on this point, and think that there is no error, either upon the record or in the learned Judge's direction to the jury, the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

[118] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, EASTER TERM, 4 VICTORIE.

HOWARD v. SHAW. Exch. of Pleas. April 15, 1841.—Where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off.

[S. C. 10 L. J. Ex. 334. Referred to, *Crouch v. Tregonning*, 1872, L. R. 7 Ex. 92.]

Assumpsit for use and occupation, for interest, and on an account stated. Pleas, first, non assumpsit; 2ndly, the Statute of Limitations; on which issues were joined. The particulars of the plaintiff's demand were, "For the use and occupation of stable and coach-house, from 24th September, 1827, up to 16th July, 1839, at £12 per annum, £142." At the trial before Lord Abinger, C. B., at the Middlesex sittings after last Michaelmas Term, the facts appeared to be as follows:—

The plaintiff, Colonel Howard, having purchased a farm called the Priory, near Kilburn, with a view to let the land for building, about the year 1819 entered into negotiations with one Pocock for building upon the property. Pocock accordingly built several houses, &c., and amongst others the stable and coach-house in question, which were very near the house in which he himself resided. These premises, with others, were put up to auction in May 1827, [119] and the defendant became the purchaser of Pocock's house, and of the stable and coach-house in question, for £1200, upon which he paid the auctioneer a deposit of £315. Shortly afterwards, a draft conveyance of the premises, the plaintiff and Pocock being the conveying parties, was sent by the plaintiff's solicitor, Mr. Mortimer, to the defendant. It recited an agreement of the 2nd October, 1819, between Mortimer and Pocock, whereby Mortimer, on the part of the plaintiff, agreed to grant a lease to Pocock of a field called the Eight-Acre Field, on certain buildings being completed thereon, for ninety-nine years from the 29th September, 1819, and to convey the fee thereof to Pocock at any time within ten years, at a perpetual rent of 6d. per foot frontage: and that Pocock had accordingly erected a messuage, &c. on the Eight-Acre Field, and had also built a coach-house and stable on other ground belonging to the plaintiff, contiguous thereto, but which was not included in the above agreement; that the plaintiff had made considerable advances to Pocock on account of the buildings; that these several premises had been put up to sale by Pocock, on the 7th May, 1827, as lot 4 in the particulars of sale, subject to a perpetual charge of 6l. 5s. per annum to the plaintiff, and a further sum of £20 per annum to Pocock: that the said piece of ground on which the said coach-house and stable had been built was not sold as freehold, but the plaintiff was to grant a lease for a term like other leases of the same property, at a rent to be

agreed upon, and the purchaser was to be allowed out of his purchase-money for lot 4, fifteen years' amount of rent for the leasehold ground, and the coach-house and stable thereon: that the defendant had purchased lot 4 at the sum of £1200, subject to the said two rents of 6l. 5s. and £20, and the rent for the said piece of leasehold ground, and the said allowance out of the purchase-money; that he had also purchased the said freehold ground rent of £20 for the sum of £375, and it had since [120] been agreed that the sum of eight guineas per annum should be the rent for the said piece of leasehold ground, and that the defendant should be allowed the sum of £126 out of the purchase-money: and that it had also been agreed that the defendant should, out of the purchase-money, pay the plaintiff the debt owing by Pocock to the plaintiff, and the residue to Pocock. It then proceeded to convey the premises to the defendant accordingly.

This draft was perused and approved on behalf of the defendant, and sent back to Mortimer; but disputes arising between him and Pocock as to the appropriation of the purchase-money, the sale was not completed, and the defendant shortly afterwards demanded his deposit back from the auctioneer, and received a part of it, but failing to obtain the remainder, kept possession of the stable and coach-house by way of indemnity against his loss, and had ever since retained the possession without paying any rent, until October 1839, when, on being served with a declaration in ejectment at the suit of the plaintiff, he delivered up the possession to him, and paid the costs of the ejectment up to that time.

Under these circumstances, it was contended for the defendant, that the relation of landlord and tenant had never existed between the plaintiff and defendant, and therefore this action for use and occupation could not be maintained; and the Lord Chief Baron being of that opinion, directed a nonsuit, leave being reserved to the plaintiff to move to enter a verdict for £50.

In Hilary Term, Thesiger obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered accordingly, or a new trial had; against which

Platt and Bere now shewed cause. This action is not maintainable. It is clear there was not originally any privity between these parties; the defendant came into possession on the going off of a contract of purchase, [121] and held under the belief that he was entitled to hold as a matter of right. Under such circumstances, the relation of landlord and tenant has never been constituted between the parties, and no implied contract for use and occupation can arise: *Kirtland v. Pounsett* (2 Taunt. 145); *Hearn v. Tomlin* (Peake's N. P. C. 192). Trespass for mesne profits may perhaps lie, but not an action for use and occupation; that is founded upon a contract of tenancy, which it is clear neither of these parties ever contemplated.

Peacock, contra. The relation of landlord and tenant did exist in this case, during the period in respect of which the plaintiff claims. It appears from the recitals in the draft conveyance, that the plaintiff was originally let into possession on the negotiation for a sale, but that of this particular part of the property a lease was to be granted to him, at a rent the amount of which was agreed upon. But after the negotiation for the sale had gone off, he continued in possession in the character of tenant at will. *Kirtland v. Pounsett* is quite distinguishable: there the action was brought for rent claimed to be due before the purchase went off; here it is claimed only for the time after it went off. A party so let into possession by a vendor is clearly not a trespasser; and the only mode of recovering the value of his subsequent occupation of the land is by an action for use and occupation, founded on an implied promise to pay a reasonable compensation for the use of the land. There is not, indeed, any power of distress in such a case, because there is no agreement to hold at a fixed rent; but the party is liable for use and occupation, in the same way as a tenant holding over: *Jenner v. Clegg* (1 M. & Rob. 213); *Ibbs v. Richardson* (9 Ad. & Ell. 849; 1 Per. & D. 618).

LORD ABINGER, C. B. I have entertained some doubts [122] on this case, but I am now satisfied that the plaintiff is entitled to recover. [His Lordship stated the facts, and continued]: While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant; the parties could not convert the contract for purchase into a contract of tenancy, nor, while the former was pending, infer another of a different nature. But what is the relation of the parties when the contract of sale has gone off? The defendant remains in possession with the consent of the landlord, but without any title to or contract to purchase the

land itself. Under those circumstances, he is a tenant at will; and if the occupation is beneficial to him, that is sufficient to imply a contract to pay a reasonable sum by way of compensation for such occupation. For the last six years of his occupation, therefore, the plaintiff is entitled to recover.

PARKE, B. I am of the same opinion. If the defendant had entered under an agreement for a lease, there is no doubt he would have been a tenant at will until the lease was granted. Here it may be assumed that he entered into possession under the agreement for sale, which was to have been carried into effect by the conveyance. There may be some difficulty in saying, that, while that agreement existed, the relation of landlord and tenant subsisted between the parties; although this case differs in its circumstances from *Kirtland v. Pounsett*, because here a rent is charged upon the premises. I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay a compensation for the occupation of the land, because the contract shews that he was to occupy without compensation, and so long as it subsisted, he was entitled so to occupy, but still he was tenant at will. When the agreement went off, he still continued tenant at will; but after that, there is nothing to shew that he was not to pay a compensation for his occupation, because the stipulated com-[123]-pensation, by payment of the purchase-money, was at an end. From that time, therefore, he became liable to be sued for such compensation, in an action for use and occupation.

ALDERSON, B. I am of the same opinion. While the defendant was in possession under the contract for sale, he was a tenant at will, under a distinct stipulation that he should be rent-free; therefore, for that time no action for use and occupation can be brought against him; but when that contract is at an end, he is a tenant at will simply; therefore, from that time he is to pay for the occupation.

ROLFE, B., concurred.

Rule absolute.

HUGHES v. ROGERS, Executor. Exch. of Pleas. April 16, 1841.—Where a witness, called to prove the signature of the attesting witness to a bond, swore that the signature was not in the supposed attesting witness's hand-writing, another paper (not in evidence in the cause) was put into his hand, which he also stated was not that person's writing:—Held, that the plaintiff was not at liberty to prove, for the purpose of contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond.

[S. C. 10 L. J. Ex. 238; 5 Jur. 225, 323.]

This was an action of debt against the defendant, as executor of the will of John Rogers, deceased, upon a bond given by the testator to the plaintiff. The defendant pleaded non est factum.

At the trial before Coleridge, J., at the last Shrewsbury assizes, the plaintiff called the son of one of the attesting witnesses, who was dead (the other being the defendant himself), to prove the execution of the bond, but he stated that the signature to the attestation was not his father's hand-writing. The counsel for the plaintiff then put into his hands another paper, not in evidence in the cause, and asked him if that was his father's handwriting, to which he replied in the negative. The plaintiff's counsel then proposed to call witnesses to prove that this second paper had been actually signed by the father in their presence. The learned Judge rejected this evidence, as [124] tending to raise a collateral issue; and the jury found a verdict for the defendant.

Ludlow, Serjt., now moved for a new trial, on the ground of the rejection of this evidence. The evidence was receivable, for the purpose either of shaking the credit of the witness, or of testing his means of knowledge. In *Doc d. Mudd v. Suckermore* (2 Nev. & P. 16; 5 Ad. & Ell. 703), where the signature of an attesting witness to a will was in dispute, the witness, who was alive, and was called at the trial, swore that the attestation was his. He admitted on cross-examination that the signatures to his depositions respecting the same will in the Ecclesiastical Court, and several other detached signatures of his name, were also in his hand-writing. The plaintiff tendered as a witness to contradict him, an inspector at the Bank of England, who had no knowledge of the witness's hand-writing except from having previously to and during the trial examined the signatures to the documents admitted by the attesting witness

to be his. The case was fully argued, and the Court took time to consider; but they ultimately differed in opinion, Lord Denman, C. J., and Williams, J., being of opinion that the evidence was admissible; and Patteson, J., and Coleridge, J., that it was not. [Parke, B. There was no point decided in that case.] Except as to the objection of its tending to raise a collateral issue, there is no reason why the evidence should not be admissible, and that is no sufficient objection. [Alderson, B. The question arose in *Doe v. Newton* (1 Nev. & P. 1; 5 Ad. & Ell. 514); and it was there held that evidence of hand-writing by comparison is inadmissible, except either when the hand-writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document.]

PARKE, B. I am of opinion that no rule ought to be granted in this case. I think the learned Judge was [125] perfectly right in not receiving this evidence, on the principle that the receiving it would have had the effect of raising a collateral issue. A case was tried before me about two years ago, when several documents were put into the hands of a witness, under circumstances similar to the present, who stated them to be all in the same hand-writing; and I allowed the papers to be shewn to the jury, in order to enable them to see what degree of credit the witness was entitled to in so stating. That ruling of mine was not afterwards questioned, although a bill of exceptions was tendered; but in a subsequent case of *Griffiths v. Ivory* (3 Per. & D. 179; 11 Ad. & Ell. 322), the Court of Queen's Bench held that course to be erroneous; and in a case which recently occurred before me at Stafford, I acted in conformity with that decision. But that is altogether beside the present question; for in this case, the plaintiff's counsel did not ask to have the paper which was put into the hands of the witness submitted to the jury, but proposed to call witnesses to contradict him. Now there can be no doubt that that is not allowable; it is clearly raising a collateral issue.

ALDERSON, B. This case is very different from that where a party denies one document to be in his hand-writing, and admits others put into his hands; there it has been made a question whether those documents may not be looked at by the jury, in order to see whether they have really been written by the same person. On that point there has been some difference of opinion; but the real question there is, does it not enable the jury to appreciate the testimony given by the witness? The present case is, however, very different, and the evidence, if admitted, would have the effect of raising a collateral issue.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[126] FOX v. VEALE. Exch. of Pleas. April 16, 1841.—By a local act of Parliament, 2 & 3 Viet. c. ciii., a court was established for the recovery of debts not exceeding £15, and it enacted that “no plaint entered in the Court, nor any order, judgment, or proceeding therein, should be removed into any superior Court by any writ or process whatsoever, except by leave of one of the Judges of the superior Courts at Westminster;” with a proviso, that the provisions contained in the act for abolishing arrest on mesne process, for the removal of judgments of inferior Courts into the Courts at Westminster, for the purpose of issuing execution on them, should be applicable to this Court:—Held, that under that section, after judgment had been obtained in the inferior Court, the proceedings could be removed only for the purpose of issuing execution.

[S. C. 9 Dowl. P. C. 798; 10 L. J. Ex. 275; 5 Jur. 345.]

W. H. Watson had obtained a rule to shew cause why an order made by Rolfe, B., and another order made by Gurney, B., in this cause, should not be set aside. It appeared from the affidavits, that an action by plaint had been commenced by the plaintiff against the defendant in the court established for the recovery of small debts in the parish of Eckington, in the county of Derby, to recover a sum of £15, the balance of an account, which came on to be heard before the Judge of that Court, who, without the assistance of a jury, decided in favour of the plaintiff, and refused an application which was made to him for a new trial. The plaintiff sued out execution in the Court below, and levied thereby a sum of £15. An order was then made by Rolfe, B., that on the defendant's bringing into Court the sum of £15, then in the hands of the bailiff, and giving security for the costs below and above, including those

of the present summons, the plaint entered into the Court below should be removed into the Court of Exchequer, and in the mean time all proceedings be stayed. A subsequent order was made by Gurney, B., relieving the defendant from so much of the above order as directed him to bring the money into Court, and ordering it to remain impounded in the hands of the bailiff. The present rule was obtained on the ground, that by the provisions of the local act, no power was vested in the Judge of the superior Court to remove the plaint, after judgment had been given in the Court below.

By the local act, 2 & 3 Viet. c. ciii., intituled "An Act for the more easy and speedy recovery of Small Debts within the Parish of Eekington, and other Places within the County of Derby," a Court was established for the recovery of debts not exceeding £15; and it was enacted by section 46, that "[127] Court, nor any order, judgment, or proceeding therein, shall be removed into any superior Court by any writ or process whatsoever, except by leave of a Judge of one of the superior Courts at Westminster, and then only in cases where the debt claimed shall exceed £5; and in all such cases, it shall be lawful for every such Judge, by an order in writing under his hand, to stay all proceedings in the Court hereby created, upon such terms as to giving security for the costs incurred in the said Court hereby created, and for the costs which may be incurred in any action to be brought in the superior Courts for the same matter, or otherwise, as such Judge shall direct: Provided always, that the provisions contained in an act passed in the 2 Viet. intituled 'An Act for abolishing Arrest on Mesne Process in Civil Actions, &c.,' relating to any writ of fieri facias to be sued out of any inferior Court, and to the removal into any one of her Majesty's superior Courts of Record at Westminster of any judgment, rule, or order of any inferior Court of Record, in which, at the time of the passing of that act, a barrister of not less than seven years' standing should act as judge, assessor, or assistant on the trial of causes, and to the force and effect of any such judgment, rule, or order when so removed, shall, notwithstanding anything herein contained, be applicable and applied to executions against goods, chattels, and personal estate issued by the Court by this act established, and to the removal into any one of the said superior Courts of Record, of judgments, rules, and orders for the payment of money exceeding the sum of £5, made or given by the said Court hereby established, and to the force and effect of such judgments, rules, and orders when so removed, in as full and ample a manner as if the said Court hereby established had been an inferior Court of Record, &c."

Hoggins now shewed cause. It was intended by the 46th section of this act to give power to the superior Courts to [128] protect suitors under circumstances like the present, and for that purpose to remove the plaint out of the inferior Court. That section expressly enacts, that "in all such cases," (that is, where the debt claimed shall exceed £5), "it shall be lawful for every such Judge, by an order in writing under his hand, to stay all proceedings in the Court hereby created," upon such terms as to costs as such Judge shall direct.

W. H. Watson, contra. This is an attempt to erect the superior Courts into Courts of appeal against the decision of the Court of Requests in all cases. Assuming, however, that the superior Courts have power to remove the plaint before judgment, no such power exists after judgment has been obtained. The words of the statute are all restrictive, and their meaning is, that in all cases where the plaint might, independently of the statute, be removed into a superior Court, the special order of a Judge shall be necessary for that purpose.

PARKE, B. It appears to me that it is impossible, on the construction of the 46th section of this statute, to say that the legislature meant the Judges of the superior Courts to sit as a Court of appeal to review all that is done in the Court below. Were it not for the use of the word "judgment" in that section, there could have been no difficulty whatever on the subject; the obvious construction would be, that in all cases where the amount claimed exceeded £5, the proceedings could not be removed by the general process of law, without the previous sanction of a Judge of the superior Courts. Such would be the meaning of the clause, independently of the word "judgment," but then that is explained by the subsequent part of the section, which provides that the proceedings, in any state, may be removed under the act for the abolition of arrest on mesne process; but shews that the meaning of the clause was to vest a discretionary power in the Judge of [129] the Court above, to remove

the proceedings at any stage, for the purpose of issuing process on them under that statute. Such appears to be the true construction of this section. The general rule is, that proceedings in inferior Courts cannot be removed by certiorari after judgment, and I cannot go so far as to hold, that, by the negative words in this section, a power is vested in a Judge of the Courts at Westminster to decide on the merits of all cases determined in the local Courts, whenever the sum in dispute shall exceed £5. If the legislature intend to confer any such power as that, they must use much clearer words for the purpose than they have employed in this section: for suppose the record removed, what is the Court above to do with it, further than for the purpose of execution? there is no power reserved to them by the act to alter the judgment.

The rest of the Court concurred.

Rule absolute.

SPAIN v. CADELL. SAME v. SAME. Exch. of Pleas. April 17, 1841.—Where an action of trespass was referred by order of nisi prius, which empowered the arbitrator to amend the pleadings, and to certify for costs, in the same manner as a Judge at nisi prius; and the arbitrator awarded a verdict for the plaintiff with nominal damages, and certified in his award that the action was brought to try a right, &c.:—Held, that he had power to do so, and that the plaintiff was entitled thereon to his full costs.

[S. C. 9 Dowl. P. C. 745; 10 L. J. Ex. 313; 5 Jur. 322.]

These actions, one of which was in trespass, the other in case, having come on for trial, a verdict was taken in each, by consent, for the damages in the declaration, subject to a reference of both causes to an arbitrator; and a clause was inserted in the order of reference, giving power to the arbitrator to amend the pleadings, and to certify for the purpose of costs, in the same manner as a Judge at nisi prius. The arbitrator found in favour of the plaintiff in both actions, with 1s. damages, and certified, [130] in his award, that the actions were brought to try a right, as well as to recover damages for the trespasses for which the first-mentioned action was brought. After the Master had commenced the taxation of the plaintiff's costs, pursuant to this certificate, a Judge's order was obtained by the defendant, directing the Master to defer making his allocatur until the fifth day of this term, in order to give the defendant an opportunity of obtaining the opinion of the Court as to the validity of the arbitrator's certificate: in the event of the Court refusing a rule, the plaintiff's costs in the first action to be taken at the sum of 177l. 6s., in the second at £95, and the Master to give an allocatur accordingly.

Thesiger now moved for a review of the taxation. The question is, whether the arbitrator had power to grant a certificate to give the plaintiff his costs: and that turns upon the construction of the stat. 3 & 4 Vict. c. 24, s. 2, which enacts, that "if the plaintiff, in any action of trespass, or trespass on the case, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, unless the Judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right," &c. By the express words of the act, therefore, the power of certifying is limited to the two classes of persons therein mentioned, viz. the Judge, or the officer presiding at the trial. In *Wilson v. Thorpe* (6 M. & W. 721), where, upon a writ of trial, a verdict was taken for the plaintiff with nominal damages, subject to a reference, both parties consenting that the arbitrator should have power to direct a verdict to be [131] entered for either party, and the arbitrator accordingly directed a verdict for the defendant, the Court set it aside, holding that the sheriff had no power to delegate his authority under the writ, but was bound to try the issue sent to him. So here, the legislature has expressly vested the power of certifying for this purpose in the Judge, and he cannot delegate it to an arbitrator. [Alderson, B. The question here turns upon the agreement of the parties. In the case you cite, it is not clear that the award itself was bad; all that the decision amounts to is, that the verdict could not stand, because the arbitrator had no power to direct a verdict to be entered.] But further, even if the statute is not conclusive as to the person by whom the certificate

is to be granted, it is clearly imperative as to the time and mode of granting it, viz. by indorsement on the record, immediately after the trial. This is a mere statement of his opinion subsequently made by an arbitrator in his award, and is in no respect a compliance with the statute.

ALDERSON, B. I think no rule should be granted in this case. The parties are concluded by their own agreement, which must be reasonably construed, and to which we must give effect in a reasonable manner. By the order of reference, they have agreed that the arbitrator is to be in the same situation, and to have the same powers, that a Judge has under the 3 & 4 Will. 4, c. 24, and have given him the same authority to determine whether the verdict shall or shall not carry costs. No doubt, the arbitrator, who is invested with this power by the consent of the parties, must, in all substantial matters, follow the rules laid down in the statute for the guidance of the Judge: that is, he must give his opinion upon the matter immediately; he cannot make his award at one time, and certify as to the costs at a subsequent time. That is in substance the power possessed by the Judge at nisi prius, which the arbitrator, [132] although he cannot follow it literally, is bound to follow *exprès*—the mode of doing which is by immediately inserting his certificate in the award, which has been done in the present case. By this construction, the intention and agreement of the parties are carried into effect, and we think they may be so carried into effect consistently with the provisions of the statute.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

BROWN v. ELKINGTON. Exch. of Pleas. April 20, 1841.—Defective formation, or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time, (e.g. “curby hocks”) is not an unsoundness.

[S. C. 10 L. J. Ex. 336. Discussed, *Bailey v. Forrest*, 1845, 2 C. & K. 131.]

Assumpsit on the warranty of a horse. Pleas, first, non assumpsit; secondly, a denial of the unsoundness, on which issues were joined. At the trial before Lord Abinger, C. B., at the last Warwick Assizes, it appeared that at the time of the sale of the horse to the plaintiff, he remarked that the horse had “curby hocks,” and objected to him on that ground. The defendant, however, gave a general warranty of soundness, and the plaintiff bought the horse for £60. He was ridden hunting by the plaintiff, and on the third day’s hunting, about a fortnight after the sale, he sprung a curb. Veterinary surgeons were called on the part of the plaintiff, who stated that the term “curby hocks” indicated a peculiar form of the hock, which was considered as rendering the horse more liable to throw out a curb, but did not of itself occasion lameness; and that the horse in question had curby hocks at the time of the sale. The Lord Chief Baron, in summing up, told the jury that a defect in the form of the horse, which had not occasioned lameness at the time of the sale, although it might render the animal more liable [133] to become lame at some future time, was no breach of the warranty. A verdict having been found for the defendant,

Balguy now moved for a new trial, on the ground of misdirection, and contended that a malformation, the natural consequence of which was lameness, amounted to an unsoundness.

ALDERSON, B. *Dickinson v. Follett* (1 M. & Rob. 299) is expressly in point for the defendant, and the law, as laid down by me on that occasion, has not been questioned in any subsequent case.

LORD ABINGER, C. B., and ROLFE, B., concurred.

Rule refused.

OCKLEY v. PYE. Exch. of Pleas. April 21, 1841.—A. succeeded B. in the occupation of a house, and on taking possession agreed with B. for the lease at the sum of £80, and to take the furniture and fixtures at a valuation as between an outgoing and incoming tenant. The goods were accordingly valued at 109l. 15s. 10d. and the amount paid by A., and an assignment executed. The plaintiff after-

wards commissioned the auctioneer who had valued the goods, to sell them, but before he could do so the sheriff entered and seized them under an execution against B., and (the same auctioneer being employed by the sheriff) the goods were sold, and produced only £73, the plaintiff himself being a purchaser to the amount of £20. In an action of trespass brought by A. against the sheriff:—Held, that the jury were justified in giving damages for the full amount of the valuation.

[S. C. 9 Dowl. P. C. 744; 10 L. J. Ex. 305; 5 Jur. 346.]

This was an action of trespass against the sheriff of Staffordshire. The first count was for seizing and taking certain goods, the property of the plaintiff: the second was for breaking and entering his house, pulling down and severing certain fixtures therein, and turning himself and his servant out of possession. Pleas, first, not guilty; secondly, to the first count, that the goods were not the goods of the plaintiff; and thirdly, to the second count, that the house and fixtures were not the plaintiff's. At the trial before [134] Gurney, B., at the last assizes for the county of Stafford, it appeared that the plaintiff, who was a chemist residing at Westbromwich, had some time previously to the alleged trespass taken possession of the house, fixtures, and furniture in question, under an assignment from a person named Mason, the former tenant of the premises. The plaintiff paid £80 for the lease, and the fixtures and goods were purchased at a valuation as between an outgoing and incoming tenant, for 109l. 15s. 10d. The plaintiff afterwards commissioned the auctioneer who had valued the goods to sell them, but before he could do so, the defendant, as sheriff of Staffordshire, entered, and seized them under colour of a writ of execution against Mason, and (the same auctioneer being employed by the sheriff) the goods were sold, and produced only £73, the plaintiff himself being a purchaser to the amount of £20. The learned Judge told the jury that, as to the amount of damages, he thought the least they could give the plaintiff was the sum he had paid for the goods. The plaintiff had a verdict with 109l. 15s. 10d. damages on the first count, and £25 on the second count.

Bayley now moved for a rule to shew cause why there should not be a new trial, or why the amount of the verdict on the first count should not be reduced to the sum of £40. The damages were assessed on a wrong principle; the plaintiff had no just cause of complaint, inasmuch as he had himself directed that the goods should be sold, and the sale was conducted by the auctioneer whom he had commissioned for that purpose. The fact of the sale being directed by the sheriff could not damnify the plaintiff; the jury ought, therefore, to have assessed the damages at the amount which the goods produced, minus the expenses of the sale. The observation of the Judge, though perhaps it may not amount to a misdirection, was calculated to mislead the jury. [Alderson, B. A trespasser has no right [135] to value the goods on which he commits a trespass.] The plaintiff was at all events not entitled to make a profit of the trespass.

ALDERSON, B. It was entirely a question for the jury what damages they would allow. Juries have not much compassion for trespassers, and I do not think they are bound to weigh in golden scales how much injury a party has sustained by a trespass.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

ROSS v. JACQUES. Exch. of Pleas. April 23, 1841.—This Court will not stay the proceedings in an action, on an affidavit that a former action had been brought between the same parties for the same cause of action, which was settled by the defendant paying the debt and costs: but the defendant must plead the former recovery in bar.—A plaintiff will not be compelled to give security for costs merely on the ground of his poverty.

[S. C. 9 Dowl. P. C. 737; 10 L. J. Ex. 306; 5 Jur. 345.]

Cross applied for a rule to shew cause why all further proceedings in this cause should not be stayed, or why the plaintiff should not give security for costs. It was sworn in the affidavits on which he moved, that a former action had been brought by the plaintiff against the defendant for the same cause of action, which was settled by

the defendant paying the debt and costs. The affidavits also stated certain facts from which it might be inferred that the plaintiff was in insolvent circumstances, and the defendant swore that he verily believed, that in the event of his obtaining a verdict, he should not be able to recover his costs. Cross urged, that under these circumstances the Court would stay the proceedings. It is true that the Courts will not in general adopt this course, but will put the defendant to plead the former recovery in bar of the action; but it is stated in the books of practice, that they will sometimes interfere in a summary way: Chitty's Archb. Pr. 1036 (6th edition). At least, under the circumstances, [136] the Court will grant a rule calling on the plaintiff to give security for costs.

ALDERSON, B. We cannot interfere in the manner prayed for. Whether this action be brought for the sum recovered in the former action, we cannot tell, and we cannot be called upon to decide that on affidavits. If it be so, that should be pleaded in bar as a defence to the action. With respect to the other point, the plaintiff is within the jurisdiction of the Court, and her poverty is no reason why she should give security for costs. The case of a plaintiff suing in forma pauperis is an instance of that.

The other Barons concurred.

Rule refused.

PAGE v. JARVIS. Exch. of Pleas. April 22, 1841.—A declaration in assumpsit stated, that one W. A. S. was in the custody of the warden of the Fleet in execution at the suit of the plaintiff, upon a judgment in this Court, and that in consideration that the plaintiff would cause him to be discharged, and would take his warrant of attorney for the debt and costs, the defendant undertook that W. A. S. should be forthcoming to satisfy the amount of the judgment to be entered up on the warrant of attorney, on the 18th July, 1840, at the office of Mr. A., and also, that one day's previous notice of meeting W. A. S. should be given to Mr. A.:—Averment, that the plaintiff, confiding, &c., did discharge W. A. S. out of custody, and took a warrant of attorney for the debt and costs: Breach, that W. A. S. was not forthcoming to satisfy the amount of the judgment so to be entered up as aforesaid, at the day and place agreed on, nor was one day's notice, &c., given to Mr. A.:—Held sufficient, on motion in arrest of judgment, without an averment that judgment was actually entered up on the warrant of attorney.

[S. C. 10 L. J. Ex. 239; 5 Jur. 412.]

Assumpsit. The declaration stated, that heretofore, to wit, on the 17th of July, 1839, one William Augustus South was in the lawful custody of the warden of the Fleet, in execution at the suit of the plaintiff for the sum of 95l. 9s. 6d. upon and by virtue of a certain judgment for that sum before then, to wit, in Hilary Term, 2 Vict. recovered by the plaintiff against the said W. A. South in her Majesty's Court of Exchequer of Pleas at Westminster; and the said W. A. South so being in such custody as aforesaid, in consideration that the plaintiff, at the request of the defendant, would cause the said W. A. South [137] to be discharged out of the said custody of the said warden of the Fleet, and would take the warrant of attorney of the said W. A. South for the payment of the debt and costs in respect of which he the said W. A. South had been so taken in execution as aforesaid, the defendant, to wit, on the day and year last aforesaid, undertook and promised that the said W. A. South should be forthcoming to satisfy the amount of the judgment to be entered up on the said warrant of attorney, on a certain day and at a certain place in that behalf agreed upon between the plaintiff and defendant, to wit, on the 18th day of July, A.D. 1840, at one Mr. Ashley's, No. 9, Shoreditch, in the county of Middlesex; and further, that one day's previous notice of the time of meeting the said W. A. South should be given to the said Mr. Ashley. And the plaintiff avers, that he, confiding in the said promise of the defendant, did cause the said W. A. South to be discharged out of the said custody of the said warden, and did take the warrant of attorney of the said W. A. South for the payment of the debt and costs in respect of which he had been so taken in execution as aforesaid, of all which the said defendant had notice, to wit, on &c.; yet the defendant did not regard his said promise, inasmuch

as the said W. A. South was not forthcoming to satisfy the amount of the said judgment so to be entered up as aforesaid, on the day and at the place in that behalf agreed upon as aforesaid, nor was one day's previous notice of the meeting the said W. A. South given to the said Mr. Ashley; whereby the plaintiff lost the benefit of his said execution, and of the said warrant of attorney, and of the judgment thereon, and was put to divers charges and expenses in the law and otherwise, amounting in the whole to a large sum, to wit, the sum of £100, in and about the premises, &c.

Pleas, first, non assumpsit; second, that W. A. South was forthcoming to satisfy the amount of the said judgment so to be entered up, &c.; third, that one day's pre-[138]-vious notice of meeting the said W. A. South was given to Ashley:—on which issues were joined.

At the trial before Alderson, B., at the London sittings in last Michaelmas Term, the plaintiff obtained a verdict, damages £5. R. V. Richards subsequently obtained a rule to shew cause why the judgment should not be arrested, on the ground that the declaration contained no averment that judgment had been entered up on the warrant of attorney.

E. James and Baddeley now shewed cause. After verdict, it will be presumed that that which was material to be proved in order to support the declaration, was proved at the trial. The rule on this subject is laid down in the notes to *Stennell v. Hogg* (1 Saund. 228, n. (1)):—"Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." If, therefore, it was necessary in this case, in order to entitle the plaintiff to damages, to prove that judgment had actually been entered up, it must now be assumed that such proof was given. But that was not necessary to make the contract binding. [Alderson, B. There is an equal breach of contract, whether the judgment was entered up or not; the difference is, that in the latter case there was no damage. Lord Abinger, C. B. I do not think the contract imports that judgment is to be entered up before the day named; it is to be then entered up; therefore, if the party does not appear on the day, it may be entered up afterwards.] The Court then called on

[139] Whateley, in support of the rule. The object of the debtor's coming on the day and to the place mentioned in the declaration, is to satisfy the judgment; it is therefore a condition precedent that it should be first entered up—that there should then be an existing judgment. The requisition of one day's notice shews this to be so; there was no necessity for notice, except to enable the creditor to get the judgment entered up in the mean time. Inverting the terms of the contract, it amounts to this, that notice shall be given on the 17th of South's intention to appear on the 18th, thereby to enable the plaintiff to enter up judgment; and that on the 18th he shall appear to satisfy the judgment so to be entered up.

LORD ABINGER, C. B. There is some nicety in the case, but upon consideration, I think the declaration is sufficient, and that the rule must be discharged. The defendant undertakes for two things: first, that South shall be forthcoming on the 18th of July, at Mr. Ashley's, to satisfy the amount of the judgment to be entered up; and secondly, that a day's notice of the time of meeting South shall be given to Ashley. The declaration alleges that neither of these things was done. The object of the day's notice was to enable the plaintiff to sign judgment. Then he alleges, that by the neglect to give such notice, he lost the fruits of the judgment signed afterwards. The defendant has therefore broken his contract.

ALDERSON, B. The contract was broken by the omission to give notice to Ashley on the 17th, the object of which was that the plaintiff might sign judgment, so as to be ready to take South on the 18th. If that notice was not given, the plaintiff was not bound to put himself to the unnecessary expense of signing judgment.

ROLFE, B. I am entirely of the same opinion: and [140] even without the matter relating to the notice, I should have thought the declaration sufficient, because the undertaking is that South shall be forthcoming on a given day to satisfy a judgment to be entered up; and the breach alleged is, that he was not forthcoming, whereby the plaintiff lost the fruits of his judgment. I think, after verdict, it may

be safely inferred that the fruits of the judgment which the plaintiff lost, were those of a judgment actually existing.

Rule discharged.

THOMAS, Administrator of Thomas, Deceased v. HAWKES AND ANOTHER. Exch. of Pleas. April 22, 1841.—Under a plea of non assumpsit to a count on an account stated, the defendant may shew that accounts between the plaintiff and himself, the correctness of which he has admitted, were in fact incorrect.

[S. C. 9 Dowl. P. C. 801 ; 10 L. J. Ex. 240, and (as to costs) 9 M. & W. 53.]

Referred to, *Daniell v. Sinclair*, 1881, 6 A. C. 183.]

Assumpsit by the plaintiff, as administrator, against the defendants as joint makers of a promissory note payable to the intestate ; with a count on an account stated with the intestate. Pleas, to the first count, that the defendants did not make the note ; to the second, non assumpsit. At the trial before Lord Abinger, C. B., at the London sittings after last Michaelmas term, the plaintiff put in, to prove the second issue, certain accounts between the defendants and the intestate, and proved an admission on the part of the defendants of their correctness. The defendants proposed to shew, in answer to this evidence, that mistakes to their prejudice existed in the accounts. The Lord Chief Baron rejected the evidence, on the ground that, under the plea of non assumpsit, the only question was whether an account had in fact been stated or not, and that fraud or mistake should have been specially pleaded. A verdict having been found for the plaintiff, Humfrey, in Hilary Term, obtained a rule nisi for a new trial, on the ground that the evidence had been wrongly excluded.

[141] Erle and Montagu Chambers now shewed cause. The plaintiff relies upon an express promise, but the defendants seek to convert some of the items of the account, whose correctness they have expressly admitted, into a subject of set-off. [Alderson, B. The issue is not simply whether there was an account stated or not, but whether the defendant was indebted on an account stated or not.] The evidence is of an express contract, whereby the defendants admitted a debt. An account stated is conclusive of a debt until avoided ; it is voidable ; the plea, therefore, should have been in confession and avoidance.

Humfrey and J. Henderson, contra, were stopped by the Court.

ALDERSON, B. The rule must be absolute. It cannot be contended that from the mere statement of an account a debt arises. The averment of the declaration is, not merely that an account was stated, but that the defendants were indebted upon it. How can the defendants confess and avoid this allegation ? They must confess the being indebted ; then how could they avoid it ? They were entitled, therefore, under the general issue, to shew that the account did not shew them to be indebted, because it was not correct.

LORD ABINGER, C. B., and ROLFE, B., concurred.

Rule absolute.

[142] BOSANQUET AND OTHERS v. CORSER. Exch. of Pleas. April 23, 1841.—Assumpsit by the holders against the drawer of a banker's cheque. Plea, that the defendant made the draft for the accommodation of C., and that there never was any consideration for it ; and further, that there never was any consideration for the transfer of the same by C. to the plaintiffs, and that they always held and now hold the same without value. Replication, *de injuriâ*. At the trial, it appeared that the plaintiffs were trustees of the L. and W. Bank, and that they employed one R. as their agent to manage one branch of the concern. C., in whose favour the bill was drawn, had an account with that branch, which was considerably overdrawn. It was the practice of the bank to send round an inspector to all their branch banks once every quarter to examine their agents' accounts ; and in order to prevent its being discovered that C. was in debt to the bank, R. was in the habit of taking cheques from C. before the quarter-day approached, which he placed to his credit on the account, but upon an express understanding that they were not to be presented, but returned to C. after the

quarter-day was past. The cheque in question had been obtained from the defendant for this purpose by C., R. being aware of it, in consideration of a counter cheque from C. for the same amount:—Held, that neither of the averments in the plea was sustained on the evidence, and that the plaintiffs were entitled to recover.

[S. C. 10 L. J. Ex. 275; 5 Jur. 369. At Nisi Prius, 9 Car. & P. 604.]

Assumpsit on a banker's cheque for £500, dated the 31st of March, 1840, drawn on Messrs. Barnard, Dimsdale, & Co., and made payable to M. Chippenfield or bearer, and by the said M. Chippenfield indorsed to the plaintiffs.

Plea, that the defendant made the said draft for the accommodation of the said M. Chippenfield, and that there never was any value or consideration for the making of the same; and further, that there never was any consideration for the transfer or delivery of the same by Chippenfield to the plaintiffs; and that the plaintiffs always held and now hold the same without any value or consideration.

To this plea the plaintiff replied, *de injuriâ*.

At the trial before Gurney, B., at the Middlesex Sittings after Hilary Term, the following facts appeared in evidence:—The plaintiffs, who were trustees of the London and Westminster Bank, employed a person of the name of Charles Rees as their agent, to manage the Whitechapel branch of the bank. Chippenfield, in whose favour the cheque was drawn, had an account with the Whitechapel branch, which had been considerably overdrawn for some time. It was shewn to be the practice of the London and Westminster Bank to send round a visiting inspector once a quarter to all their branch banks, to examine their agents' accounts and balance their books. In order to prevent the Bank from ascertaining that Chippenfield was in their debt, Rees was in the habit of obtaining from the latter, before the quarter-day approached, cheques and bills drawn by himself or his friends, which he placed [143] to the credit of his account; but upon the express understanding between them, that the cheques, &c., were not to be presented for payment, nor the parties to be held liable on them, but were to be returned after the inspector had gone round. In pursuance of this arrangement, the cheque in question had been obtained from the defendant, with the knowledge of Rees, by Chippenfield. It did not however appear that the defendant knew anything of this arrangement; on the contrary, he was induced to give the cheque only on receiving from Chippenfield a counter cheque for the same amount, but on an understanding that neither was to be presented for payment. Suspicion having been created in the minds of the trustees of the Bank relative to the conduct of Rees, they sent suddenly to the Bank at Whitechapel, and took away his papers and desk, when they found two cheques drawn by the defendant, one of which was the subject of the present action. At the trial, the plaintiffs insisted that they had a right to recover on this cheque, on the ground that it had been transferred to their agent in payment of the balance of an overdrawn account, and consequently rendered them indorsees for a valuable consideration; and the learned Judge, being of this opinion, directed the jury accordingly, who returned a verdict for the plaintiffs for the amount of the cheque.

Erle now moved for a new trial, on the ground of misdirection. The plaintiff's stand in the situation of Rees, and must take the cheque as affected by his acts; and as it was delivered to Rees on the express understanding that it never should be presented, but should be returned to Chippenfield, the plaintiffs are estopped from insisting on payment of it by the defendant. [Gurney, B. The cheque was made part of the account balanced in the books of the bank. It was not presented, it is true, but credit was given for it by the bankers.] In [144] *Ferguson v. Carrington* (9 B. & C. 59), where A. purchased goods on credit, fraudulently intending at the time not to pay for them, and B., the vendor, brought assumpsit for the goods sold before the credit had expired; it was held that the action was not maintainable, though the vendor might have treated the matter as a nullity, and have brought trover immediately to recover the value of the goods. So in *Strutt v. Smith* (1 C. M. & R. 312), where goods were sold upon the terms of a "bill at three months; 10l. per cent. discount; cash in fourteen days;" it was held that the vendors could not sue in indebitatus assumpsit within fourteen days, even if the sale had been effected by fraud on the part of the vendee, so that trover might have been maintained. Those decisions proceeded on the ground that the transaction was treated as a matter of

contract. So here, the delivery of this cheque was a matter of contract, an express agreement having been entered into that it was not to be presented, but returned. If no such agreement had existed, an implied contract to pay would have arisen; but here there is an express contract that the cheque shall not be presented, but returned. The plaintiffs' claim is through Rees, who entered into this contract, and they are affected by his acts.

ALDERSON, B. It seems to me that no rule ought to be granted in this case. This is an action on a banker's cheque; and the question for us now, as raised by the pleadings, is, whether the defendant has established these two propositions: first, that as between him and Chippenfield, there was no consideration given in respect of the delivery of this cheque; and secondly, that as between Chippenfield and the present plaintiffs, no consideration passed for it. He is bound to make out those two propositions; and I think he has failed in both. With respect to the first, it appears that cheques were inter-[145]-changed between these parties; that the defendant gave a cheque for £500 to Chippenfield, and received from him another to the same amount, and of which, for all that appears to the contrary, he may still be the holder, as a security for the debt due to him by Chippenfield. His allegation, that there was no consideration for making the cheque, consequently fails. Then, as between Chippenfield and the plaintiffs, the real bargain and fraudulent contract appears to be this; that Chippenfield shall give Rees the cheque for £500, which is to pass into his account with the Bank, to whom Chippenfield owes a much larger sum; and then it is corruptly agreed between Chippenfield and Rees, that the cheque shall only be held for that purpose, and returned after inspection day is over; and the whole contract so made by Chippenfield is with the view of inducing the Bank to believe that he was not at the time in their debt. It is a corrupt agreement, that Rees shall take from Chippenfield a certain cheque, and set off against its amount a certain sum of money standing in his account to the credit of the Bank; but what is there to shew, that because Rees and Chippenfield thus make a separate contract between themselves, in addition to the one made by Rees on behalf of his principals, the plaintiffs, the money allowed to Chippenfield, in his account with the Bank, is not a consideration passing to Chippenfield? I think there was consideration passing between them, and consequently, in that part of his plea, the defendant also fails. This is not at all like the case of the plaintiffs themselves making the bargain, and being parties to the fraud; so far from that, the fraud is here intended to take effect against them.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[146] JONES v. GOODAY. Exch. of Pleas. April 20, 1841.—In trespass for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition.

[S. C. 1 Dowl. (N. S.) 50; 10 L. J. Ex. 275. Referred to, *Wigzell v. School for Indigent Blind*, 1882, 8 Q. B. D. 367; *Whitham v. Kershaw*, 1885, 16 Q. B. D. 614; *In re Swan*; *Whitham v. Swan*, [1915] 1 Ch. 832. See further, 9 M. & W. 736.]

This was an action of trespass for digging and cutting the plaintiff's close, and carrying away therefrom large quantities of earth, soil, &c. The defendant pleaded not guilty (by statute). At the trial before Tindal, C. J., at the last Suffolk Assizes, it appeared that the defendant, in his character of commissioner under a local Paving Act for the town of Sudbury, had directed a certain ditch to be widened, and in so doing had caused a strip of a field belonging to the plaintiff, adjoining the ditch, to be cut and carried away; which was the trespass complained of. The Lord Chief Justice directed the jury to give such damages as they thought the plaintiff had sustained by the cutting into and carrying away of his land; and the jury found a verdict for the plaintiff, damages £5.

Kelly, for the plaintiff, now moved for a new trial on the ground of misdirection, contending that the learned Judge ought to have directed the jury that the plaintiff was entitled to such a sum, by way of damages, as would restore the land to the condition in which it was before the commission of the trespass.

LORD ABINGER, C. B. I think there is no ground for a rule. I cannot at all assent

to the principle which has been contended for, that a person whose land has been cut into, and the soil carried away, is therefore entitled, by way of damages, to the amount which would be required to restore the land to its original condition. All that he is entitled to is to be compensated for the damage he has actually sustained.

ALDERSON, B. I am of the same opinion. The plaintiff is entitled, by way of compensation, to what the land [147] was worth to him. If the principle for which Mr. Kelly contends were to be adopted, it would follow that a party who has let the sea in upon the land of another, the land itself being worth only £20, would have to pay, by way of damages, the expense of excluding it again by extensive engineering operations. The same argument, I remember, was urged in an action brought against the Regent's Canal Company: it was contended that they were bound to replace the soil they had taken away, or to pay such a sum in damages as would enable the plaintiff to do so. The jury, however, did not adopt that view of the case, and the Court refused to disturb their verdict.

ROLFE, B., concurred.

Rule refused.

WILLIS v. SNOOK. Exch. of Pleas. April 27, 1841.—The affidavit in support of an application for a *capias*, under the 1 & 2 Vict. c. 110, s. 3, need not state that the deponent has probable cause for believing that the defendant is about to quit England; it is sufficient if the facts stated in the affidavit enable the Judge to form that belief.

[S. C. 10 L. J. Ex. 266; 5 Jur. 579.]

The defendant in this case having been arrested by virtue of a *capias* issued upon a judge's order, under the stat. 1 & 2 Vict. c. 110, s. 3, a rule had been obtained to shew cause why he should not be discharged out of custody, on the ground that the affidavits upon which the order was made did not sufficiently establish the fact that he was about to leave the kingdom.

Platt having shewed cause against the rule on the merits,

Erle, in support of it, objected, that the defendant was entitled to his discharge, on the ground that in the affidavits on which the order was made, none of the deponents stated that they had probable cause for believing that the defendant was about to leave the country in order to [148] avoid his creditors; and that a mere statement of circumstances, upon which such an inference was to be founded, was not sufficient. He likened it to the case of an application for a criminal information, where a mere statement of circumstances is not considered sufficient, but the Court requires that some person shall swear to his belief of the existence of the criminal intention imputed to the party against whom the application is made.

Per Curiam. Such an allegation is usually inserted in the affidavits on which a *capias* is applied for, but it is not at all essential, and when it is inserted, the Judges pay no attention to it. All that the statute requires is, that "the plaintiff shall by affidavit shew to the satisfaction of the Judge, that there is probable cause for believing that the defendant is about to quit England:" that is, that the probable cause shall appear, from the facts stated, to the Judge; it does not mean that it shall appear to the deponent.

Rule discharged.

GREENSHIELD v. PRITCHARD. Exch. of Pleas. April 27, 1841.—The Court refused, after the lapse of a year, to discharge a party who had been arrested under a *ca. sa.* in a wrong county, although he swore that he was not aware of that fact until ten months after his arrest, and that he then applied immediately for his discharge to a Judge, who refused to interfere.

[S. C. 1 Dowl. (N. S.) 51; 10 L. J. Ex. 295; 5 Jur. 439.]

Peacock moved for a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Oxfordshire, upon an affidavit of the defendant, which stated that he was arrested on the 13th of April, 1840, by virtue of a writ of *ca. sa.*

directed to the sheriff of Oxfordshire, but that the arrest was made in the county of Berks, at a distance of more than 900 yards from the boundary of the county of Oxford; that the defendant was not aware of the last-mentioned fact until the month of February, 1841, and that immediately on ascertaining it he applied to a Judge to be discharged, who, however, refused to interfere. Peacock urged that [149] the rule which requires parties complaining of irregularity in process to apply to the Court promptly, did not apply where the proceeding was altogether void, as in this case. But.

Per Curiam. We cannot interfere after such a length of time has been allowed to elapse: the defendant must adopt any other remedy to which he may be entitled.

Rule refused.

WELLS v. FOSTER. Exch. of Pleas. April 29, 1841.—A compensation granted to a public civil officer on the reduction of offices in his department, under the 4 & 5 Will. 4, c. 24, is not assignable by him.

[S. C. 10 L. J. Ex. 216; 5 Jur. 464. Distinguished, *Spooner v. Payne*, 1852, 1 De G. M. & G. 388. Dietum adopted, *Willcock v. Terrell*, 1878, 3 Ex. D. 334. Adopted, *Birch v. Birch*, 1883, 8 P. D. 165; *Lucas v. Harris*, 1886, 18 Q. B. D. 136. See also, *Morris v. Manesty*, 1845, 7 Q. B. 674.]

Assumpsit for money had and received, and on an account stated. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the Middlesex sittings after Hilary Term, it appeared that the defendant had held a situation as clerk in the Audit Office for upwards of twenty years, up to the year 1835, when, the establishment being reduced, he was placed on a retired allowance of £130 a year, granted to him, not for life, but as an allowance for maintenance until he should be called on to serve again, and with an express understanding that he was bound, whenever he should be called upon, to re-enter the Audit Office, or to take any other office under the Crown of equal value. In 1837, the defendant, being in execution at the suit of the plaintiff, executed to him an assignment of this annuity, and also gave a warrant of attorney to secure the payment of the debt by instalments. The deed of assignment contained a covenant that the defendant had good title to assign the annuity. In consideration of the execution of this deed, the defendant was discharged from custody. After his discharge, the plaintiff's debt remaining unpaid, he obtained an injunction to restrain the defend-[150]-ant from securing or assigning over any part of his pension; which was subsequently dissolved, upon the terms that the defendant's attorney should receive the pension and pay it into a banking-house, and that the plaintiff should be at liberty to bring any action he might be advised, for the amount so paid in. The present action was brought accordingly. Upon these facts, the Lord Chief Baron directed a verdict for the plaintiff, damages 67l. 10s., leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the defendant's pension was not assignable in law.

Erle having obtained a rule nisi accordingly,

Hoggins now shewed cause, and contended that this pension or annuity was not like half-pay, which was a retaining payment for future services, and therefore not assignable; *Flarty v. Odum* (3 T. R. 681), *Lidderdale v. Duke of Montrose* (4 T. R. 248), *Priddy v. Rose* (3 Mer. 102); but that it was altogether in the nature of a compensation for past services, and when once granted, could not be withheld. It was therefore subject to the absolute control of the grantee, and he might assign it to a creditor. In support of this view, he referred to the stat. 4 & 5 Will. 4, c. 24, s. 19.(d)

[151] Erle and W. J. Alexander, contra, insisted that this allowance could not be assigned; that it was clearly not vested in the defendant absolutely, for his life,

(d) Which enacts, that every person to whom any compensation or allowance, in consequence of the abolition or reduction of office, shall hereafter be granted, shall at all times, when called upon, be liable to fill, in any part of his Majesty's dominions in which he shall have already served, any public office or situation under the Crown for which his previous public services may render him eligible; and that if he shall

but only during the pleasure of Parliament; that it was as well a retainer for future as a compensation for past services: and that the defendant might even be considered as being still in the public service, in the character of a supernumerary clerk, although not now performing any actual duty. They cited *Barwick v. Reade* (1 H. Bl. 627), *Palmer v. Bate* (2 Brod. & B. 673; 6 Moore, 28), *Davis v. Duke of Marlborough* (1 Swanst. 74), *Ex parte Battine* (4 B. & Adol. 690), *Gibson v. East India Company* (5 Bing. N. C. 262; 7 Scott, 74).

LORD ABINGER, C. B. The Court are of opinion that this pension was not assignable. It stands upon the same footing as the half-pay of an officer in the army. It is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty. Besides, the defendant may be assigning what he has no right to receive; for his pension subsists only during pleasure, and it depends on Parliament whether it shall be continued or not. The rule to enter a nonsuit must be absolute.

PARKE, B. I concur in the opinion that this action is not maintainable, upon the ground that, on principles of public policy, the allowance granted to the defendant was not assignable by him. It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right, or whether it [152] is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the Treasury and of Parliament, by which the fund for its payment is provided. On the other hand, even if it be payable only during pleasure, it appears to me that it is not therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But viewing the matter on the ground of public policy, we are to look, not so much at the tenure of this pension, whether it is held for life or during pleasure, as whether it is, in either case, such a one as the law ought to allow to be assigned. The correct distinction made in the cases on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. In such a case, the assignee acquires a title to it both in equity and at law, and may recover back any sums received in respect of it by the assignor, after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable. Under the terms of the stat. 4 & 5 Will. 4, c. 24, the party, if an inferior officer, is liable at any time to be called upon to serve the public again; in the mean time a reduced allowance is awarded to him, in consideration of his holding himself in readiness for that purpose. This is the case of an officer who has received a compensation on account of a reduction in the number of the persons of his class employed in the office to which he belonged; and by the terms of the 19th section, all such persons are bound to give their services again to the public, if called upon, and in the event of their refusal to do so, are liable to forfeit their pension [153] altogether. I cannot assent to the argument that this pension cannot be taken away, for it appears to me to be clear from the 30th section of the act, that this gentleman, so far as the question of his retainer or discharge is concerned, is exactly in the same position as if he were in full employment or on full pay; that he is equally liable to be dismissed at any moment, either for positive misconduct, or on any ground which would render him an unfit person to remain in the service of the Crown. I think the true view of this case

decline, when called upon so to do, to take upon himself such office or situation, and execute the duties thereof satisfactorily, being in a competent state of health, he shall forfeit his right to any compensation or allowance which may have been granted to him in respect of any former services.

Sect. 10 enacts, "that nothing in this act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under this act, or to deprive the commissioners of his Majesty's Treasury, and the heads or principal officers of the respective departments, of their power and authority to dismiss any person from the public service without compensation."

The Audit Office is one of the offices mentioned in the schedule to this act.

is, that the defendant is still to be considered as in the public service, although not at present actually performing any duty in it; and that the compensation allotted to him under this act is by way of salary, the object of which is to enable him to maintain such a position in life as will save him from the necessity of risking his character, by incurring those temptations which persons reduced to poverty are necessarily exposed to, and which would render him an unfit person to be again employed as a servant of the Crown. For this purpose, public policy requires that he should not be permitted to assign it away.

ALDERSON, B. I am also of opinion that, on grounds of public policy, this pension is not assignable, and that in this respect it stands on the same footing as an officer's half-pay. The observations of Lord Kenyon, in *Flarty v. Odlum*, are very forcible, and apply fully to the present case. It appears to me that the defendant is a supernumerary officer in the pay of the Crown, although not at the present moment actually employed; he may be called into active employment again whenever his services are required by the Crown. I think he is within the 30th section of the act, and is now liable to dismissal for misconduct or unfitness for service.

My Brother Rolfe requested me, before he left the Court, to state that he is of the same opinion.

Rule absolute.

[154] EYRE v. SHELLEY. Exch. of Pleas. April 29, 1841.—Where, in an attorney's bill of costs, several items, not for fixed fees but of a discretionary nature, had no charges set opposite to them, and others were charged, some too low and some too high; and the Master, on taxation, reduced the latter to the proper scale, but declined to increase the former, or to insert the charges omitted altogether; the Court refused to review the taxation.

[S. C. 1 Dowl. (N. S.) 83; 10 L. J. Ex. 295; 5 Jur. 439.]

This was an action on an attorney's bill. The plaintiff having obtained judgment on demurrer (6 M. & W. 269), the defendant obtained an order for staying all proceedings in the action, the plaintiff's bill to be referred to the Master for taxation, and the defendant undertaking to pay the amount which should be found on taxation to be due. On the examination of the bill before the Master, it was found to contain several items against which no charge was inserted; other items (which were not in respect of any fixed fees, but were discretionary charges) were charged, some too high, and some too low. The Master reduced the former to the proper amount, but declined either to insert any sums for the items left in blank, or to increase the items which were undercharged. The total amount of the charges, if altered as was desired, would not have exceeded the amount of the bill as delivered.

Peacock now moved for a review of the taxation, and urged that the Master ought to have allowed the charges omitted, and to have increased those which were undercharged to the proper amount. But

Per Curiam. There is a great difference between charges made in respect of fees, the amount of which is fixed and known, and charges which are merely discretionary. The plaintiff, by inserting the charges in his bill at the amounts he has done, has put his own value upon his labour, and cannot now call upon the Court to increase it.

Rule refused.

[155] ROACH AND OTHERS v. WRIGHT. Exch. of Pleas. April 29, 1841.—The sheriff having taken in execution goods which the defendant, who was one of the administrators of an intestate person, had become possessed of under a sale from his co-administrator, was served with a notice from another party, that he and others were also entitled to shares in the goods, as next of kin to the intestate, and that, upon a bill filed by them in the Court of Chancery, the defendant had been restrained by injunction from selling, mortgaging, or disposing of the goods, and that they should hold the sheriff answerable for all loss and damage occasioned by the seizure:—Held, that this was not such a claim as entitled the sheriff to

apply for relief under the Interpleader Act.—Quære, whether the Court will grant such relief in any case where the claim is of a merely equitable nature?

[S. C. 1 Dowl. (N. S.) 56; 10 L. J. Ex. 267. Referred to, *Richards v. Jenkins*, 1886, 17 Q. B. D. 549.]

In this case E. V. Williams, on behalf of the sheriff of Glamorganshire, moved for an interpleader rule. The circumstances of the case, as disclosed in the affidavits, were as follows:—

The sheriff having, on the 6th of March last, seized a ship in the possession of the defendant, William Charles Wright, called the “Stephen Wright,” under a fieri facias at the suit of the plaintiffs, was served on the 8th of April with a notice by the attorneys of Frederick Owen Dickens and Anna Eliza his wife, stating, that a bill had been filed in the Court of Chancery, on the 25th of June, 1840, by the said F. O. Dickens and Anna Eliza his wife, against the defendant W. C. Wright and others, wherein it was alleged, that the said Anna Eliza Dickens was one of the children and next of kin of John Wright, who died in the year 1839, intestate, leaving the defendant W. C. Wright, and the other defendants therein named, his other children and next of kin; that the said F. O. Dickens, in right of his wife as one of such next of kin, became entitled to a share of the residue of the estate of the said intestate; that the defendant W. C. Wright and Elizabeth Clark Hawkes, the wife of George Hawkes, one of the defendants to the said bill, being two of the children and next of kin of the said intestate, had procured letters of administration to be granted to them, and were thereby possessed of the estate of the intestate, and of the said ship, called the “Stephen Wright,” as part thereof; that by agreement between the said George Hawkes and the said W. C. Wright, the said ship had been transferred to W. C. Wright for the sum of £2000, which had not been paid; and that, in pursuance of the prayer of the said bill, a writ of in-[156]junction had issued out of the Court of Chancery, whereby the said W. C. Wright was restrained from selling, mortgaging, or in any manner disposing of the said ship. The notice then stated, that in consequence of the above-mentioned facts, the said ship had always, from the death of the said intestate, remained a part of his estate and effects, and that no property in the same passed to the defendant W. C. Wright; and that the said F. O. Dickens and Anna Eliza his wife, on behalf of themselves and of the other parties interested in the estate of the intestate, would hold the sheriff answerable for the loss and damage occasioned to them by the levy on and seizure of the said ship.

E. V. Williams contended, that under these circumstances the sheriff was entitled to relief. The question in this case is one substantially between the execution creditors and the claimants under the estate of the intestate, which ought to be disposed of between them independently of the sheriff. The parties, by the form of their notice, have put in a legal, not a mere equitable claim, by stating that no property in the ship passed to the defendant: and the proper course would seem to be, to direct an issue to be tried at law between those parties and the execution creditors, whether the ship was part of the personal estate of the intestate, or was liable to be taken in execution as the property of the defendant Wright. [Rolfe, B. Is not the question whether the ship belongs to the defendant *proprio jure*, so as to be liable to an execution for his debts, or whether he holds it only as a trustee for himself and others?] If the property forms part of the estate of the intestate, the sheriff, by selling it, would be liable to an action at the suit of the administrator, because the property would be changed by the sale: *Whale v. Booth* (4 T. R. 625, n.; 4 Dougl. 36). [Parke, B. In *Farr v. Newman* (4 T. R. 621), it was held that the goods of a testator [157] in the hands of his executor could not be taken in execution upon a judgment against the executor in his own right. Alderson, B. The claimant here is not the administrator, and could not therefore bring any action to try the question.] Still the sheriff is in jeopardy, because if he proceeds to a sale, the Court of Chancery may order an action to be brought against him in the name of the administrators, for the benefit of the parties applying for the injunction, and then he would be in jeopardy from having sold the goods in defiance of a notice from those parties.

PARKE, B. I think no rule ought to be granted in this case. It seems to me that there is no ground for saying that this ship ever formed part of the assets appropriated to the next of kin, by whom the bill in equity was filed. If it belongs to them, they may bring an action against the sheriff; or the question may be tried

by an action brought against the sheriff by all the administrators. In the present case, the claim arises out of proceedings in equity, and in the case of *Sturgess v. Clowle*,^(a) it was decided by my Brother Patteson that the Interpleader Act does not apply to claims in equity. If an execution creditor, under such circumstances, refuse to indemnify the sheriff, the proper course for him is to apply to the Court, not under the Interpleader Act, but to enlarge the time for making a return to the writ.

ALDERSON, B. I do not think we should be justified in calling upon the next of kin to come in and state their claim under the Interpleader Act. This is a claim on which they could not sustain any action at law against the sheriff in their own name, however they might do so through the medium of the administrators. The issue that would be tried between them and the defendant [158] Wright would afford no relief to the sheriff. Our jurisdiction is confined to the cases of claims actually made: but what has taken place here is not the making of a legal claim, but only the statement of an equitable interest.

ROLFE, B., concurred.

Rule refused.

DOE D. PARSONS v. HEATHER. Exch. of Pleas. April 29, 1841.—A declaration in ejectment laid the demise on the 31st of October (without mentioning any year). At the trial, the lessor of the plaintiff proved a title in himself on the 31st of October, 1840:—Held, first, that this was not a variance between the declaration and the proof, so as to empower the Judge at the trial to amend the declaration under the stat. 3 & 4 Will. 4, c. 42, s. 23, by inserting the year: secondly, that the omission was no ground of nonsuit.—Semble, that the defendant's proper course in such case, is to apply to the Court to compel the plaintiff to insert the correct date.

[S. C. 1 Dowl. (N. S.) 64: 10 L. J. Ex. 296: 5 Jur. 755.]

In this ejectment, the demise was laid on the 31st of October (not mentioning any year). At the trial before Lord Abinger, C. B., at the sittings after last term, the plaintiff's counsel applied to his Lordship to amend the declaration under the statute 3 & 4 Will. 4, c. 42, s. 23, by adding the year 1840, conformably with the evidence, which shewed the lessor of the plaintiff's title then to have accrued. The amendment was made accordingly, leave being reserved to the defendant to move to enter a nonsuit; and a verdict passed for the plaintiff, a certificate being also granted for immediate possession.

Leahy having obtained a rule nisi for a nonsuit, pursuant to the leave reserved, and also for restitution of the premises to the defendant;

G. T. White now shewed cause. First, this was a case in which the Judge had power to amend the record at nisi prius, under the statute, this being a variance between the declaration and the evidence. But at all events, the omission of the year is no ground of nonsuit. It is not necessary, in stating the title in ejectment, to mention any year at all. In *Small d. Baker v. Cole* (2 Burr. 1159), the pleadings were [159] intitled as of Hilary Term, 1 Geo. 3, but the lease declared on was alleged to be made "in the 33rd year of the said king," which was, at the time of the decision of the case (Easter Term, 1 Geo. 3), an impossible date; but the Court, on motion in arrest of judgment, held that this was not the case of setting out a defective title, but was only a title defectively or improperly set out: and that no amendment was needed. In *Doe d. Hardman v. Pilkington* (4 Burr. 2447), Lord Mansfield says—"An ejectment is a mere fictitious action. The demise is a mere matter of form: it does not exist. It is not like a real title." There an amendment was made in the date of the demise, to prevent the title from being barred by a fine.

No counsel appeared to support the rule.

PARKE, B. The rule must be discharged. As to the amendment, the Judge at Nisi Prius had no such power in this case. This is not a question of variance between the declaration and the proof, but, if anything, is a defect in the declaration itself. It turns out that the lessor of the plaintiff had a title to these premises on the 31st of

(a) 1 Dowl. P. C. 505. See, however, *Putney v. Tring*, 5 M. & W. 425.

October, 1840, and the declaration is applicable to the 31st of October in any year, so that his case is proved. Consequently, if this be any objection at all, it could only be made available on motion in arrest of judgment, although it would probably even then have failed, on the authority of the cases which have been referred to. We need not, however, decide that point at present, because this motion is to enter a non-suit, which we clearly cannot do. A defendant has no opportunity of demurring to a declaration in ejectment; he must plead not guilty; and if he considers himself prejudiced by the uncertainty of the date of the demise, his proper course is to apply to the [160] Court to compel the plaintiff to insert the correct date. In the present case, he has chosen to go down to trial, and has let slip his opportunity of having the amendment made.

The other Barons concurred.

Rule discharged.

STEWART v. CAUTY. Exch. of Pleas. April 17, 1841.—In an action for the non-acceptance of railway shares, which by the contract (made at Liverpool through brokers) were to be delivered in a reasonable time, a written rule of the Liverpool Stock Exchange, stated to be acted upon by all the Liverpool brokers—"that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee"—was held admissible on an issue whether the plaintiff within a reasonable time was ready and willing and offered to transfer the shares; although it was not proved that either of the parties, or their brokers, was a member of the Liverpool Stock Exchange.—In such action, the proper measure of damages is the difference of the prices of the shares according to the contract, and on the day when they were resold by the vendor, such resale being within a reasonable time.

[S. C. 10 L. J. Ex. 348; 5 Jur. 411.]

This was an action of assumpsit, for not accepting certain half-shares in the Great Western Railway, agreed to be sold by the plaintiff to the defendant. The declaration stated, that the shares were by the contract to be delivered in a reasonable time, and averred that within such reasonable time the plaintiff was ready and willing and offered to transfer the shares to the defendant, but that the defendant discharged him from transferring the same; and alleged a breach in non-acceptance of the shares. The defendant pleaded, first, non assumpsit; secondly, that the plaintiff was not within a reasonable time ready and willing, nor did he offer to transfer the said shares to the defendant, modo et formâ; thirdly, a traverse of the defendant's having discharged the plaintiff from transferring the shares; and fourthly, that the defendant was ready and willing to accept and pay for the shares within a reasonable time, but that the plaintiff refused to transfer the same, whereupon the defendant rescinded the contract. The plaintiff joined issue on the three first pleas, and replied to the fourth by a traverse of his alleged refusal to transfer the shares; on which replication also issue was joined.

[161] At the trial before Rolfe, B., at the last Liverpool Assizes, it appeared that the contract in question was made at Liverpool, between the respective brokers of the plaintiff and defendant, on the 26th of August, 1840. At that time, however, the names of their principals were not mentioned; and it was not until the 31st of August that the name of the defendant, as the purchaser, was disclosed. The defendant then pressed for a transfer of the shares, and on the plaintiff's neglecting to transfer them, the defendant, on Saturday the 5th of September, gave him notice that he would not accept them, unless they were ready by the following Monday. On the Monday the defendant had notice that the shares were ready for delivery, but he then repudiated the contract altogether, and refused to accept them. On the 15th of September, the plaintiff resold the shares, at a loss of £161 from the price agreed for by the defendant, and this action was brought to recover that sum. For the purpose of proving the averment that the plaintiff was ready and willing and offered to transfer the shares in a reasonable time, the plaintiff's counsel tendered in evidence a copy of the rules of the Stock Exchange at Liverpool, which, it was stated, were acted on by all the brokers carrying on business in Liverpool; one of which was, that the seller of shares

was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was made acquainted with the name of his transferee. It was proved also, that this rule had been shewn to the defendant at the time of the bargain, on the 31st of August; but it did not appear that either of the parties, or their brokers, was a member of the Liverpool Stock Exchange. This evidence was objected to on the part of the defendant, but was admitted by the learned Judge. His Lordship, in summing up, directed the jury, that if they were of opinion that the defendant had broken his contract, the plaintiff was bound to resell the shares within as short a time as he reasonably [162] could, and if he did so, was entitled to damages up to the time of such resale. The jury found a verdict for the plaintiff for the whole amount claimed.

Crompton now moved for a new trial. First, the evidence of the rules was improperly received. Those rules were not in any way evidence for the plaintiff. They were not shewn to the defendant as part of the contract. And the usage of any particular set of mercantile houses is not evidence to bind third parties. [Rolfe, B. I told the jury that the defendant was not bound by them, but that they were cogent evidence of what was reasonable time.] It is in effect setting up a usage or custom, which cannot be proved, although it may be disproved, by a number of individual instances. Secondly, the learned Judge misdirected the jury as to the measure of damages. The damages ought only to have been calculated up to the Monday, the 7th of September, when the defendant declared off, whereas they were calculated up to the resale of the shares on the 15th. The damages, in such a case, are to be measured by the difference between the contract price and the price at the time of the repudiation of the contract. The jury, in effect, acted upon the rules as to the damages also.

ALDERSON, B. I think there should be no rule on either of these points. It appears to me that my Brother Rolfe was quite right in admitting the rules in evidence, not as binding the defendant, but as ascertaining the practice of brokers in Liverpool, as a guide to the determination of what was reasonable time under all the circumstances of this case; whether what was reasonable time under ordinary circumstances was not so in this instance. As to the other point, the damages are to be calculated at the difference between the contract price, and the price to be obtained within a reasonable time after the breach of [163] the contract; and it was for the jury to say what was such reasonable time. I do not see that they formed a wrong conclusion, and they certainly were not misdirected.

GURNEY, B., and ROLFE, B., concurred.

The rule for a new trial was therefore refused; but a rule nisi was granted for arresting the judgment, which was discharged in Trinity Term.

THE ATTORNEY-GENERAL v. KINGSTON. Exch. of Pleas. April 24, 1841.—An action brought in another court against a revenue officer for the value of goods seized by him for a breach of the revenue laws, will be removed into this Court, on the application of the Attorney-General, at any stage of the proceedings.—And the affidavit in support of such application was held to be properly intitled as between the Attorney-General and the plaintiff in the action, proceedings having been commenced for the condemnation of the goods, although no information had yet been filed in this Court.

[S. C. 1 Dowl. (N. S.) 358, 450; 5 Jur. 580.]

The defendant having entered a claim to a quantity of coffee, which had been seized by a custom-house officer of the name of Dabbs for a breach of the revenue laws, it was given up to him upon his entering into recognizances to the Crown, pursuant to the stat. 3 & 4 Will. 4, c. 53, s. 101. The Crown issued a writ of appraisement, with a view of proceeding to the condemnation of the coffee; but before any information was actually filed, the defendant commenced an action of trover against Dabbs, in the Court of Common Pleas, to recover the value of the coffee, to which Dabbs appeared and pleaded. On the first day of this term, the Attorney-General, on the authority of the case of *Cawthorne v. Campbell* (1 Anstr. 205, n.), obtained a rule to shew cause why, in order to the trial of the said information, the cause of *Kingston v. Dabbs* should not be removed out of the Court of Common Pleas into this Court,

and when so removed, should not be in the same state of advancement as it was in the former Court. The affidavit in support of the rule was intitled "Between her Majesty's Attorney General and John Kingston." Against this rule

F. V. Lee now shewed cause, and admitted that the cases [164] of *Cawthorne v. Campbell*, and *Siddon v. East* (1 C. & J. 12), were authorities to shew that this application must be granted, if it had been made in time; but contended that it was too late, after the defendant in the action had appeared and pleaded. He objected also, that the affidavit ought to have been intitled "The Attorney-General, informant, in a cause of *Kingston v. Dabbs*," no information having yet been filed, and the application having reference to the cause. Thirdly, he urged that the Crown were not entitled to this rule until an information had been filed in this Court: and lastly, that, at all events, it ought not to be made absolute except upon payment of costs, inasmuch as, until the trial of the information, it was uncertain whether the defendant might not succeed in the action of trover.

The Attorney General (Jervis with him) in support of the rule. The application is simply to remove the cause; and for the defendant's benefit the Crown undertakes that it shall be as forward in this Court as in the Court of Common Pleas. It matters not, therefore, in what stage the proceedings in the action are. Secondly, the affidavit is rightly intitled. If it had been intitled in the cause of *Kingston v. Dabbs*, it would have been bad, for there is no such cause in this Court; but there is a cause of *The Attorney-General v. Kingston* pending in this Court. He was then stopped.

ALDERSON, B. It appears to me that all the objections taken on the part of the defendant have failed, and that the rule must therefore be absolute. First, as to the title of the affidavit. In the first place, we cannot be called on to determine such a question as whether an affidavit is properly intitled, upon conflicting statements made in counter affidavits; but further, it appears that proceedings were [165] actually going on in this Court at the suit of the Attorney-General against this defendant, for the condemnation of the goods, at the time when this rule was moved for. The affidavit, therefore, is quite sufficient. Next, it is said, that the application comes too late, not having been made before plea pleaded in the action in the Common Pleas. But there is no principle for that: the basis of our jurisdiction is, that it is a contempt of this Court to proceed in another Court against a revenue officer for a matter done by him in the execution of his duty; and this Court has authority, therefore, to interfere at any stage to remove the proceedings thus improperly commenced. As to the costs, it would be absurd to award costs to a party who has proceeded improperly in a wrong Court.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

FISK v. MASTERMAN AND OTHERS. Exch. of Pleas. April 26, 1841.—An insurance was effected on the 12th of April on a cargo of cotton then at sea, by five several policies, at the rate of 50 guineas per cent.; and on the 13th, news of the vessel's safety having arrived, a further insurance was bonâ fide effected by six different policies, at ten and five guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not:—Held, that the assured were entitled to a return of premium on the amount of the over-insurance, to which the underwriters who subscribed the policies of the 13th of April were to contribute rateably, in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies); but that no return of premium was to be made in respect of the policies effected on the 12th.

[S. C. 10 L. J. Ex. 306.]

This was an action of indebitatus assumpsit for money had and received and on an account stated, to which the defendants pleaded non assumpsit; and by consent of both parties, it was ordered by Parke, B., that the facts should be turned into a special case for the opinion of the Court.

The plaintiff, who is a merchant at New Orleans, in February, 1839, shipped 1957 bales of cotton on board [166] the ship "Bradshaw," on a voyage from Mobile to Liverpool, and consigned the said cotton to Messrs. Holford & Co. of Liverpool,

merchants, who have also a house of business in London, and advised them of the shipment by a letter bearing date the 15th day of February, 1839, as follows:—

"The ship 'Susanna Cummings' and the ship 'Bradshaw' sailed from Mobile on the 8th or 9th, the former an American ship with 1850 bales, the latter an English ship with 1957 bales cotton for my account to your address. If these vessels have not arrived you will please to effect insurance valued policies, valuing the cotton at sixty dollars per bale."

This letter reached Messrs. Holford & Co. in the early part of April 1839, and at that time the "Bradshaw" had not arrived, and was out of time; and as there had been a violent hurricane on the 5th and 6th of March preceding, the Liverpool underwriters declined taking the risk when applied to by Messrs. Holford & Co., pursuant to their instructions.

On the 11th of April, Messrs. Holford & Co. wrote to their London house to effect insurance on the cotton by the "Bradshaw"; and the London house on the 12th of April effected insurances to the amount of £14,150, at the rate of thirty guineas per cent. upon £1000, and fifty guineas per cent. upon £13,150.

Of this insurance the London house advised the Liverpool house of Holford & Co. by letter of the 12th of April, announcing the difficulty they had in effecting it, and the little probability there was of their being able to effect any more in London, though they would try to do so, and recommending the Liverpool house to effect what they could there.

On the 12th of April it was known in Liverpool, and on the 13th in London, that the "Bradshaw" had been spoken with off Cape Clear on the coast of Ireland, and within a few days' sail from Liverpool; and on the 13th of April [167] the London house of Holford & Co. effected further insurance to the amount of £12,300, at ten guineas per cent., making in the whole effected in London £26,450.

On the 13th of April the Liverpool house of Holford & Co. effected insurances on the cotton in Liverpool, to the amount of £10,000, at five guineas per cent. The whole amount of insurance, therefore, upon the cotton in London and Liverpool amounted to £36,450, and was distributed as follows:—

London Policies.

| 1839. | | £ | Guineas. |
|-------------|------------------------------------|-------|----------|
| 12th April, | London Indemnity Marine, | 3,000 | at 50 |
| " | Alliance | 5,000 | " 50 |
| " | Marine, London | 1,000 | " 50 |
| " | Thornton and others | 4,150 | " 50 |
| " | London Marine | 1,000 | " 30 |
| 13th April, | Indemnity Mutual Marine | 3,500 | " 10 |
| " | Alliance | 6,000 | " 10 |
| " | Thornton and others | 2,800 | " 10 |

Liverpool Policies.

| | | | |
|-------------|------------------------------------|-------|-----|
| 13th April, | Jones & Hodgson | 1,500 | " 5 |
| " | Thomas Morris and others | 1,500 | " 5 |
| " | McMurdo & Co. | 7,000 | " 5 |

£36,450

The cotton was valued in the policies at 15l. 10s. per bale, which, upon 1957 bales, gives 30,333l. 10s., the value of the subject-matter of the insurance as stated in the policies. There is, therefore, an excess in the insurance beyond the value of the cotton, and the interest of the assured therein, to the amount of 6116l. 10s.

At the time of effecting the insurances by the London and Liverpool house of Holford & Co., on the 13th of April, each house was ignorant of the amount insured by the other, or whether anything had been insured beyond what was done on the 12th.

[168] The ship and cotton arrived safe at Liverpool, and a return of premium was claimed from the underwriters on all the policies, on the ground of short interest, to the amount of 6116l. 10s.

The defendants, who had insured the cotton to the extent of £5000, at 50 guineas per cent., by a policy effected in London, and dated the 12th of April, and mentioned in the foregoing list as the policy for that amount effected with the "Alliance," were called upon to repay to the assured the sum of 440l. 9s. 2d., being the estimated proportion of premium according to the plaintiff's calculation, which ought to be refunded by them, on account of the over-insurance, the plaintiff contending that the underwriters upon all the policies should make the return in a general equal proportion, according to the amount taken or insured by each upon the entire interest.

This, however, was resisted by the defendants, who contended, that if there was to be any return at all, it ought only to affect those policies which were made in Liverpool or in London on or after the 13th of April, and that the underwriters upon the policies effected in London on the 12th of April, before it was known that the vessel had been spoken with are not bound to make any return of premiums under the circumstances before mentioned. And the question for the opinion of the Court is, whether the underwriters upon the above policies, or any of them are bound to return any part of the premiums; and if they or any of them are, in what proportion and upon what principle, the calculation is to be made.

If any return is to be made, the amount is to be calculated by Mr. William Richards, of the City of London, average adjuster, according to the principle laid down by the Court, and judgment to be entered for that sum. If no return is to be made, the judgment is to be entered for the defendants.

The interest of the plaintiff in the insurance and the [169] subject-matter of it, the effecting the policy by his orders, the subscription of the defendants, and the payment of the premium, are admitted. And it is agreed, that either party is at liberty to refer to the policy as if it were part of the case, and either party is to be at liberty to turn this case into a special verdict.

Cresswell for the plaintiff. It is admitted that the parties acted in perfect good faith in effecting these policies, and there ought therefore to be a return of the premium to the amount of the over-insurance. This is the ordinary case of a policy *bonâ fide* effected for a certain amount, where the interest turns out to be less; in such cases it is well understood that there ought to be a return, and that must be upon the whole of the policies effected on the ship. The defendants themselves insured on the 13th for the sum of £6000 at 10 per cent., having on the 12th insured for the sum of £5000 at 50 per cent. If the vessel had been lost, and the subsequent insurance had been effected before the loss was known, these would have been treated as one policy. [Parke, B. Suppose the ship had been lost, and news of her loss had arrived on the afternoon of the 12th, and before the policies of the 13th were effected, would not the defendants have been bound to pay the whole amount insured by them? and if so, are they not entitled to keep the premium as compensation for their risk?] From the time that the second policies were effected, they all stood on the same footing. In *Marshall on Insurance*, p. 649 (3rd edition), the foreign writers on this subject are quoted; and it is said, "All the underwriters upon policies in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their respective subscriptions, without regard to the priority of [170] their dates. If by several policies, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good to the extent of the true interest of the insured; and in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions, without regard to the priority of their dates. And it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions." This shews that the two insurances made by the defendants must be blended together and considered as one. The Court are not at liberty to distinguish between the two insurances: the return must be made on both policies. [Parke, B. Suppose there had been a loss, and the news of it had arrived between the making of the first and second policy, the underwriters would have been liable on the first policy to the entire extent of the sum insured.] It cannot be denied that there was a period of time when they would have been liable to the whole amount insured on the first policy. [Lord Abinger, C. B. The point does not appear to have arisen in our Courts, whether, where several insurances have been effected at different times, and the insurance is greater than the

risk incurred, the return shall be limited to the last insurance, or whether the return is to be on all rateably.] In this case, when the second policy was effected, they all bore a proportionate risk.

Kelly for the defendants. It is not meant to be disputed that the plaintiff has a right to a return of premium upon the policies effected on the 13th; but it is contended that there ought to be no return upon the policy effected on the 12th. [Parke, B. There can be no return in respect of the policies effected on the 12th. The cases put in Marshall on Insurance, are where the insurance was [171] effected before the risk commenced. Alderson, B. There was no over-insurance until the 13th.]

Per Curiam. The judgment must be for the plaintiff to have a return of the premium to the amount of the over-insurance, to which the underwriters who subscribed the policies on the 13th of April are to contribute rateably, in proportion to the sums insured by them respectively on that day—the amount of over-insurance to be ascertained by taking into account all the policies, but no return of premium to be made in respect of the policies effected on the 12th of April.

Judgment accordingly.

THE ATTORNEY-GENERAL v. LORD CHURCHILL. Exch. of Pleas. May 1, 1841.—

In an information of intrusion, the Crown has not the right, as of its prerogative, to lay the venue in any county, or to issue the venire facias juratores into a different county from that in which the venue is laid.

[S. C. 9 Dowl. P. C. 772; 10 L. J. Ex. 314. 5 Jur. 803. Referred to, *Attorney-General for Prince of Wales v. Crossman*, 1866, L. R. 1 Ex. 386; *Dixon v. Farrer*, 1886, 17 Q. B. D. 662.]

This was an information of intrusion against the defendant, for alleged encroachments upon lands of the Crown in the forest of Wychwood, in the county of Oxford. The venue was laid in that county.

In Hilary Term, the Attorney-General moved that the venire facias juratores might issue into the county of Hertford, instead of into the county of Oxford: and on the authority of *The Attorney-General v. Parsons* (2 M. & W. 23), the Court made an order for that purpose absolute in the first instance. On a subsequent day in the same term, Sir W. W. Follett, for the defendant, obtained a rule to shew cause why the above order should not be rescinded, contending, on a review of the authorities, that the Crown had no prerogative to have the inquisition in another county from that in which the venue was laid. Against this rule

The Attorney-General, the Solicitor-General, R. V. Rich [172]-ards, and W. J. Alexander shewed cause. The Crown has the right, by its prerogative, to lay the venue, in an information of intrusion, in any county, or, when it is laid in a particular county, to have the inquisition in another. No doubt, as between subject and subject, the action would be in its nature local; but the Crown possesses, in this as in many other respects in the course of legal proceedings to which it is a party, a privilege which does not belong to the subject. Many of such privileges, which are clearly beyond dispute, are far more burthensome upon the subject, and, it might be alleged, more liable to abuse, than this. Thus, the Crown may choose its Court: and although the subject could have brought a real action only in the Court of Common Pleas, the Crown may bring a writ of right or a quare impedit in the Court of Queen's Bench or Exchequer. So, the subject can only have a trial at bar by leave of the Court: the Crown claims it de jure. The subject, at common law, could plead but one defence, whereas the Crown had always the right to plead several matters. The subject cannot amend without leave of the Court: the Crown may amend at any stage of the proceedings. Again, in a suit between subject and subject, if one party demurs, the other must join in demurrer, whereas the Crown may renounce the demurrer and join issue. The Crown possesses also privileges during the progress of the trial which are denied to the subject. The Attorney-General has the right to withdraw the record, after the jury have been sworn and the trial has proceeded: and is entitled to the reply, as well in criminal as in civil proceedings—even in cases of capital felony—although no evidence be adduced for the defendant. And a review

of the authorities will shew that the privilege now contended for is equally indisputable.

It is not necessary, indeed, on the present occasion, to inquire whether this privilege is exerciseable in real actions: but it exists, at all events, in all personal actions; and an information of intrusion is a personal, and not a real, [173] action. The law is so stated in Manning's Exchequer Practice: it is there said (book 3, chap. 2, s. 1, p. 196)—"An information of intrusion is a proceeding which, although answering the purpose of a real action, is said to be in the nature of an action of trespass quare clausum fregit for the King, in respect of a trespass committed against his lands and possessions, as by entering them without title, holding over after a Crown lease is determined, taking the profits, cutting down timber, and the like." And again (ibid. s. 2, p. 197)—"The King may lay his venue in any county, without regard to the local situation of the premises." The authorities cited are *Lyster dem. Eaton v. Edwards* (Savile, 9, 10), and *Rex v. Webb* (1 Ventr. 17; 1 Sid. 412). In Com. Dig., Prerogative (D. 85), it is laid down, that "The King may lay his action in what county he pleases, in any personal action:" and in another place, Debt (G. 12), "If the King sues a personal action, he may lay it in what county he pleases, by his prerogative." And having laid it in a particular county, the Crown has equally the right to change it into another. For this the case of *Rex v. Webb* is an express authority. That was an action for embezzling the King's goods, which was laid in the declaration to be in London: it was moved for the King that the county might be changed; and the Court held, "that the King might choose his county, and might waive that which he seemed to have elected before, as he may waive his demurrer and join issue, and contrā." In the report in *Siderfin*, the Court is stated to have said that "The King has the prerogative to try his personal actions where he pleases;" and it will be argued for the defendant that the "personal actions" there mentioned mean transitory actions: if however the right were so limited, the point could never have arisen, because the subject has equally the right, in transitory actions, to lay the venue where he pleases. The decision must necessarily apply to something [174] which the subject had not, but which the Crown had, authority to do. Personal actions are opposed to real actions—local to transitory actions. Many entries are to be found among the records of this Court, shewing that wherever the Attorney-General has applied for leave to issue a venire into a different county from that in which the venue was laid, it has been always stated on the record that it appertains of right to the Crown to try the cause where it pleases in personal actions. Thus, in the Order Book of this Court, Easter Term, 53 Geo. 3, is the following entry:—"Rex v. Penny, sci. fa. under an extent, venue Suffolk, changed to Middlesex:" and the form of the order is as follows:—"His Majesty's Attorney-General prays may be inquired of by the Court, and the said John Penny doth the like. Issue is joined, and his Majesty's Attorney-General being present here in Court in his proper person, states to the Court here that it is the prerogative of his said Majesty, that all inquisitions in personal suits instituted in this Court for and on behalf of his said Majesty, be taken in any county within that part of the United Kingdom of Great Britain and Ireland called England, and prays that an inquisition in the premises may be taken in the county of Middlesex, which is ordered by the Court accordingly." In *Rex v. Tyers*, Trin. Term, 4 Geo. 3, (also sci. fa. under an extent), there is a similar entry of change of venue from Suffolk to Middlesex, with the like suggestion by the Attorney-General. Other like instances occur in *Rex v. Leicester* and *Rex v. Grimwood*, Mich. Term, 25 Geo. 3, *Rex v. Ogle*, Mich. Term, 48 Geo. 3, and *Rex v. Stake*, Mich. Term, 55 Geo. 3: which are changes of venue from the counties of Essex and Lancaster to Middlesex. Great authority is due to these recorded precedents: it is laid down in Plowden, 321, (the case of *Mines*), that the precedents and records of the Exchequer are to be taken as the most substantial proofs of the law of the land. The same right has been admitted also in penal actions, in [175] which the Crown may lay the venue or try the action in what county it thinks fit: see 4 Inst. 172; 1 Saund. 312 b., n. (2). There are instances also in which the right has been adjudged to belong to the Crown even in criminal proceedings. Thus, in an information against the inhabitants of Wilts for not repairing a bridge, the Court held that "the Attorney-General might take a venire facias to any adjacent county, and that it might be de corpore of the whole, or de vicineto of some particular part therein next adjoining:" *Rex v. Inhabitants of Wilts* (3 Sulk. 381). An information of that nature is at least as local in its nature

as an information of intrusion. There are, however, authorities in support of the view that this privilege belongs to the Crown in real actions, properly so called. In *Bulwer's case* (7 Rep. 53) it is laid down, that "Writs of quare impedit and quare incumbravit shall be always brought where the church is, for by the one the plaintiff shall recover his presentment, and by the other the bishop's clerk shall be removed, and the plaintiff's clerk admitted:" and so it is said to have been decided in 4 Edw. 3, fol. 9: "otherwise it is in the King's case." In *Bac. Abr.*, Prerogative (E. 7), it is stated to be "a rule of the common law, that the King, by his prerogative, may sue in what court he pleases, and therefore may bring a writ of right or a quare impedit in the Court of King's Bench." The same position is recognised as law in *Com. Dig.*, Action (N. 4), where it is said, that a quare impedit shall always be brought where the church is, "except in the case of the King." The case of *Lyster v. Edwards* (Savile, 9, 10) has always been cited and considered as an authority to the same extent. That was an ejectment for lands in Wales; and the question before the Court was, whether an officer of this Court had the privilege of bringing the action in the county of Salop. *Manwood*, J., says, [176] "He cannot have privilege for lands in Wales, because they are to be tried in the county where the land lies, by statute 34 Hen. 8:" to which *Shute*, J., adds, "If the Queen were a party, sert try ici:" implying that the Crown had a privilege not claimable by the officer of the Court. It is said on the other side, that "ici" means here, i.e., in this Court: but the question was not as to the Court before which, but as to the county in which, the cause should be tried, and it would have been idle to take occasion of saying that the Queen might sue in her own Court of Exchequer. It is clear that the word "ici" meant "in England," i.e., in an English, in contradistinction to a Welsh, county. [*Alderson*, B. Have you been able to find the clause in the stat. 34 Hen. 8, which binds parties to try their cases in Wales?] It does not appear on the statute book, and the origin of the practice seems to be involved in obscurity; it is doubtful whether it is referable to the common law, or to some act of Parliament not now extant (see per *Lord Ellenborough*, C. J., *Goodright v. Williams*, 2 M. & Sel. 274; and *Vaugh. Rep.* 217). There is an entry on the records of this Court, of Michaelmas Term, 8 Will. 3, which is strongly in support of the privilege; but the record to which it refers has not been found. The case was, however, either a real action or an information, and though the venue was originally laid in the county of Montgomery, a venue was awarded into Middlesex, which must have been on the application of the Attorney-General.^(b) [177] There is therefore, upon the whole of the authorities, much reason for contending that the right now claimed extends to all proceedings at the suit of the Crown.

But assuming that it is limited to personal actions, the information of intrusion is a personal action: it is no more than an action quare clausum fregit at the suit of the Crown. No writ issues to give the Crown possession of the land, the Crown being considered in law as never out of possession; the judgment consists in a fine upon the intruder. In 3 Bla. Com. 261, it is said—"An information on behalf of the Crown, filed in the Exchequer by the King's Attorney-General, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the Crown." In *Vin. Abr.*, Prerogative (F. c. 3, pl. 2), the following case is cited—"Information of intrusion was for intruding into a certain portion of tithes of the rectory of D., in the county of

(b) This entry is as follows:—"Michaelmas, 18 Nov., 8 Wm. 3." In the margin, there is "Michaelmas—Montgomery." The title of the cause is, "Between the Attorney-General of our Lord the King, informant, the most noble Henry Duke of Beaufort, and others, defendants, about the seizure of lands in the county of Montgomery, late the lands of William Marquis of Powis. Upon the motion of Mr. Brown, of counsel with the defendants, informing the Court that the cause is appointed to be tried at the bar of this Court, upon Friday next coming se'nnight, and praying that a special jury may be returned by the deputy remembrancer for the trial of this cause, and hearing Sir Thomas Trevor, knight, his Majesty's Attorney-General, on behalf of his Majesty, it is ordered by the Court that the under-sheriff of the county of Middlesex do attend William Baron Powis with his book of freeholders' names, who is desired to take out forty-eight names, whereof each side are to strike out twelve, and the remaining twenty-four are to be returned by the sheriff for the trial of the said cause. Bathurst for the defendants."

Lancaster: the defendant pleaded non intrusit, whereupon a commission was prayed to examine witnesses who are not able to come to the Court: but Manwood denied it; for this information is to prove a title for the Queen, and it is in the nature of an inquisition, and is not to try the right; but had it been to try the title of the defendant, upon a bill whereto the defendant had answered, and that they had proceeded to issue, then he might either join in commission, or have commission alone." And again (pl. 10), it is said—"Information of intrusion is not real, but personal, and to be resembled in all points to trespass: for it supposes the King in possession, as action of trespass supposes a [178] subject; and the land is not demanded or recoverable, but damages only, as in trespass, and the defendant is to be fined si convinctur de intrusione, as in trespass, if he be found guilty of entry vi et armis." *Perrot's case* (Moore, 375), and *Friend v. Duke of Richmond* (Hardr. 460), are authorities in support of the same doctrine. Upon a conference of the Judges of this Court on errors assigned in an information of intrusion, in the 25th Eliz. (Savile, 47, 48), it was said by Manwood, C. B., that "the general informations for intrusion in certain lands and tenements, are as good as trespass quare clausum fregit, which is used in trespass at common law, which do not express any certain quantity of acres." In the case of *Mines* (Plowd. 337), which was an information exhibited by the Attorney-General, in the 10th Eliz., against the Earl of Northumberland, for intrusion into a mine of copper claimed by the Crown, an exception was taken to the information, that "it was not shewn in what town or hamlet Newlands lay, so that if the defendant had pleaded not guilty, it was uncertain from whence the visne should come. But all the Justices and Barons agreed that the information was good, because it is but in effect for a trespass, for which the Queen shall recover only damages But if it had been in an action real, then it ought to have been shewn in what town or place the land was, for otherwise the sheriff would not know where to put the party in seisin if he recovered." In *Walsingham's case* (ibid. 561), it is also said—"It appears to be the practice of the Exchequer, that where a man is convicted in the Exchequer of an intrusion into any lands of the Crown, upon a bill of intrusion there exhibited, where the title of the Crown appears to be good, and the title of the party to be insufficient, although such suit is but a personal suit, and in effect nothing more than a trespass, yet the party shall [179] be removed, and put out of possession, by a writ framed in the case." And if, in the present case, the verdict should be in favour of the Crown, and the defendant continued to keep possession, there would be no difficulty in framing a writ to meet the case, which would recite the information, the trial in the county of Hertford, the verdict and judgment thereon, and that the defendant still trespassed on the possessions of the Crown; which writ would issue, as a matter of course, to the sheriff of the county of Oxford.

The case of *Regina v. Lord Vaux* (1 Leon. 37) will probably be cited for the defendant. That was an information of intrusion, for entering into the rectory of Ethelborough, in the county of Northampton, and for taking sheep, calves, &c., the goods of the Queen issuing from the tithes of the rectory, at Westminster, in the county of Middlesex: and the question was, whether a sufficient title had been made out for the Crown. The Court there say, "The bill of intrusion is but in the nature of a possessory action, as an action of trespass, in which case it is sufficient to make title to the possession only, without relying upon the right." Judgment having been given for the Crown, a writ of error was afterwards brought (4 Leon. 26), the error assigned being, that the bill was exhibited for taking goods of the Queen at Westminster, in the county of Middlesex, and also for intruding into the rectory of Ethelborough, in the county of Northampton: whereas the Queen ought to have brought several bills, being but several causes of action arising within several counties; but it was resolved by the Court, that the bill of the Queen was good enough, for if the defendant would plead not guilty, two several writs of venire facias should be awarded, one into Middlesex and the other into Northampton. There is a record of a case in 7th Eliz., *Attorney-General v. Gerard*, which may appear, until carefully examined, to be an authority for the defendant. That was an information of intrusion, filed by the Attor-[180]-ney-General, for entering into lands in the county of Durham: issue was joined on a traverse of the fact, and then follows this entry—"And because it is witnessed here in Court, by relation of the aforesaid Attorney-General of our now Lady the Queen, that all the free tenants within the bishopric of Durham aforesaid hold of the bishop in capite, either immediately or mediately, so that the issue aforesaid to the county

there cannot be indifferently tried : therefore it is agreed, by the consent and assent of the said defendants, that it be commanded to the sheriff of York that he cause to come," &c. &c. The words in the original are, "ideo concordatum est assensu et consensu," &c. ; and the entry amounts to no more than this, that the parties agreed upon the county in which the issue should be tried. *Rowe v. Brenton* (8 B. & C. 737 : 3 Man. & R. 133) is no authority, because there also it appears, on inquiry, that the venire was awarded into Hertfordshire by agreement between the parties. Upon the whole, it is submitted that the decision in the *Attorney-General v. Parsons* was fully warranted by the authorities, and that the present rule ought to be discharged.

Sir W. W. Follett, Manning, Serjt., Whateley, and Robinson, in support of the rule. The Attorney-General has not the right, in virtue of the Crown's prerogative, to have the venire facias issued into a different county from that in which the venue has been laid. The only direct authority in support of the right so claimed is that of the *Attorney-General v. Parsons* ; but the decision in that case proceeded entirely upon the authority of the passage cited from Manning's Exchequer Practice ; and the case of *Lyster v. Edwards*, which is there referred to, does not appear to have been brought under the consideration of the Court. But such a prerogative cannot possibly be established by statements in books of practice ; it ought to be clearly proved by usage, or by a current of decisions or precedents. Now there [181] is no authority, nor even any clear dictum, that the prerogative exists in actions for injuries to real property : and in all the cases wherein it is stated to exist in personal actions, it will be found, upon examination, that those dicta refer to transitory actions, for injury to personal chattels, or for debts. The existence of such a prerogative is in itself very improbable ; because in early times the jury were summoned *de vicineto*, not merely as judges of the fact, but in the character of witnesses also. No trace of it is to be found in the former treatises on the jurisdiction and practice of this Court—either in Lord Chief Baron Gilbert's Treatise on the Exchequer, or Burton's Office of the Exchequer : and the proposition laid down in Manning's Exchequer Practice is founded altogether on a misconception of the case of *Lyster v. Edwards*. The question in that case was one of privilege, not of prerogative. An usher of this Court had brought an ejectment for lands in Wales, intending to try it in the next adjoining English county. Manwood, B., thereupon says, that he could not have privilege for lands in Wales ; for the stat. 34 Hen. 8 requires the trial to take place in the county where the lands lie. To understand the meaning of the case, it is necessary to advert to the state of law previously to the stat. 34 Hen. 8. Before that statute, actions relating to lands in Wales were tried in the next adjoining English county, probably because there was then no officer by whom a jury could be summoned in Wales. The statute having obviated this difficulty, it appears, from the dictum of Manwood, J., that the judges then considered that actions respecting lands in Wales must be tried in Wales : then Shute, B., says, "If the Queen were a party, it might be tried here"—i.e. the Queen might have had the trial in the Court of Exchequer, and had the jury from an adjoining English county. It is evident from a subsequent report of the case in the same book (p. 12, No. 32) that such is its meaning. [182] A case in the Year Book, 13 Edw. 3, where it was held that a *præcipe quod reddat* would lie here for a seignory in Wales, shews that at that time the Courts at Westminster exercised jurisdiction in Wales. The passages cited from Com. Dig., Prerogative (D. 85), only shew that the Crown may sue in what Court it pleases, and may, in personal actions, have a venire into any county. It is said, that if the words "personal actions" be construed to mean transitory actions, there would be no difference in this respect between the rights of the subject and of the Crown : but that is not so. Before the stat. 6 Rich. 2, st. 2, c. 2, all actions, whether for injuries to real property or otherwise, were transitory : that statute required that they should be brought in the county in which the cause of action arose. The mode in which that statute was evaded, and the present practice of changing the venue afterwards grew up, is stated in Tidd's Practice, p. 650. But the statute of Rich. 2 not binding the Crown, it might, in transitory or personal actions, lay the venue in any county, and the defendant could not remove it on the ground that the cause of action arose in a different county. That is the whole extent of the prerogative claimed in the case of *Rex v. Webb*, as reported in Siderfin, and referred to in Com. Dig. That case turned upon the question whether the Crown was bound by the statute of Richard 2, which established a distinction between transitory and local, not between personal and real, actions. The cases which have

been cited as authorities that the Crown has this privilege in penal actions, shew only that the Crown is not bound by the statute 31 Eliz. c. 5, s. 2, which made penal actions local, they being in their nature transitory: *Attorney-General v. Hines* (Parker, 182), *Attorney-General v. Browne* (Bunb. 236). Neither is it true that this prerogative exists as to writs of quare impedit and quare incumbravit. In Fitzherbert's *Natura Brevium*, 32 E., the prerogative as to the writ of quare impedit is [183] stated to be, that "the King may sue this writ in what Court he will." And again (p. 48)—"Quære incumbravit ought to be sued in the county where the church is, because the wrong is done there; and quare incumbravit doth not lie but where the plaintiff recovereth by judgment of Court; and the King may sue a quare incumbravit in the King's Bench, although the record of the recovery be in the Common Pleas; but a common person cannot do so." In the Year Book, 21 Edw. 3, 5, fol. 5, pl. 13, is a case of quare impedit brought by the Crown for disturbing the King's presentment to a prebend in the cathedral church of Salisbury. The venue was laid in Wiltshire, where the church was, and it was objected that it ought to have been laid in Hampshire, where the manor was: but it was answered for the Crown, (not that it had the prerogative of laying the venue in any county, but) "that the action was properly brought in Wilts, where the cathedral church of the said prebend was; and for that reason it was agreed, by all the justices, that the writ was properly brought." That case is cited, in *Merrick's case* (2 Dyer, 194 a.), as an express authority that the venue in quare impedit ought to be laid in the county where the church is. A similar case is to be found in the Y. B. 43 Edw. 3, fol. 1, pl. 4. The dictum of Lord Coke in *Bulwer's case* (7 Rep. 53) cannot therefore be law. The case in the Y. B. 4 Edw. 3, fol. 9, is referred to in Bro. Abr., Lieu, 78, with a "quod quære, car mirum:" and no such doctrine is stated in Fitzherbert's *Natura Brevium*, Comyns' Digest, or Bacon's Abridgment. The authority referred to in support of it, in the Year Book, 4 Edw. 3, was a question, not whether the King could lay the venue in any county, but whether he could issue the writ into the county in which the defendant lived. That such was the case appears clearly from another case of quare impedit reported in the Year Book, [184] 13 Edw. 3. (a) The case of *Rex v. Inhabitants of Wilts* (3 Salk. 381) is explained in *Rex v. Inhabitants of Nottingham* (2 Lev. 112), which shews that the ground on which the venue was moved must have been that all the inhabitants of the county of Wilts were liable to the repair of the bridge. If this prerogative had existed in criminal cases, it would certainly have been claimed in the case of *Rex v. Burdett* (3 B. & Ald. 717; 4 B. & Ald. 95). [Alderson, B. In *Rex v. Hunt* (3 B. & Ald. 444), the trial was had in Lancashire, on the application of the defendant, against which the Attorney and Solicitor-General shewed cause.] In the Order Book of this Court, which has been already referred to, several instances occur of applications by the Attorney-General to change the venue in cases at the suit of the Crown; whether they were informations of intrusion does not appear. (f) The entries quoted on the other side are cases of scire facias on extents for Crown debts, in which it is admitted that

(a) This case was cited from the translation by Manning, Serjt., in the Inner Temple Library, the interval in the Year Books between the 10th and 17th Edw. 3 not being published.

(f) The following were particularly referred to:—

"4th June, 1703. *The Queen v. Barker*. Upon the motion of Mr. Attorney-General, to have the defendants alter their several pleas, and lay the several venues in London, and upon reading the affidavit of Mr. James Hodson, it is ordered by the Court, that the venue be laid in London, unless cause be shewn to the contrary to-morrow.

"Upon the motion of Mr. Etterick, of counsel for the defendant, shewing cause against an order of this Court, made in this Court 4th June instant, and upon hearing Mr. Dodd and Mr. Phipps on the same side, and Mr. Attorney-General for her Majesty, it is ordered by the Court, that the venues in the defendants' pleas be altered, and laid in London, and that the defendants are to take notice of trial this term, if by the course of this Court they are obliged to do so.

"21st January, 1707. *The Attorney-General v. Wisher*. Mr. Shephard to move the venue from London into Devon. No order.

"1765. *The Queen v. Read*. Upon the motion of Mr. Attorney-General to change the venue. No order."

the Crown may have the inquisition taken in any [185] county. In *Ewer v. Moil* (Lane, 83), a commission had issued out of Chancery, in Mich. 7 Jac. 1, to inquire what lands and tenements the late prior of Bister, in the county of Oxford, had in Caversfield, in the County of Bucks, and to inquire if a rent reserved upon a grant made to Banbury of the lands of the priory were in arrear or not: the question was, whether a jury of the county of Oxford could inquire as to lands held by the church in Oxfordshire, in the county of Bucks: and the Court held that they could not. That question need never have arisen, if the Court had power, by its prerogative, to inquire by a jury of one county respecting the title to lands in another. The form of the venire facias itself—"per quos rei veritas melius sciri poterit"—is strong to shew that it ought to go into the county where the lands lie. Nor would it have been necessary, if the prerogative as now claimed had existed, to pass the statutes which authorize the trial of persons charged with criminal offences in other counties than those in which the offences were committed.

Secondly, a writ of intrusion is not a personal action. It is the mode adopted by the Crown, in lieu of a real action, to recover possession of property whereof it has been disseised. It is to be observed, however, that the term "personal action" is used with great vagueness by different writers. The definition given by Blackstone (3 Comm. 117) is, "such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise, whereby a man claims satisfaction in damages for some injury done to his person or property." That definition would include an action of trespass quare clausum fregit, or nuisance. In Com. Dig., Action (N. 12), the term is repeatedly used, in a very indefinite sense. In Bac. Abr., Actions Local and Transitory (A.), the action of trespass quare clausum fregit, and the action of waste, are described as mixed actions. In the [186] description in Co. Litt. 285, the meaning of the term "personal action" is equally indefinite. The most accurate definition is in the Termes de la Ley, 18, where personal actions are said to be "such actions whereby a man claims debt, or other goods and chattels, or damage for them, or damages for wrong done to his person." The text writers in general evidently use the term "personal actions" in the sense of transitory actions, as contradistinguished from actions local in their nature. The division of actions into personal, real, and mixed, is indeed of comparatively modern date: no mention is made of it in Cowell's Interpreter, which was written in the reign of James I.: and although the text writers refer to Bracton as the authority for it, his definitions have not the least application to those several species of actions as now understood. When speaking of transitory and personal actions, he says (Lib. iii. cap. 3, fol. 103)—"Si aliquæ vero sunt actiones quæ ex quæcunque causâ dentur in hæredes, vel contrâ, dei poterunt transitorie, eo quod transeunt ad hæredes vel contrâ." Again (fol. 102)—"Omnes fere personales actiones sunt ex contractu, sicut mutui, commodati, depositi, mandati, ex empto, vendito, locato, et conducto. Personales vero actiones quæ nascuntur ex maleficio, aliæ persequuntur penam tantum, ut actio furti, aliæ vero persequuntur ipsam rem et penam, sicut actio vi bonorum raptorum." [Alderson, B. Lord Coke says (Co. Litt. 288 a.), that an action personal is an action wherein damages only are recovered. Parke, B. In Willes, 131, it is said that whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence; therefore replevin is a personal action.] A release under the great seal of all personal actions would not include the writ of intrusion, which is, in substance, a real action; it is only by the fiction of law, that the King cannot be disseised, that it can be at all assimilated to a per-[187]-sonal action. It is said that no writ of habere facias possessionem follows the judgment, but it results in a fine upon the defendant remaining in possession, and that it is therefore analogous to an action of trespass quare fregit:—that, however, is a local action. But though there is no writ of habeas facias, the Crown may have a writ of amoveas manus, and a writ of injunction, to prevent the defendant from again intruding:—see Plowden, 561; and the form of the writ of amoveas manus, which charges the defendant with intending to disinherit the Crown, shews that the writ of intrusion is not merely an action of trespass, in which damages are to be recovered, and nothing else: *Winkworth v. Man* (Yelv. 114). In *Ree v. Ridsford* (Savile, 35), it is said by the Court that "the suit [the writ of intrusion] is in the nature of an ejectio firmæ, and the party shall have execution by injunction each time, or otherwise the judgment is that the defendant be removed from the possession:" and several precedents of such writs of injunction, directed to the

sheriff, are to be found in Burton's Exchequer Office, vol. 2, p. 290; see also the form of the judgment in Coke's Entries, 372, from which it is evident that the land itself is recovered. And at the present day the practical mode of proceeding upon writs of intrusion is stated by the officers of the Court to be as follows:—Judgment is entered, stating the verdict against the defendant: then it states, that it appearing to the Barons that the verdict is against the defendant, they order that thereupon he be convicted, and that he be forthwith removed from the possession of the premises mentioned in the information. Then a writ of injunction issues, directed to the sheriff, commanding him to remove the defendant from the possession of the premises, and ordering that all persons claiming through him also remove themselves. Then a writ of amoveas issues, directed to the sheriff, commanding [188] him to remove the defendant from the possession of the premises, and to take the defendant, that he be fined for his contempt; which writ is enforced by the Attorney-General, directing the person to whom the sheriff is to deliver possession. At common law, the Crown, by its prerogative, might at once put the defendant in an information of intrusion upon proof of his title, and if he pleaded not guilty, he should be immediately put out of possession; until the stat. 21 Jac. 1, c. 14, provided, that if the King or those claiming under him, or those under whose title the King claims, have not been in possession or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession till the title be found or adjudged for the King. The practice in proceedings upon writs of intrusion is also stated to the same effect, in Com. Dig., Prerogative (D. 77). The statement in Vin. Abr., Prerogative (F. e. 3, pl. 10), is copied from *Perrol's case* (Moore, 375), where it is merely the argument of counsel, not adopted by the Court. In the case of the *Attorney-General v. Gerard*, the venue was changed in a writ of intrusion, upon the special grounds that the freeholders held in capite of the Bishop of Durham, and that a fair trial could not be had in that county. That case is referred to in a MS. book of practice of the Exchequer by Mr. Jocelyn, who was one of the clerks of this Court in 1758; he says, "In some special cases a venire facias may be of another county, by consent; as where an information of intrusion was exhibited against the Bishop of Durham for lands in that county, after issue joined, for that it was suggested that all the freeholders of that county did hold immediately or mediately of the bishop, it was ordered, by consent, that the venire facias should be made to the sheriffs of the county of York, from the body of that county." It is contended, therefore, that the prerogative [189] now claimed applies only to personal actions properly so called, and that the writ of intrusion does not fall within that class.

The Attorney-General in reply. The argument against the probability of the existence of a prerogative of this kind, founded upon the ancient practice of summoning jurors de vicineto in the character of witnesses, would equally apply against the allowance of the same right in transitory actions, which has never been questioned. Then it is said, that the prerogative cannot be established without instances being shewn of its exercise from time to time. But it is not to be expected that an express adjudication should be found with reference to all the kinds of action to which the claim applies; it is sufficient that particular cases are adduced in which the right has been acknowledged, and the general doctrine laid down; as in the Year Book, 4 Edw. 3, and the cases of *Rex v. Webb* and *Lyster v. Edwards*. The case of *Regina v. May* (Savile, 34), which occurred in the 24th Elizabeth, shews that the term "transitory actions" was well known in those times, and that a writ of intrusion was not one. It was an information of intrusion into lands in Sussex, against two defendants, one of whom pleaded title to lands in another vill, absque hoc that he was guilty as to the lands specified in the information. Manwood, J., lays it down that this is not a good matter in bar, "for the plea is not of the same thing contained in the information, but of lands in another vill: no more than in trespass for a horse, the defendant could justify the taking of a cow, absque hoc that he is guilty of a horse." Shute, J., concurs, but adds, "mes antierment est de transitory actions." The term "personal actions" is properly used in contradistinction to real actions, and does not exclude local actions. [Parke, B. It is difficult to see what real actions there are, in the case [190] of the Crown, except quare impedit.] The Crown may maintain an ejectment; *Doe d. Hayne et Regis v. Redfern* (12 East, 96); which, being a mixed action, sufficiently satisfies the distinction. A correct definition of the several kinds of actions is given by Mr. Tidd (Tidd's Pract. 1):—"Actions are

commonly divided into criminal, or such as concern pleas of the Crown; and civil, or such as concern common pleas: and these latter are again divided into real, personal, and mixed actions. In a real action, the proceedings are in rem, for the recovery of real property; in a personal action, they are in personam, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a mixed action, they are in rem et personam, for the recovery of real property, and damages for withholding it." According to this definition, a writ of intrusion is a personal action, being not for the recovery of the possession, which in contemplation of law the Crown has never lost, but for the recovery of damages only; and although the title to the land may come in question, so may it also in trespass or replevin. The writs of injunction and of amoveas manus are for the purpose, not of putting the Crown into possession, but of removing the defendant as a trespasser. As to the writ of quare impedit, it is expressly stated in Mallory's *Quare Impedit*, p. 160, that the Crown may bring it in what county it pleases. The case of *Regina v. Barker*, which has been cited from the Order Book, was a case of scire facias; and if the authority be of any value, it would go to the extent that the prerogative does not exist even in scire facias. That of *Regina v. Read* was a proceeding upon a claim to goods seized in the port of London.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. In this case, of a writ of intrusion against [191] Lord Churchill for lands in Oxfordshire, the Attorney-General obtained, in January last, an order, upon his simple suggestion, without affidavit, to have the venire awarded into Hertfordshire, on the authority of *The Attorney-General v. Parsons*. On the 22nd of January, Sir Wm. Follett moved to discharge this order, and a rule nisi having been obtained, the Attorney and Solicitor General shewed cause, and the case was argued, in the absence of the Lord Chief Baron, very elaborately, and with great ability on both sides. The case, however, notwithstanding the great learning and research which was brought to bear upon it, really lies in a very narrow compass. A subject would have no right to pursue such a course, but the Crown has, most undoubtedly, many prerogatives in the conduct of suits, and the question is, whether this be one. This question must be determined, as such always are, by authority—viz., by precedent, and the decisions and dicta of judges and text writers. As to precedent, there is none in the case of a writ of intrusion, except that of *The Attorney-General v. Parsons*, which, we know, was decided ex parte, and under a mistake occasioned by an inapplicable quotation of a case in Savile, in my brother Manning's Treatise on Exchequer Practice; and many other precedents which were cited, for the recovery of debts due to the Crown, on inquisitions under extents and outlawries, do not apply. As to the dicta and decisions, first of judges, and secondly of text writers; the former are to be found in the case of *Rex v. Webb* only, and the latter appear to be all derived from that case. Com. Dig., Prerogative (D. 85),—"The king may lay his action in what county he pleases, in any personal action;" and the same author, title "Debt" (G. 12), refers to *Rex v. Webb*, reported in 1 Vent. 17, and 1 Sid. 412, in which case the Court held, in an action for embezzling the King's goods, that the King might choose his county; and in the report in Siderfin, it is said, "The King has his prerogative [192] to try his personal actions where he pleases." In truth, this latter expression is the foundation of all that has been said on the subject; and admitting that it is law, the only point is, in what sense the word "personal" is there used. It is capable of two different senses. Actions may be personal, as contradistinguished from real and mixed; the first being actions against the person only, for damages, the second for recovery of real estate, and the third for both. In this sense of the word "personal," there appears to be no question, but that an information of intrusion is a personal action, for its object is the recovery of damages, not the recovery of the estate, for the Crown has never in contemplation of law lost it. But the word "personal" may mean such actions as are for the recovery of debts or damages to the person or personal effects; and in this sense of the word, a writ of intrusion is not a personal action. It gives some colour to this construction of the word, that the dictum of the Court in the case, both as it is reported in Siderfin and Ventris, is in reference to an action of this nature,—an information in the nature of trover.

But it is said that this construction of the word "personal" would give the Crown no prerogative at all, because every subject has the same right. This, however, is

not correct; for there are statutes to oblige the subject to lay the venue where the cause of action arose, in transitory actions; and a long established practice founded thereon, to change the venue. There is a very old statute, referred to by Mr. Tidd as contained in the laws of Henry I., (which is not found in the edition of statutes published by the Commissioners of Public Records, but has since been published in a separate work). This provides that every one is to be judged by his peers, and of the same "county": "Unusquisque per pares suos judicandus est, et ejusdem provinciæ; peregrina vero judicia modis omnibus submovemus." This may possibly apply to trials in criminal cases, and to judgments of tribunals abroad. But the 6 Ric. 2 was passed to confine actions of debt, [193] account, and other such actions, to their proper counties. This enactment, from the nature of its provisions, was evaded; and to remedy the evil, the statute 4 Hen. 4, c. 18, was passed, which directs attorneys to be sworn not to sue in a foreign county. After that statute, a practice appears to have prevailed, to plead the impropriety of the venue in abatement of the writ, even before the plaintiff had declared; and afterwards the defendant was allowed to traverse the venue, and try the traverse by the country. (Blackstone, J., in *Santler v. Heald* (1 W. Bla. 1032).) The practice of changing the venue on motion was introduced upon the equity of the statutes of Rich. II. and Hen. V.; and this practice, Lord Holt says (*Knight v. Farnaby*, 1 Salk. 670), began in the reign of James I. But neither these statutes, nor the practice of the Courts, bound the Crown; and consequently, with respect to all personal actions, in the sense of transitory actions, the Crown had a privilege which the subject had not, and it seems highly probable that this was all that the Court intended in the case of *Rex v. Webb*; for, as it is reported in *Siderfin*, it was a motion by the defendant to change the venue from Middlesex to London, because, if there was any conversion, it was in London; but the Court refused it, and said the King had a prerogative to try his personal actions any where: according to the report in *Ventris*, the motion was made by the Crown. But with this uncertainty attending the principal case, on which the authorities in the text writers wholly depend, and in the absence of any precedent whatever, in an information of intrusion, or other action usually termed local (for the precedents in cases of recovering debts due to the Crown, upon inquisitions in out-lawry and extent, as has been before said, do not apply), we think that the Crown officers have failed to establish the right to the prerogative claimed.

It may be added, that in the only precedent of an award [194] of venire to a different county, in an information of intrusion, which was cited from the record in 7th Eliz., the suggestion by the Attorney-General is on the special ground, that the issue could not be indifferently tried in the county where the lands lay, namely, Durham; which affords a strong ground for believing that he had no right to such a venire, as a matter of course, by virtue of the prerogative.

The rule in this case must therefore be made absolute. But the Attorney-General may, if he think fit, as was done in the case last cited, apply to the Court for a writ into a different county, on a similar suggestion.

Rule absolute.(a)

MORRICE AND OTHERS v. LANGHAM AND OTHERS. Exch. of Pleas. April 26, 1841.

—By indenture of the 12th of April, 1804, and by a fine and recovery levied in pursuance thereof, certain hereditaments and premises were settled to the uses of such persons, &c., as the settlor should by deed or will appoint: and in default of appointment, to the use of the settlor in tail general; remainder to J. L., the second son of the late Sir J. L., for life; remainder to the eldest son of J. L. in tail male; remainder to the second, third, fourth, fifth, and all and every other the son and sons of the body of the said J. L., in tail male; remainder to L. C. for life, with remainders over: subject to a proviso "that in case J. L., or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir J. L. deceased, then

(a) The Attorney-General subsequently moved for and obtained a rule to shew cause why the venire should not issue into the county of Hertford, upon affidavits setting forth special grounds: which rule, in Trinity Term, was made absolute.

and in every such case the uses and estates hereinbefore limited, expressed, and declared of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or the receipt of the rents and profits of the family estates of the said Sir J. L., and to and for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void; and then and in every such case, all and singular the said hereditaments and premises shall immediately thereupon, from time to time, devest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." J. L., as the second son of the late Sir J. L., became entitled to the possession of the family estates mentioned in the proviso, in the lifetime of the testator, who afterwards died without issue, and without having exercised the power of appointment. At the time of his death there were living the said J. L. (then Sir J. L., Bart., who had become entitled to the family estate), J. H. L., the eldest son of the said Sir J. L. the son, H. L., his second son, and four other sons, also the said L. C. mentioned in the indenture:—Held, that the remainders to the sons of J. L. were destroyed, and that L. C. took an estate for life.

[S. C. 10 L. J. Ex. 289: in Equity, 11 Sim. 260; 10 L. J. Ch. 38; 6 Jur. 334: reversed in part, *nomine Sunford v. Morrice*, 1844, 11 Cl. & F. 667; 8 E. R. 1255 (with note).]

By an order of the Vice-Chancellor, the following case was stated for the opinion of this Court:—

[195] The Reverend Francis Tutte, of Glyndbourne, in the county of Sussex, now deceased, was at and previously to the time of executing the indenture hereinafter mentioned, seised in fee-simple of the lands and hereditaments in the said indenture mentioned and described.

On the 12th day of April, 1804, an indenture was duly made and executed by and between the said Francis Tutte, clerk, of the first part, George Bramwell, therein described, of the second part, and Francis Burton, therein also described, of the third part, by virtue whereof, and of a fine and common recovery duly levied and suffered in pursuance thereof, all that the manor of Goate, otherwise Gotte, in the said county of Sussex, and also all that the manor of Belhurst, in the said county, together with divers messuages or tenements, farms, lands, tithes, and hereditaments therein described, and situate, lying and being in the several parishes of Glynd, Ringmere, Salehurst, Etchingam, and Selmeston, otherwise Simpson, in the county of Sussex: and all other the manors, messuages, tenements, tithes, and hereditaments whatsoever, being freehold, of the said Francis Tutte, situate respectively in the said parishes, or elsewhere in the said county of Sussex, were, with their appurtenances, settled, limited, and assured to the uses, and subject to the provisos expressed in the said indenture; that is to say, to the use of such person or persons, and for such estate and estates, upon such trusts, and for such intents and purposes, and subject to such charges, and by, with, and under, and subject to such powers of revocation and limitation, and such other powers, provisos, conditions, restrictions, limitations, declarations, and agreements, and in such manner and form, as he the said Francis Tutte should at any time or times, by any deed or deeds, instrument or instruments in writing, to be by him so executed and attested as therein mentioned, or by his last will and testament in writing, or any writing purporting to be, or in the nature of a will or testament, [196] to be by him signed and published in the presence of and attested by three or more such witnesses, declare, direct, limit, or appoint, of or concerning the said hereditaments and premises, or any part thereof; and in default of such declaration, direction, limitation, or appointment, to the use of the said Francis Tutte and the heirs of his body to be begotten; and for default of such issue, to the use of James Langham, Esq., the second son of the late Sir James Langham, of Cottesbrooke in the county of Northampton, Bart., deceased, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise in the lifetime of the said James

Langham, to the use and behoof of the Rev. Henry Poole and Anthony William Hodgson therein respectively described, and their heirs, during the natural life of the said James Langham, upon trust to preserve the contingent uses and estates therein limited from being defeated and destroyed; and from and immediately after the decease of the said James Langham, to the use and behoof of the first son of the body of the said James Langham lawfully begotten or to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said James Langham lawfully begotten or to be begotten, severally and successively, and respectively, and in remainder one after another as they and every of them shall be in priority of birth and seniority of age, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, so as that the elder of such sons and the heirs male of his body shall be always preferred to, and take before the younger of the same sons and the heirs male of his and their body and bodies; and for default of such issue, to the use of Langham Christie, the eldest son of Daniel Beale Christie [197] therein described, by Elizabeth his wife, heretofore Elizabeth Langham, spinster, and the assigns of the said Langham Christie, for and during the term of his natural life without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise in the lifetime of the said Langham Christie, to the use and behoof of the said Henry Poole and Anthony William Hodgson, and their heirs, during the life of the said Langham Christie, upon trust to preserve the contingent uses, remainders, and estates thereafter limited from being defeated or discharged; and from and immediately after the decease of the said Langham Christie, to the use and behoof of the first son of the body of the said L. Christie lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue to the use of the second, third, fourth, fifth, and all and every other son and sons of the body of the said Langham Christie lawfully to be begotten, severally, successively, and respectively, &c. &c.; with other remainders over. And the said indenture contained a proviso as follows:—"Provided always, and it is hereby declared and agreed by and between the parties to these presents, to be the true intent and meaning of them, and of these presents, that in case the said James Langham, or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates, late of the said Sir James Langham, deceased, to the amount of £1000 per annum over and above all outgoing and reprises, then and in every such case the use, limitation, and estate, uses, limitations, and estates hereinbefore limited, expressed, declared, and contained, of and concerning the said hereditaments and premises, whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or the receipts of the rents and profits of the family estates [198] of the said Sir James Langham, or any of them, to the amount of £1000 per annum as aforesaid, and to and for the benefit of the issues male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void: and then, and in every such case, all and singular the said hereditaments and premises shall immediately thereupon, from time to time, devest out of the person or persons so becoming entitled, and shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male."

On the 12th of May, 1812, the said James Langham, in the said indenture described as the second son of the late Sir James Langham, became entitled to the possession or to the receipt of the rents and profits of the family estates mentioned in the said proviso, to the amount of £1000 per annum and upwards over and above all outgoing and reprises.

The said Francis Tutte died on the 12th of January, 1824, without issue, and without having made any appointment in exercise of the power contained in the said indenture.

At the time of the death of the said Francis Tutte the following persons were living, that is to say, the said James Langham the son, (then Sir James Langham, Bart.), James Hay Langham, the eldest son of the said Sir James Langham the son, Herbert Langham, his second son, and four other sons of the said Sir James Langham the son, and also the said Langham Christie mentioned in the said indenture.

The questions for the opinion of the Court are—1st. Whether, under the limitations

contained in the said indenture of the 12th of April, 1804, the said Herbert Langham, upon the death of the said Francis Tutte, became entitled to any and what estate in the hereditaments therein comprised?

2nd. Whether, under the limitations contained in the [199] same indenture, the said Langham Christie, upon the death of the said Francis Tutte, became entitled to any and what estate in the same hereditaments?

Erle, for the plaintiffs. The clear meaning of the proviso is, that if the Langham property shall come into the possession of James Langham, the second son of the late Sir James Langham, or any of his issue male, then the uses limited to him or them shall absolutely cease and be void; and therefore as soon as he became possessed of those estates, all his sons were excluded, and Langham Christie, the person next in remainder, took an estate for life, according to the terms of the settlement. The proviso first says, that in the event mentioned the use in favour of James Langham and his issue male shall cease, and then, and in every such case, the hereditaments shall immediately thereupon from time to time devest out of the person or persons so becoming entitled, and shall go over in such and the same manner as if such person or persons so becoming entitled were actually dead without issue male. Unless the words of the instrument are altered, no one else but Langham Christie can come in. It would be necessary to strike out the words "and to and for the benefit of his issue male." It may perhaps be contended on the other side, that the words of the instrument are to be altered, because it was the testator's intention that the family of James Langham should be preferred before the family of Langham Christie: but all that he intended was that there should not be a union of the two estates. That argument cannot have much weight, for it is impossible for the Court to know what were the settlements of the Langham property, and what were the facts which the settlor had in view at the time. The words "and to and for the benefit of his issue male" would be surplusage, if the settlor had intended that the clause should operate merely on tenants in tail, because it is [200] apprehended that if an estate is settled on a tenant in tail, and in a given event the uses for the benefit of the tenant in tail are to cease, and the estate to go over, if the estate tail ceases, it ceases from his issue male. The uses are for the benefit of James Langham and his issue male, and in a certain event the estate is to devest out of him and go over as if he died without issue male, therefore it does devest out of him and his issue. The Court will not look to any supposed intention of the settlor, to be gathered from extrinsic circumstances; but if they were to do so, it would be in favour of the plaintiffs; for the settlor may have contemplated that if James Langham came into possession of the Langham estates, he would provide for his own children. In *The Earl of Scarborough v. Doe dem. Savile* (3 Ad. & Ell. 897), the Court rejected the idea of speculating on the supposed intention of the testator, and decided upon the words which were expressed. Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, says, "Now, before we come to the construction of this proviso, we cannot but observe, in the first place, that, whilst the intention of the testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will. No surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will, unless such object can be collected from the plain language of the will itself." And again: "In the second place, we hold it to be a necessary rule in the investigation of the intention of a testator, not only that we ought to look to the words alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such [201] estate is once collected from the words of the will itself. In determining, therefore, whether the intention of the testator was in any particular case to give the devisee an estate tail or for life only, we cannot think it a sound or legitimate mode of reasoning to import into the consideration of that question, that if the estate is held to be an estate tail, the devisee will have the power of defeating the intention of the testator altogether by suffering a common recovery." The Court therefore looked strictly to the words of the will. In that case, if the name and arms of the testator were not taken for two years, the estate was to cease and determine; but if the title of Earl of Scarborough devolved on any person taking under the will, then the use in favour of such person and his issue male was to fail, and the estate to go over. It was contended that the same operation of cesser was to take place in both

events; but the Court said not. In the one case, if the devisee would not take the name and arms of Savile, he was to forfeit the estate, and it was to go over to the person next entitled; but if the title of Earl of Scarborough should devolve on any person taking the Savile property, then the intention was that the use in favour of that person should go over as upon a failure of his issue. In *Curr v. The Earl of Errol* (6 East, 58), and *Doe d. Henneage v. Henneage* (4 T. R. 13), the Court decided in favour of the construction now contended for, and that the use for the tenant for life and his issue ceased and determined, and the estate went over in the same manner as it would have done if the tenant for life had died without issue male. That is what the plaintiffs contend in the present case.

Kelly, *contrà*. The important question in this case is, whether the proviso is to operate upon the estate of the individual upon whom the Langham property shall descend, or [202] whether it is to operate also upon the estate subsequently and separately created in favour of his issue. If it were possible to look at the general intention of the settlor, no doubt could be entertained that he merely intended that any person upon whom the Langham estate should descend, and his direct lineal male issue, that is, his eldest son, or the eldest son's son, should be excluded; but by the introduction of the words in the middle of the proviso, "and to and for the benefit of him or them who shall so become entitled," the present difficulty is raised. This is not the creation of an ordinary estate tail in favour of any of the Langham family: but these are distinct estates conferred on each member of the family in succession. It can only be by words which are indisputable and irresistible in their sense and effect, that these separate and distinct estates can be defeated. If the whole of this proviso be taken together, it will appear that the intent of the settlor was merely that the estate of the person upon whom the Langham property should descend should be divested. That part of the proviso which says that the estate shall be divested on the contingency happening, applies only to the individual himself; there are no words expressly taking away any estate from any other person; and the question is, whether the Court will, in consequence of the earlier words, extend by implication the effect of the proviso, so as to destroy those estates. In a case in the House of Lords, *Thornhill v. Hall* (2 Clark & F. 22), it was held to be a rule in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words [203] of the clause giving that interest or estate. Now with regard to this express limitation in favour of the issue male in succession of the first-mentioned James Langham, it can be by implication only, as far as relates to the latter words, that those estates can be taken away. The question is, whether, taking the whole of the proviso together, it does not mean, that if the Langham estates shall come to any person whilst he is in possession of the estate under this deed, he, and his direct male issue, shall lose that estate, and every estate derivative from it; but still the other estates which are created distinctly and separately shall continue in force. By taking that view of the case, the Court would give effect to every word in the proviso. The question is, whether any thing more was intended than that when any of the estates tail should vest in possession, the issue of the party taking the estate tail should be deprived of the estate, as well as the party himself; but that if the two properties should unite in the same person, while there was only an estate for life in existence, any thing further was intended than that the estate should be divested out of that person, and the estate for life destroyed, but still that the estate tail should take effect. Now applying the words of the proviso, "and to and for the benefit of such person or persons so becoming entitled," to the case of the two estates uniting in one who had taken an estate tail under this deed, then those words would have effect, because that estate tail would be entirely defeated; and effect would also be given to the words that "the estate shall immediately thereupon, from time to time, devest out of the person or persons so becoming entitled," because the estate tail which is thus divested was the estate of which the party in whom the two properties were united was seised and possessed at the time. Thus effect would be given to every part of the instrument. [Parke, B. If that had been the intention of the settlor, the proper way of doing it would have been [204] to have said, that it shall go over in the same way to all intents and purposes, as if such person or persons so becoming

entitled, being tenant for life, were actually dead, or being tenant in tail, were dead without issue. But that is not said.] Still the words may have that effect.

LORD ALINGER, C. B. It appears to me that we must take this as being only one clause, though Mr. Kelly has argued the case as if it were two distinct clauses. It is all one clause relating to the same subject-matter, and the construction of the first part is explained by the subsequent part. The uses and limitations created by the settlement to and for the benefit of James Langham, and to and for the benefit of his issue, are to cease in the event specified; both the estates to the tenants for life, and the usual limitations for the benefit of his issue, are to cease if the Langham estates come to him to the amount of £1000 a year. Then the next branch of the clause makes the uses operate in such a manner as if he were actually dead without issue. It appears to be that the clause is sufficient without that addition. It is all in one sentence, and the meaning is not plain until we come to the end of it; but taking the whole proviso together, it is quite clear that the person who comes into the possession of the Langham estates, of the value of £1000 a year, and who was entitled under the limitations contained in this deed, was to be treated as if he were dead without issue, and the remainder was to go over. I think, therefore, that Mr. Langham Christie is entitled.

PARKE, B. I am clearly of the same opinion. The only question in this case is, what is the meaning of the words of the proviso: and if you read the proviso altogether, no reasonable doubt can be entertained as to the meaning of the words; the only objection to it is, that it is too redundant in one part, and not quite sufficiently redundant in another. The proviso begins with declaring, "that in [205] case the said James Langham, or any issue male of his body, shall become entitled to the possession or to the receipts of the rents and profits of the family estates, late of the said Sir James Langham, deceased, to the amount of £1000 per annum, over and above all outgoings and reprints, then and in every such case the use, limitation, and estate, uses, limitations, and estates, hereinbefore limited, expressed, declared, and contained, of and concerning the said hereditaments and premises, whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession, or to the receipt of the rents and profits of the family estates of the said Sir James Langham, or any of them, to the amount of £1000 per annum as aforesaid, and to and for the benefit of the issue male of such person or persons so becoming entitled, shall cease and determine." So far it is perfectly clear; if there had been nothing further in the clause, it would have shewn very clearly that those estates would have determined; and if they had, of course the remainder over would have taken effect. And this is made more clear by the concluding part, which provides that the estate "shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." Then here is a complete clause of cesser, and a complete clause of devolution, and the only apparent difficulty introduced into the case is from the insertion of unnecessary words, that the estate "shall devest out of the person or persons so becoming entitled as aforesaid." That was quite unnecessary, because the preceding clause had put an end to, and made void, all the limitations in favour of that person and his issue male; therefore it was wholly unnecessary to add a clause expressly divesting the estate out of the person so becoming entitled; and it is only the introduction of those words that can create any difficulty. But it [206] seems to me that it creates no real difficulty, because it is but, after all, imperfect, and the meaning of the settlor is clearly expressed by the first part of the proviso; and by the last part, in the event of the devolution of the estates to James Langham, the use limited to him becomes absolutely null and void, and the use limited for the benefit of his issue male becomes absolutely null and void and the estate goes over in such and the same manner, and to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male; in which case Langham Christie would have been entitled, the estate being limited to him in that event by the deed. The clause is certainly expressed imperfectly; if properly drawn up, it should have omitted the words "that the estate shall devest, &c.," or should have said that the estate of the tenant for life, and the estate of the issue male, shall devest out of them, and shall go over to some other person. The above-mentioned words, however, may be rejected as surplusage, and the intention of the settlor is perfectly clear from the other parts of this proviso; viz.,

that both the estate to the tenant for life, and the estate to his issue male, shall cease, and go over to another, in the same manner as if both the tenant for life and his issue had died, or the tenant for life had died, and there were no issue. In order to effect the intention which Mr. Kelly contends for, it is clear that the concluding clause ought to have been worded differently, and in the manner I before stated, namely, that the estate should go over in the same way as if the party becoming entitled, being the tenant for life, was actually dead without issue male. That the settlor has not said. The result might then have been, that the son of Sir James Langham would have taken the estate; but that not being so, it appears to me that the proviso is very clear, and that really the difficulty is only introduced by its being in one part too redundant. That part of the clause is wholly un-[207]-necessary, and does not go quite far enough; but it appears to me to introduce no real difficulty into the case. Upon the whole, I think it is perfectly clear that the meaning of the words of the proviso are, to divest the estate not only from the tenant for life but also from his issue male, and to take it over to the person next in remainder: and that is a reasonable provision on the part of the settlor, because if the family estates came to the father, he would be possessed of a large income, and it was reasonable to suppose that he would take care of his own children, and provide for them out of that estate. We have, however, nothing to do with the reasonableness or unreasonableness of the disposition except that it aids the rule of construction. Our duty is to see what is the meaning of the words of the instrument, and that meaning I think is very clear.

ALDERSON, B. I am of the same opinion. It appears to me that we must certify, that under the limitations contained in this deed Herbert Langham took no estate, and that Langham Christie took an estate for life, with remainder over in tail male to his children. The proviso seems to me to be perfectly clear; and the teste that Mr. Kelly referred to, as stated by the Lord Chancellor in the House of Lords, in the case of *Thornhill v. Hall*, appears to me to be applicable to the present case; namely, that you cannot divest an estate given by clear words in the early part of a deed or will, unless it appears, by subsequent words equally clear and distinct, to have been the intention that it should be divested: and it does appear to me, that by the words in this proviso the estate is clearly so to be divested. There are two parts of the proviso:—it is perfectly clear, that in the event which is contemplated, namely, of James Langham coming into possession of the Langham estates of the value of £1000 a-year, not only his estate but the estate of his issue male is to cease:—that is the first part. The latter part is equally clear, that the estate [208] shall go over in like manner as if James Langham were actually dead without issue male. If that had been all, it is quite clear that Herbert Langham would have taken no estate at all; but then there are these words, that “the hereditaments and premises shall immediately thereupon, from time to time, divest out of the person or persons so becoming entitled.” And we are asked to infer, from the mere circumstance of the settlor’s stating that the estates are to divest out of James Langham, that they are to divest out of nobody but James Langham. It appears to me, that although such a conclusion might be drawn from these words, and from them alone, it is altogether irreconcilable with the preceding part of the clause, which states that the estate not only of James Langham, but of his issue male, shall cease; and with the last part of the clause, which states “that it shall go over in such and the same manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male.” It is perfectly clear that the conclusion which might otherwise have been drawn from the ambiguous use of the words in one part of the clause, is entirely reversed by what is to be found in the other part.

The following certificate was afterwards sent:—“We have heard this case argued by counsel, and have considered it, and are of opinion, that under the limitations in the indenture of the 12th of April, 1804, Herbert Langham, upon the death of Francis Tutte, did not become entitled to any estate in the hereditaments therein comprised: and that Langham Christie, on the death of Francis Tutte, became entitled to an estate for life in the said hereditaments.”

“ABINGER.

“J. PARKE.

“E. H. ALDERSON.”

[209] CARPENTER v. BULLER. Exch. of Pleas. April 28, 1841.—Where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital; and a recital in an instrument not under seal may be such as to be conclusive to the same extent.—But a party to an instrument is not estopped, in an action by another party, and founded on the deed, and wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made, is receivable to shew that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish.

[S. C. 10 L. J. Ex. 393. Applied, *Ex parte Morgan; In re Simpson*, 1876, L. R. 2 Ch. D. 89.]

This action was brought for a trespass alleged to have been committed in the close of the plaintiffs, situate at the upper side of Cholwell Down, in the parish of Mary Tavy, in the county of Devon.

Pleas: first, not guilty; secondly, that the close in which, &c., was not the close of the plaintiff; thirdly, that the close was the close, soil, and freehold of the defendant.

At the trial before Coleridge, J., at the last Summer Assizes for the county of Devon, it appeared that the action was brought to try the right to a piece of land situated on Higher Cholwell Down, between two places called Higher Kingsett and Lower Kingsett, the defendant being entitled to the former and the plaintiff to the latter. The defendant was the owner of a mine called the Wheal Betsy Mine, close to which the land in dispute was situated; and he claimed to be entitled to the close in question as lord of the manor of Mary Tavy. The plaintiff proved a strong *prima facie* case by a series of acts of ownership, during a period of more than sixty years: and the defendant, amongst other evidence, put in a deed, dated the 9th of June, 1837, made between the defendant and the plaintiff and one William Fanshawe, by which it was recited, that “Whereas the said John Buller is seised to him and his heirs, for an indefeasible estate of inheritance in fee simple in possession, of (amongst others) certain pieces or parcels of freehold land, situated in the parish of Mary Tavy, in the said county of Devon, more particularly described in the map or plan drawn on the back of the last skin of these presents, and therein distinguished by the colour yellow, upon the southernmost of which said pieces of land a certain mine or adventure, called Wheal Friendship, hath for many years been wrought, and upon the northernmost of which said pieces of land a certain other mine or adventure, called Wheal Betsey, hath also for many years been [210] wrought, subject, as to part thereof, to the mineral rights of the said William Fanshawe, hereinafter mentioned.” The deed related to an adit, which it was proposed to construct, and which was therein described as “an adit from Wheal Friendship, in continuation of the present Wheal Friendship adit, through the lands of the said John Buller and John Carpenter, to Wheal Betsey.” The course of the adit was then described to be “through the lands set forth in the map on the last skin of these presents:” and there were covenants for the use and repair of the adit by the owners of such lands, but not confined thereto. It was admitted that the land in dispute was coloured yellow on the plan. The adit, as its course was described in the deed, did not, however, go through that part of Cholwell Down. It was contended by the plaintiff’s counsel, in reply, that the recital, though admissible in evidence, was not conclusive, and he proposed to shew that the admission was made under a misapprehension. For the defendant it was contended, that the plaintiff was estopped, by his admission in the recital contained in the deed, from denying the defendant’s title to the locus in quo, and therefore that such evidence was inadmissible. The learned Judge was of opinion that the recital was not conclusive, and admitted the evidence; and left the whole case to the jury, who found a verdict for the plaintiff with 1s. damages.

Bompas, Serjt., in Michaelmas Term last, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had; first, on the ground that the recital was conclusive against the plaintiff, and therefore that the evidence was improperly received; and secondly, that the verdict was against the

evidence. In the Vacation Sittings after last Hilary Term, cause was shewn against the above rule by

Sir W. W. Follett, Bere, and Rowe, for the plaintiff. They [211] were first heard on the ground of the verdict being against the evidence, but the Court refused to set aside the verdict, saying there was evidence on both sides, and that it was a question for the jury. Then as to the deed of the 9th of June 1837. The recital did not operate as an estoppel against the plaintiff, and therefore evidence was admissible to explain the admission it contained. Although it may have been strong evidence against the plaintiff, it was not conclusive; it was still open to him to shew that it was incorrect, and made under a misapprehension of the fact. The object of the deed was collateral, and the effect of the evidence was not to alter or contradict the recital, but only to shew that it was made under a mistake. The deed was not intended to apply to the locus in quo, or in any way to affect the title to the land. The adit, to which alone the deed relates, does not even run through it. No doubt it was evidence against the plaintiff, but it was not conclusive, and the learned Judge was right in admitting the evidence tendered to explain it.

Bompas, Serjt., Erle, and Crowder, contra. The recital operated as a complete estoppel, and the evidence ought not to have been received. Where the words of a deed are clear and intelligible, evidence is not receivable to shew that the party using them did not mean what they express, since that would amount to a denial of the deed. The evidence in effect contradicts the deed, and is introduced for the purpose of depriving it of effect. [Parke, B. We entertain a strong impression that the recital did not operate as an estoppel in this action; but we will look at the cases before we deliver our judgment.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. During the sittings after the last term, the [212] Court disposed of the principal question in this case, by refusing to make the rule absolute for a new trial, on the ground that the verdict was against evidence. The only question reserved for consideration was, whether my Brother Coleridge was right in holding, that the recital, in an indenture of 9th June 1837, between the plaintiff and defendant, that the locus in quo was then the property of the defendant, estopped the plaintiff from saying in this action that it was not. We are all of opinion, that the plaintiff was not estopped by that recital in the present suit, and that such recital was merely evidence.

It might be sufficient for the present purpose, to say that the circumstance of the estoppel not having been pleaded as such, leaves the matter at large before the jury, according to the authority of *Vooght v. Winch* (2 B. & Ald. 662), *Bowman v. Rostron* (2 Ad. & Ell. 295; 4 Nev. & M. 552), and other cases.

But independently of that consideration, we think the admission is not conclusive in the present case.

If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352 b.; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed, is found in the case of *Lainson v. Tremere* (1 Ad. & Ell. 792; 3 Nev. & M. 603), where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of £170, and the defendant was estopped from pleading that it was £140 only, and that such amount had been paid. So, where other particular facts are men-[213]-tioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond: 1 Roll. Abr. 873, c. 25. All the instances given in Com. Dig., Estoppel (A. 2), under the head of "Estoppel by matter of writing" (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to shew that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the

recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of £170 in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them.

The statement in the deed in question, the agreement of 1837, we are strongly inclined to think is of the latter description, so far as relates to the land in question. The ownership of Mr. Buller in that land, amongst others, is recited by comparing the deed with the plan: but the adit does not go through that particular land, and the language of the deed does not expressly confine the right to use the adit for the purposes of the lands so described only, or the obligation to repair it, through those lands; and the adit, [214] in the deed itself, is described as going to the Wheal Betsey only. But whether the recital as to the lands in question in this action be immaterial or not, for the reasons above given, we think that the statement in the deed and plans, though under seal, and evidence of ownership, is not conclusive in this case; and we have no doubt, that if it be not conclusive, the evidence of the circumstances under which such admission was made, was admissible, upon the ground already stated by the Court in the course of the argument. That evidence in no way contradicts the deed: it does not shew that such admission was not made, nor does it propose to alter it; but tends to prove that the admission therein contained was inconsiderately made, and is not entitled to weight as a proof of the truth of the fact which it is used to establish.

The rule therefore must be discharged.

Rule discharged.

THE GRAND JUNCTION RAILWAY COMPANY v. WHITE. Exch. of Pleas. April 28, 1841.—By the 183rd section of the Grand Junction Railway Act (3 Will. 4, c. xxxiv.) it is enacted, that the owners and occupiers of lands through which the railway should be made (“except in cases in which the company should, at their own expense, have made communications from the land on the one side of the railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of the act”), at all times for the purpose of occupying the said land, without payment of toll, might pass and repass directly over and across such parts of the railway as should be made in or upon their respective lands. The 186th section prohibited all persons, except the company and their servants, from crossing the railway, “except only directly crossing the same at places to be appointed for that purpose, for the necessary occupation of the respective lands through which the said railway should pass.” And by the 180th section, in case of dispute, the company are to make such communication as two or more justices of the peace shall, upon the application of any owners, &c., judge necessary and appoint:—Held, that until the company had made a communication, the owners of severed lands had a right to cross the railway at any part within their respective lands.

[S. C. 2 Railw. Cas. 559; 10 L. J. Ex. 292; 5 Jur. 775.]

Trespass for breaking and entering a close of the plaintiffs, situate in the parish of Eccleshall, in the county of Stafford, that is to say, a certain close called the Grand Junction Railway, and breaking down certain gates and fences, &c., of the plaintiffs, then being the said close, whereby &c.

[215] Plea, that the said close and railway in which, &c., in the declaration mentioned, is part of a certain railway called the Grand Junction Railway, which said railway was made and formed under and by the authority and subject to the provisions of a certain act of Parliament, to wit, an act passed in the third year of the reign of his late Majesty, intituled “An Act for making a Railway from the Warrington and Newton Railway at Warrington, in the county of Lancaster, to Birmingham, in the county of Warwick, to be called the Grand Junction Railway;” and that before and

at the said several times when, &c., in the said declaration mentioned, he the defendant was the occupier of a certain close or land through and over which the said railway was made and passed, and which said close or land had been and was by the said railway severed and divided into two parts, one part thereof being on the west side of the said railway, and the other part on the east side thereof; and the defendant says, that the plaintiffs (the said Grand Junction Railway Company) not having, after the said severance and division of the said close or land, at their own expense, made a communication from the said part of the said close or land lying on the west side of the said railway, to the said part of the said close or land lying on the east side thereof, according to any agreement with any owner or occupier of the said close or land, or according to the provisions of the said act in this plea above mentioned, he, the defendant, as such occupier of the said close or land, at the said several times when &c., for the purpose of occupying the said close or land, did pass from the said part of the said close or land of the defendant, lying on the west side of the said railway, directly, and not otherwise, over and across the said close and railway in which &c., in such part thereof, and such part only, as had been made in and upon, and then ran through the said close or land of the defendant, unto and into the said part of the said close or land of the defendant lying on the [216] east side of the said railway, the passage upon or along the said railway not being thereby, or by consequence thereof, in any way hindered or obstructed, nor the same, or the works connected therewith, in any way damaged, as he, the defendant, lawfully might; and in so doing, the defendant, with his feet in walking, unavoidably a little trod down, trampled upon, consumed, and spoiled the said grass of the plaintiffs then growing and being in the said close and railway in which &c., in such part thereof as had been made in and upon the said close or land of the defendant as aforesaid; and because the said gates, and the said hedges and fences, had been wrongfully set up and erected, and were then erected, standing, and being in and across the said part of the said close and railway in which &c., which had been made in and upon the said close or land of the defendant, so that without forcing and breaking open the said gates, and breaking down, prostrating, and destroying the said hedges and fences respectively, the defendant could not then go, pass, and re-pass, in the said part of the said railway and close in which &c.. over and across the said close and railway in which &c., as he of right ought to have done on the occasions aforesaid, he, the defendant, at the said several times when &c., in the declaration mentioned, in order to remove the said obstruction, did break and force open the said gates, and thereby did unavoidably a little damage and spoil the same, and did break down, prostrate, and destroy the said hedges and fences respectively in the declaration mentioned, and removed the said gates, and the materials of the said hedges and fences, to a proper and convenient distance, and there left the same for the use of the plaintiffs, doing no unnecessary damage to the plaintiffs on those occasions, which are the same alleged trespasses in the declaration mentioned.

Special demurrer, assigning for causes, that it is not alleged, and does not appear in the said plea with sufficient or any certainty, that any application, request, or notice was made or given by or on behalf of the defendant, or [217] any other person, to, or to any one on the behalf or the account of, the plaintiffs, or to any justices of the peace, that any such communication as in the said plea alleged was desired, or was necessary or convenient to the defendant as such occupier as therein mentioned, or to the occupier or owner of any estate or interest in the said lands therein mentioned, or any part thereof; nor is it alleged, nor does it appear thereby with such certainty as aforesaid, that any such communication as therein alleged was desired, or was necessary or convenient as aforesaid, at any or what time, or that the plaintiffs, or any one on their behalf, had any notice thereof, or reason to believe the same; nor is it alleged, nor does it appear thereby with such certainty as aforesaid, what are the said provisions of the said act in the said plea mentioned, or how the plaintiffs have not complied with such provisions, or whether the defendant has so complied, or in what manner or respect. Joinder in demurrer.

The plaintiffs' points were—That the plea is not warranted by the 183rd section of the Grand Junction Railway Act, or any other clause thereof, and also that it is bad for the objections specially assigned as causes of demurrer.

The defendant's points were—That it is quite immaterial whether any such request or notice, as stated in the grounds of demurrer, was made or given either to the plaintiffs

or to two justices, and that the 183rd section of the Railway Act applies whenever in fact no road or communication has been made, either by agreement or upon the award of the two justices. Also, that the act referred to being a public act, it was unnecessary to set out the provisions of it with more particularity than has been used in fact.

Cowling, in support of the demurrer. The plea is bad, for the reasons alleged as causes of demurrer. The defendant relies upon the 183rd section of the Grand Junction Railway Act, by which it is enacted, "that it shall be lawful for the respective owners and occupiers of [218] lands through which the said railway shall be made, and their respective servants and workmen, (except in cases in which the said company shall, at their own expense, have made communications from the land on the one side of the said railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of this act), at all times, for the purpose of occupying the same land, and without payment of any toll, to pass and re-pass, and to lead and conduct any horse, mule, or ass, cow or other cattle, sheep, swine, or other beast, directly (but not otherwise) over and across such parts (and such part only) of the said railway as shall be made in or upon their respective lands, provided that, by so doing, or by consequence thereof, the passage upon or along the said railway be not in any way hindered or obstructed, or the same or the works connected therewith be not in any way damaged." That clause does not authorize the owners of lands to break down the fence, and cross the railway, except at places appointed for that purpose, and except for the necessary occupation of the lands. Now here it does not appear that the defendant was the owner, or had any interest in the land, at the time the rail-road was made; nor does it appear that there was any necessity for the way, or any request to have a road made. It may be said to be a hardship that the landowner should have no road to his land, but the 78th section provides for all damage occasioned by the land being separated. The company having paid both for the land and the damage done by the severance, would naturally conclude that there was no incumbrance on the land conveyed, viz. that a road was to be claimed over it by the vendor. This is confirmed by the language of the form of conveyance given in section 63. The company having bought the land on which the railroad was constructed, and fenced it, it is devoted to the purposes of the railroad, and cattle are prohibited from being upon it. The 186th section prohibits all persons, under a penalty of [219] £10, from using the railway as a passage for horses or other cattle, "except only in crossing the same as aforesaid, at places to be appointed for that purpose, for the necessary occupation as aforesaid of the respective lands through which the said railway shall pass;" and the 187th section imposes a penalty of 40s. on any person travelling on the railway on foot, without the consent of the company, "except the respective occupiers of lands through which the said railway shall pass, and their respective servants, in passing as aforesaid directly across the same as hereinbefore authorized." Those sections must be read together, and prohibit all persons from using the railway as a passage, except at the places appointed. [Alderson, B. According to that argument, if the company did not choose to appoint any place, a party could never cross the railway at all.] By the 180th section the company are directed, when the railway is laid out, forthwith to make and maintain gates, bridges, arches, culverts, and passages, over, under, or by the side of, or leading to or from the railway, of such dimensions and in such manner as two or more justices shall, upon the application of the owner, lessee, or tenant of any lands, &c., judge necessary and appoint, (in case there shall be any dispute about the same), for the use of the owners or occupiers of the respective lands through or over which such railway shall be made. Under this section, if the company do not make the gates, &c., forthwith, on the order of the justices, the applicant may make them himself, and charge the expence to the company. That gives ample protection to the landowner. [Parke, B. The question is, who is to take the initiative step—whether the party is to do so, or the company, and whether the party is not to wait until the communication is made, and then apply to the magistrates if he is dissatisfied.] The determination of the magistrates is the condition for the party to proceed. How are the company to ascertain where the road is wanted? [Alderson, B. It would be very easy to make the inquiry when [220] the land was conveyed.] For all that appears, that may have been done in this case. [Lord Abinger, C. B. When the company have once made a communication, either by agreement or by the award of two justices, the owner of the land has no right to any other. Parke, B. And if they

were not bound to make one, they might have shewn that by way of reply.] The 181st section contemplates the possibility of the gates, &c., being insufficient for the occupation of the land, and enables the landowners, after giving notice to the company, to erect, by consent of the justices, other gates and communications at their own expense. The 182nd section also empowers the landowners to require the land to be fenced off from the railway at the expense of the company, instead of requiring gates, &c., and gives the same power to the justices over the fences as is given by the 181st section over the gates or communications, and authorizes the company to fence it off, if no request to have gates erected is made, and the company choose fences instead of gates; but in either case, if the landowners require one or more gates, &c., they have the same power of enforcing them as is given by section 180. The 183rd section was intended to give an exemption from toll in cases where the cattle would pass over the railroad itself, and therefore is principally pointed to cases where the railroad is on a level or nearly so, and gates only are made at the expense of the company, and a passage only is required to be appointed by the justices, and no further communication is requested by the landowners. That appears from the marginal note and the exception, which latter excepts cases where communications shall be made at the expense of the company, — obviously meaning where something else has been done than merely erecting gates; but it does not say expressly “in all cases” it shall be lawful to pass and repass, nor does it apply to cases of railways not being nearly level, in which case there could be no such crossing. If it had said distinctly “in all cases,” it would have contradicted the former sections: but reading [221] it as the plaintiffs contend, it reconciles and is consistent with all, and means that where gates have been directed to be made, or where places have been made for crossing, with or without the erection of gates, and no other communication is made, the landowners may pass without payment of toll. But in this plea there is no averment of the railway being on a level with the land, or of any appointment by the justices, or of any request to make gates or fences. On the contrary, it is rather to be assumed that the company had thought proper, under section 182, to make both the gates and fences. The plea justifies the destruction of fences as well as gates. Even if the communication were made at a great expense, yet if it were not made by agreement or under the order of two justices, the party, according to what is contended for on the other side, might still break down the fences; and if there is no fence, how is the public to be protected? The plea is therefore bad.

Crompton, contrà, was stopped by the Court.

LORD ABINGER, C. B. It is a rule well understood, that if a party seeks to avail himself of a particular clause in an act of Parliament, which contains an exception or proviso, that exception ought to be negatived by him. But here the defendant has made a complete defence under one clause; and if the case comes within an exception or proviso in another clause, it was for the company to shew that. The intention of the act was, that the railway should be made without detriment to individuals, and by it the company are bound to make communications; if they do so, and the owner of the land is dissatisfied, he may go before a magistrate, and get his determination as to what ought to be the proper communication. If the company make no communication at all, a party may go over the railway where he pleases; but if they make one which he disapproves of, then he cannot cross at any other place, but must go before a magistrate. The necessity for going before a magistrate does not, however, arise so long as the company refuse to make any communication. I am of opinion, therefore, that the plea is good.

PARKE, B. I entirely agree with my Lord Chief Baron. The plea brings the case completely within the 183rd section, which is clear and intelligible. [His Lordship read the section.] That section comes by way of proviso on the preceding sections, and gives the occupier of the land for the time being (not the occupiers of the land previously) the right of passing across the railway from one part of a close separated by the railway to another, provided he does not do so in such a manner as to impede the passage upon it, and provided also that the company have not made a communication; and in order to compel them to do what is necessary for that purpose, a right is given by the act to the occupier of the adjacent lands, to go across the railway until one is made. Such appears to me to be the grammatical construction of this section. Then the 186th section must be qualified: it is impossible to take the words of it literally, for it imposes a penalty on all persons using the railway as a passage for horses or cattle, except in crossing the same “at the places to be appointed for that

purpose for the necessary occupation of the respective lands through which the railway shall pass." Now it is clear, from other parts of the act, that these parties would have a right to pass with cattle over the railway, if no regular place of transit for them were to be appointed; and in order to make sense of this 186th section, the expression, "places to be appointed," must be understood and read with the addition—"when such places shall be appointed." Without, however, going further into that subject it is sufficient for us at present to say, that the case comes within the 183rd section; and if it would be an answer to this plea (which I do not think it would) to reply that a requisition should have been made by the party to the company to make a communication, that is a matter of [223] reply, which should have come from the other side; but it is unnecessary to decide that point at present, as our judgment is founded on this, that this defendant had a right to pass across the railway from his property on one side of it to that which was on the other.

ALDERSON, B. I am of the same opinion. The 183rd section gives to parties in the situation of this defendant, a general power of going over the railway where they please, until the Company, by an exercise of the power vested in them by the act for the purpose, restrain their right of doing so to a particular place.

Judgment for the defendant.

GIBBS v. PIKE AND ANOTHER. Exch. of Pleas. April 28, 1841.—Where a statute is passed in a session of Parliament which commenced in one year of a reign but is continued into another, it is incorrect to describe the statute as passed in both years, but it may be described as a statute passed in a session of Parliament holden in both years.—Semble, that an order of a court of equity for the payment of money into the Bank in the name of the Accountant-General, to the credit of a cause depending in that Court, is not an order to which the effect of a judgment is given by the 18th section of 1 & 2 W. 4, c. 110.

[S. C. 9 Dowl. P. C. 731; 10 L. J. Ex. 309. See further, 9 M. & W. 351.]

Case. The declaration stated, that after the passing of a certain act of Parliament, to wit, an act made and passed in the first and second years of the reign of her Majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases: for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," and before the committing of the grievances by the said C. A. Pike and Eliz. Wells hereinafter mentioned, a certain suit was and still is depending in her Majesty's High Court of Chancery, before the Right Honourable Henry Lord Langdale, then and still being the Master of the Rolls in the said Court, in which said suit the said Eliz. Wells, and one Fanny Wells Freeman, Richard Freeman, Robert John Freeman, and James William Freeman, infants, by the said Eliz. Wells, their next friend, were plaintiffs, and the said J. Gibbs, and one Richard Freeman, and Fanny Freeman were de-[224]-fendants. And whereas also heretofore, and before and at the time of the committing of the grievances hereinafter mentioned, the said plaintiff was and still is seised in his demesne as of fee of and in divers lands, tenements, and hereditaments, with the appurtenances, situate, lying, and being, to wit, in the county of Kent: And the plaintiff further saith, that after the making of the said act of Parliament, and before the committing of the grievances by the said C. A. Pike and Eliz. Wells hereinafter mentioned, and while the said suit was so depending in the said High Court of Chancery as aforesaid, to wit, on the 11th day of June, in the year 1840, by a certain order of the said Right Honourable Henry Lord Langdale, in the said suit, bearing date the day and year last aforesaid, after reciting &c., the said Right Honourable Henry Lord Langdale did order that the said defendant J. Gibbs, (meaning thereby the said plaintiff), should within a month from that time pay into the Bank, with the privy of the Accountant General of that Court, to the credit of the said cause, the sum of 1404l. 2s., admitted by the answer of the said defendants, the said John Gibbs and Richard Freeman, to have been the amount of the proceeds of the sale of the trust fund of 1637l. 8s. 6d. £3 per cent. Consolidated Bank Annuities, received by the said defendant the said John Gibbs; and it was ordered that such sum of 1404l. 2s., when so paid into the Bank, should be

laid out in the purchase of Bank £3 per cent. Annuities, in the name and with the privity of the said Accountant-General, in trust in the said cause, and he was to declare the trust thereof accordingly, subject to the further order of the said Court, and for the purposes aforesaid the said Accountant-General was to draw on the Bank according to the form prescribed by the act of Parliament, and the general rules and orders of the said Court in that case made and provided; and upon such payment as aforesaid, it was ordered that the said defendant, J. Gibbs, should be at liberty to apply to have a certain bond delivered up; and the said J. Gibbs in [225] fact saith, that after the making of the said order of the said Right Honourable Henry Lord Langdale, they, the said C. A. Pike and Eliz. Wells, well knowing the premises, and well knowing, as the fact was and is, that the said order was not a decree or order of a Court of Equity whereby any sum of money, or any costs, charges, or expenses, were payable to any person within the said act of Parliament, or the intent and meaning thereof, but contriving and intending to oppress, harass, and aggrieve the said J. Gibbs, and to prevent him from disposing of any part of the said lands, tenements, and hereditaments, with the appurtenances, of him the said J. Gibbs, and to deprive him thereby of the means of paying the said sum of 1404l. 2s., in the said order specified, and satisfying the said order, and to injure and prejudice him in his credit and circumstances, to wit, on the 3rd day of July, 1840, wrongfully, maliciously, oppressively, and unlawfully, and under colour and pretence of the said last-mentioned act of Parliament, left, and caused and procured to be left, with the senior Master of the Court of Common Pleas at Westminster, a certain memorandum or minute in writing, containing the name and the usual or last known place of abode, and the title, trade, or profession of the said J. Gibbs, (the said plaintiff), whose estate was intended to be affected thereby, and the Court, and the title of the cause in which such order was obtained and made, and the date of such order, and the amount of the monies thereby ordered to be paid, and which same particulars contained in the said memorandum or minute so left and caused and procured to be left by the said C. A. Pike and Elizabeth Wells as aforesaid, was, by such leaving as aforesaid, and by and through the wrongful, malicious, and unlawful procurement of the said C. A. Pike and Elizabeth Wells, forthwith entered in a book by the said senior Master of the Court of Common Pleas, according to the provisions of the said act of Parliament, as and for a memorandum or minute in writing of a decree or order of a Court of Equity, whereby a sum of money, or certain costs, [226] charges, and expenses were payable to a person within the said act, whereby, after such entry by the said senior Master of the Court of Common Pleas as aforesaid had been made as aforesaid, it then and there appeared from and on the face of such entry in the said book as aforesaid, that the said order so made by the said Right Honourable Henry Lord Langdale, so being the Master of the Rolls as aforesaid, was an order within the intent and meaning of the said act of Parliament; that is to say, an order of a Court of Equity whereby the said sum of 1404l. 2s. was payable to the said Elizabeth Wells and the other plaintiffs, [naming them], and had the effect of a judgment in a superior Court of Common Law, affecting the said lands, tenements, and hereditaments of the said John Gibbs, and that the said Elizabeth Wells and the other plaintiffs [naming them] were thereby to be deemed judgment-creditors, within the meaning of the said act: By means of which said several premises, and by reason of the said order, from such entry so made as aforesaid, appearing and purporting to have the effect of a judgment against the said J. Gibbs, and so affecting the said lands, tenements, and hereditaments of the said J. Gibbs as aforesaid, by such wrongful, malicious, and unlawful procurement of the said C. A. Pike and the said Elizabeth Wells as aforesaid, he the said J. Gibbs has been hindered and prevented from selling and disposing of certain lands, tenements, and hereditaments of him the said J. Gibbs, which he otherwise might and would have sold and disposed of for divers large prices and sums of money, for the purpose of paying the said sum of 1404l. 2s. in the said order mentioned, and satisfying the said order.

Special demurrer, assigning for causes, that the order in the declaration mentioned appears on the face of the declaration to be an order within the said act of Parliament, and the intent and meaning thereof; and, therefore that no sufficient cause of action is shewn against the defendants; that it does not appear with sufficient [227] certainty when the act of Parliament in the declaration first mentioned was made or passed; and for that the declaration should have averred (if such were the fact) that

the said act of Parliament was made and passed in a session of Parliament, held in the first and second years of the reign of her said Majesty.

Hayes, in support of the demurrer. The statement in the commencement of the declaration, that the act was made and passed in the first and second years of the reign of her Majesty Queen Victoria, is clearly wrong. In *Rex v. Biers* (1 Ad. & Ell. 327; 3 Nev. & M. 475), it was held that a statute passed in a session of Parliament, begun in the second and continued in the third year of a king's reign, must not be pleaded as passed in the second and third years of the reign. There Patteson, J., said, "A correct mode of statement is followed in the act for the further amendment of the law, 3 & 4 Will. 4, c. 42, s. 16, which refers to 'the statute passed in the session of Parliament held in the eighth and ninth years of the reign of King William the Third.'" That case was decided on the authority of *Langley v. Haynes* (Moore, 302; Hawk. P. C. b. 2, c. 25, s. 104), and is directly in point. The Court then called on

Platt to support the declaration. As to *Langley v. Haynes*, the declaration there recited that the statute was made the 2nd of November, in the 2nd and 3rd of Edw. 6, and the Court held that that day could not be in two years of the reign; but that is plainly distinguishable from the present case. Where a statute has passed in a session of Parliament which began in one year of the reign and continued to another, it has been usual to describe it as of both years. Lord Mansfield, C. J., in *Rann v. Green* (Cowp. 474), recognised that method of describing statutes. He says, "In some reigns, as in Car. 2 & Geo. 2, it happens that the Parliament meets in one year of the reign, and conti-[228]nues during part of the next year. In that case the method is to intitle the acts passed, of both years" (see what Lord Mansfield there says as to the description of statutes passed in the joint reign of Philip and Mary). [Parke, B. That must mean that a statute may be stated to have been made and passed in a session held in both years, but it is clearly inaccurate to state the statute to have passed in two years, because all acts take effect from the time of receiving the royal assent, unless otherwise provided for. There can be no doubt that this statute is inaccurately described.]

LORD ABINGER, C. B. The cases cited are authorities to shew that the objection is a valid one, and that the variance is fatal. With respect to the other point, it appears to me that the order of the Master of the Rolls, set out in the declaration, is not an order within the meaning of the 18th section of the 1 & 2 Vict. c. 110. Both parties had better amend.

Amendment accordingly.

HENRY AND ANOTHER v. EARL. Exch. of Pleas. April 28, 1841.—To an action of debt for goods sold, &c., the defendant pleaded, except as to 5l. 10s. 3d., nunquam indebitatus; and as to that sum, that the plaintiff ought not further to maintain his action, because he says, that after the causes of action in the declaration mentioned accrued to the plaintiff, and after the commencement of the suit, he the defendant paid to the plaintiff who then accepted and received the same, a large sum of money, to wit, 5l. 13s. 7d., in full satisfaction and discharge of all the causes of action in the declaration mentioned, which relate to the said sum of 5l. 10s. 3d. To this there was a special demurrer, assigning for cause, that it was not alleged that the payment was made in satisfaction and discharge of the damages and costs sustained by reason of the causes of action or the detention of the debt:—Held, on special demurrer, that the plea being pleaded to a portion of the debt only, and not to the damages and costs appertaining thereto, was nevertheless a good answer to so much as it was pleaded to, although it was larger than necessary in the concluding part, that not being pointed out as a ground of demurrer.—Held also, that the plaintiff might sign judgment for any damage which was not answered by the plea.

[S. C. 9 Dowl. P. C. 725; 10 L. J. Ex. 265; 5 Jur. 828. Discussed, *Tetley v. Wanless*, 1867, L. R. 2 Ex. 280.]

Debt. The declaration stated the defendant to be indebted to the plaintiff in the sum of £12 for goods sold and delivered, and in £12 upon an account stated between them.

[229] Plea, except as to 5l. 10s. 3d., nunquam indebitatus; and as to that sum, that the plaintiffs ought not further to maintain their action thereof, because the defendant says, that after the causes of action in the declaration mentioned accrued to the plaintiffs, and after the commencement of this suit, to wit, on &c., he the defendant paid to the plaintiffs, who then accepted and received the same, a large sum, to wit, 5l. 13s. 7d., in full satisfaction and discharge of all the causes of action in the declaration mentioned which relate to the said sum of 5l. 10s. 3d., parcel &c. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiffs ought further to maintain their action thereof against him.

Special demurrer, assigning for causes, that it is not alleged or stated in the plea, that the payment therein mentioned to have been made was made or accepted in satisfaction and discharge of the damages and costs sustained or incurred by the plaintiffs, by reason of the causes of action in the declaration mentioned which relate to the said sum of 5l. 10s. 3d., parcel &c., or by reason of the detention of the said last-mentioned sum of money; but on the contrary, the allegation is so made as necessarily to exclude the inference that the payment was made and accepted in satisfaction and discharge of the said damages and costs. And that the said plea is bad and informal, uncertain and argumentative, in this, that it does not directly and positively allege that the payment was made and accepted in discharge of the said damages and costs. Joinder in demurrer.

The Court called on

Peacock to support the plea. It is only necessary for a plea to answer that portion of the declaration to which it is pleaded. This plea is not pleaded as an answer to the damages, but only to that part of the debt which has been paid. Admitting that it does not answer the damages [230] and costs, still it is a good bar as to the 5l. 10s. 3d. to which it is pleaded; and if there be any part of the plaintiffs' claim which is left unanswered, they may sign judgment for that part which is not answered, but it is no ground of demurrer. If the debt were payable at Lincoln's Inn Hall, and I were to plead that I went at the time appointed to pay the debt, but the plaintiff was not there to receive it, that would be an answer to the damages, but not as to the non-payment of the debt: *Rowe v. Young* (2 B. & B. 235). [Lord Abinger, C. B. The question on this plea would be only whether the sum of 5l. 10s. 3d. had been paid. Parke, B. Your plea is informal: it begins by answering as to 5l. 10s. 3d., and then extends itself to the damages.] That is not assigned as a ground of demurrer. *Corbett v. Swinburne* (8 Ad. & Ell. 673; 3 Nev. & P. 551) was an action on a bill of exchange for £176, and the defendant pleaded, as to £50, that the plaintiff ought not further to maintain his action, because after it was commenced the defendant delivered to the plaintiff, and the plaintiff accepted a bill of exchange in full satisfaction and discharge of the defendant's promise in respect of the said sum of £50 and all damages (without any allegation as to costs) sustained by reason of the non-payment thereof. The plaintiff traversed the plea, and having failed at the trial, it was held that he was not entitled to judgment non obstante veredicto. Lord Denman, C. J., in delivering the judgment of the Court, said: "These pleas are pleaded in bar of the further maintenance of the action, and are not open to the objection in *Le Bret v. Papillon* (4 East, 502). . . . They would have been good in that form if the transaction had been prior to the action, and they had been pleaded in bar generally; and we cannot see any reason why they are not equally good in the same form as a bar to the further maintenance." The rule is thus laid down in the notes to the [231] *Earl of Manchester v. Dale* (1 Saund. 28, n. (3)). "If a plea begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur. But if a plea begin only as an answer to part, and is in truth but an answer to part; or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit." Here the plea is against the further maintenance, and not in bar, of the action.

Hugh Hill, contra. A party reading the commencement of this plea would read it as an answer to every thing relating to the 5l. 10s. 3d., including the damages and costs in the action. There is no authority to shew that in pleading the debt and the damages are severable: and it has been quite unusual to plead to the sum due without including the damages, and such a mode of pleading ought not to be allowed. The plea ought to have shewn that which amounted to a discharge of all damages and

costs. [Lord Abinger, C. B. Could you recover damages for the detention of the debt subsequent to the commencement of the action?] Yes; the costs. The declaration does not include the costs of the writ. The plea is pleaded to the "causes of action in the declaration mentioned," so as to exclude every thing else. In *Francis v. Crywell* (5 B. & Ald. 886; 1 D. & Ry. 546), the defendant pleaded, that before the exhibiting of the bill he paid to the plaintiff a sum of money, parcel &c., in discharge and satisfaction of the promises in the declaration mentioned, and that the plaintiff accepted the same in satisfaction and discharge of the promises; the plaintiff replied, that before the exhibiting of the bill he had sued out a latitat, and that the defendant did not pay the money before. On demurrer, the [232] plea was held bad, because it did not allege the payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises. Abbott, C. J., there says: "The plea, to have been a sufficient bar, should have alleged a payment in discharge, not only of the promises and undertakings in the declaration, but of all costs and damages accrued by reason of the non-performance of those promises and undertakings." *Corbett v. Swinburne* is distinguishable, for there the allegation was, "in full satisfaction and discharge of all damages sustained," which includes costs; because "costs are a consequence, by the stat. of Gloucester, of detaining the debt, and are part of the damages; and in contemplation of law the word damages emphatically includes costs," per Lord Ellenborough, C. J., in *Phillips v. Bacon* (9 East, 304). If the words here had been "all damages occasioned by the detention of the debt," it would have included the costs, but they are "the causes of action in the declaration mentioned." The damages are for the detention of the debt, and in respect of them there can be no issue. At all events, the import of the plea is doubtful, and, as was said by Abbott, C. J., in *Dyster v. Battye* (3 B. & Ald. 453), "the usual and established forms of pleading should be observed, in order that the parties to the suit may know with certainty what is the point intended to be tried, and that the judge and jury may not be perplexed at nisi prius, by controversy and argument upon the effect and import of the issue joined on the record." [Parke, B. Suppose the plea were to the entire debt, which this is not, how would you sign judgment for the damages?] We could not do so; the judgment is for the debt and damages. There is no instance of judgment being signed for damages in an action of debt. The form of the plea of payment into Court would necessarily exclude the supposition that the plaintiff could sign judgment for the damages. [Parke, B. It [233] says nothing about damages for the detention of the debt.] The damages are merely nominal.

Peacock, in support of the plea. This plea is a clear answer to the debt, though not to the damages. A plea of tender is no answer to the damages, but to the debt only. In debt, the damages are more than nominal. It has been held that a defendant cannot prove payment in mitigation of damages. Suppose an action of debt for money due upon a mortgage-deed, and the covenantor had not paid the debt at the day named, but that he had paid it after, he could not plead that in answer to the damages for the detention of the debt, but to the debt only. If the mortgagor were to pay the mortgage debt, but not the interest, the mortgagee could maintain an action to recover the interest. [Lord Abinger, C. B. Suppose the defendant had paid the money into court?] He must have paid in for the damages, because the costs are a part of the debt by the stat. of Gloucester.

LORD ABINGER, C. B. I am inclined to think that this is a good plea as to so much as it professes to answer, and if not, the defect is not detected by the special demurrer. It professes to be pleaded, in further maintenance of the action, as to 5l. 10s. 3d. only: it does not profess to be pleaded to any damages resulting from the debt up to the time of the plea. It may be that the concluding part of the plea is larger than necessary, but that is not the ground of demurrer. No doubt costs form part of the damages resulting from the detention of the debt, and if there is no answer as to those costs, the plaintiff may sign judgment for so much. Though the damages in debt are in general considered as nominal only, yet the jury may give substantial damages if they think fit. So here, if the plaintiff can shew that he is entitled to more than the plea answers in respect of damages, he may sign judgment for the part [234] unanswered. In the ordinary course of payment of money into Court after action brought, the plaintiff is entitled to sign judgment for his damages, otherwise a party who paid money into Court would pay no costs at all. Therefore, it is the general practice, upon payment of money into Court, to pay costs up to that time. I

am therefore of opinion, that in the present case, notwithstanding the conclusion of the plea, the plaintiff might have signed judgment for costs, as part of the damages. If that be done, it will reconcile all the difficulty. The plea is informal, as being, in its conclusion, larger than necessary, but it is not pleaded to more than 5l. 10s. 3d.; and as to that sum it is good.

PARKE, B. The plea is a good plea, and there must be Judgment for the defendant.

STEAVENSON v. OLIVER. Exch. of Pleas. April 28, 1841.—Debt for work done as an apothecary: plea, that the plaintiff was not an apothecary prior to the 1st of August, 1815, nor had at any time obtained a certificate to practise as an apothecary from the Master, Wardens, and Society of the art and mystery of Apothecaries: replication, that before the work was done, and before the 1st of August, 1826, to wit, on &c., the plaintiff held a warrant as assistant-surgeon in the navy, bearing date &c., and that the work was done after the passing of the 6th Geo. 4, c. 133:—Held, on special demurrer, that the replication was good.—Held also, on objection to the plea, that the certificate required by the 55 Geo. 3, c. 194, was a certificate from the Court of Examiners, and not from the Master, Wardens, and Society of the art and mystery of Apothecaries, that the plea was good.—By 6 Geo. 4, c. 133, s. 4, it is provided that every person who held, or thereafter should hold, a commission or warrant as surgeon or assistant-surgeon in his majesty's navy or army, should be entitled to practise as an apothecary in any part of England or Wales, without having undergone the examination or received the certificate required by the 55 Geo. 3. By the 11th section, the act was to continue until the 1st of August, 1826:—Held, that those persons who held warrants prior to the 1st of August, 1826, and who were therefore entitled to practise as apothecaries, were not deprived of that right by the expiration of the act.

[S. C. 10 L. J. Ex. 338; 5 Jur. 1064.]

Debt for work and materials, for journies and attendance as a surgeon and apothecary, and for certain surgical operations, &c., with a count on an account stated.

The defendant pleaded, as to the sum of £8, parcel of the monies in the said first count mentioned, and the work [235] and materials, and journies and attendances in the said first count alleged to have been done, provided, performed, and given by the plaintiff as an apothecary, and for medicines and other necessary things, in the said first count alleged to have been provided, administered, delivered, and applied by the plaintiff as an apothecary, so far as the same relate to the said sum of £8, parcel, &c., the defendant says, that the plaintiff ought not to maintain his aforesaid action thereof against him, because the said last-mentioned work was done, and the said last-mentioned materials, journies, and attendances were done, provided, performed, and given by the plaintiff as an apothecary, and that the said last-mentioned medicines were provided, administered, delivered, and applied by the plaintiff as an apothecary, and that the said plaintiff was not in practice as an apothecary prior to or on the 1st day of August, A.D. 1815, neither has he the plaintiff at any time either before or since obtained a certificate to practise as an apothecary from the Master, Wardens, and Society of the art and mystery of Apothecaries of the city of London. Verification.

There was a similar plea as to £8, parcel of the monies in the second count mentioned.

Replication to each of those pleas, precludi non, because the plaintiff says, that before any of the work, materials, journies, and attendances in the first count mentioned were done, provided, performed, or given by the plaintiff as an apothecary, and before any of the medicines and other necessary things were provided, delivered, administered, or applied, as in the first count mentioned, and before the 1st day of August, A.D. 1826, to wit, on the 9th day of September, A.D. 1825, the plaintiff held a warrant as assistant-surgeon in the navy of our late Lord George the Fourth, then King of the United Kingdom of Great Britain and Ireland, (that is to say) a warrant bearing date the day and year last aforesaid: and [236] the said work, materials, journies, and attendances in the introductory part of the said second plea mentioned, were done, provided, performed, and given, and the said medicines and other necessary

things therein found and provided, after the passing of the statute made and passed in the 6th year of the reign of our said late Lord George the Fourth, for amending and explaining the statute theretofore made and then in force for the better regulating of the practice of apothecaries throughout England and Wales, and after the plaintiff so held the said warrant, (that is to say), at the said time in the declaration mentioned. Verification.

Special demurrer, and joinder in demurrer.

Fisher, in support of the demurrer. The replication is bad for two reasons. First, it does not sufficiently aver that the plaintiff was an assistant surgeon, but instead of doing so merely alleges that he held a warrant as such. The stat. 6 Geo. 4, c. 133, s. 4, enacts, "That every person who heretofore has held, or who now holds, or hereafter shall hold a commission or warrant as surgeon or assistant-surgeon in his Majesty's navy, or as surgeon or assistant-surgeon or apothecary in his Majesty's army, or as surgeon or assistant-surgeon in the service of the Honourable the East India Company, shall be entitled to practise as an apothecary in any part of England or Wales, without having undergone any such examination, or received any such certificate, as by the said recited act of the 55th year of the reign of his Majesty King George the Third is directed, and without being liable to any penalty or disability whatsoever imposed by the said recited act on persons who, not having been in practice as apothecaries on the said 1st day of August, 1815, without having been examined and received certificates in the manner directed by the said recited act, commenced practice as apothecaries in any part of England or Wales; and no such person shall be obliged, in order to recover in a court of law any charges claimed by him as an apothecary, to prove that he was in practice as an apothecary on the said 1st day of August, 1815, otherwise than as holding a commission or warrant as surgeon or assistant-surgeon in his Majesty's navy, or as surgeon or assistant-surgeon or apothecary in his Majesty's army, or as surgeon or assistant-surgeon in the service of the Honourable the East India Company." The meaning of that enactment is, that persons who have been, or who are in point of fact, or shall thereafter become, surgeons or assistant-surgeons in his Majesty's navy, &c., shall be entitled to practise as apothecaries. It ought to have been averred positively that the plaintiff was such a surgeon, and not merely that he had held a warrant under the statute, which is ambiguous. It is not enough to use the specific words of an act of Parliament, where the words are not sufficiently precise in their meaning. [Parke, B. You say he should have alleged that he was assistant-surgeon, and that he had a warrant. Lord Abinger, C. B. Surgeons in the navy, before they can obtain a warrant, must have passed an examination. The plaintiff exempts himself by pleading in the words of the act of Parliament. The general rule is, that to use the words of a statute is sufficient. Parke, B. It may in some cases be insufficient; here, however, the plaintiff has brought himself within the purview of the 4th section.] Then, secondly, the act gives these surgeons in the navy power to administer medicines for one year only; for it is enacted by the 11th section, "that this act shall take effect from and after the passing thereof, and shall continue until the 1st day of August next, in the year 1826." The replication ought, therefore, to have averred that the debt accrued due before the 1st of August, 1826, on which day the act ceased to have any force or effect.

[238] Martin, contra. The pleas are bad on three grounds. First, no such certificate as that mentioned in the pleas is required by the 55th section of the 55 Geo. 3, c. 194, to entitle the plaintiff to practise as an apothecary. By the 9th section of that act, the Master, Wardens, and Society of the art and mystery of Apothecaries of the city of London are empowered to appoint a Court of Examiners, to be called, "The Court of Examiners of the Society of Apothecaries," who are thereby empowered to examine all apothecaries and assistant-apothecaries throughout England and Wales, and to grant or refuse certificates to entitle them to practise. The 14th section enacts, "that from and after the 1st day of August, 1815, it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary in any part of England or Wales, unless he or they shall have been examined by the said Court of Examiners, or the major part of them, and have received a certificate of his or their being duly qualified to practise as such from the said Court of Examiners or the major part of them as aforesaid, who are hereby authorized and required to examine all person and persons applying to them, for the purpose of

ascertaining the skill and abilities of such person or persons in the science and practice of medicine, and his or their fitness and qualification to practise as an apothecary; and the Court of Examiners, or the major part of them, are hereby empowered either to reject such person or persons, or to grant a certificate of such examination, and of his or their qualification to practise as an apothecary as aforesaid." The certificate which that section requires, and which is necessary to enable a person to practise as an apothecary, is a certificate from the Court of Examiners, who, by the 9th section, are to be chosen and appointed by the Master, Wardens, and Society of the art and mystery of Apothecaries. This plea nowhere says that the plaintiff had not obtained [239] any certificate from the Court of Examiners, which it ought to have done. [Parke, B. If you look to the 16th section, it shews that it means a certificate from the examiners on behalf of the corporate body.] By the 21st section it is enacted, that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the said 5th day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the said Master, Wardens, and Society of Apothecaries as aforesaid. Under the 14th section, a person having a certificate from the Court of Examiners would be entitled to practise, although perhaps, before he could recover any charges in a court of law, he must, under the 21st section, have obtained a certificate to practise as an apothecary from the Master and Wardens. [Parke, B. The act does not require that there shall be two certificates; it says that he shall obtain a certificate from the Master and Wardens, but a certificate from the Court of Examiners would be a certificate from them.] Secondly, the plea should have alleged that the work was done in some part of England or Wales, to which the 9th section is confined. It may have been done in Ireland. [Parke B. That cannot be necessary: we must intend it to be an English contract, unless the contrary be shewn.] Thirdly, the plea states that the plaintiff was not in practice before the 1st day of August, 1815; but it does not state that the work was done after the 5th of August, 1815, which is the day mentioned in the 21st section. He might have been in practice after the 1st, but before the 5th.

Then the replication is perfectly good. As to the first objection, the averment is substantially that the plaintiff was an assistant-surgeon in the navy; because unless he were, he could not have been entitled to hold a [240] warrant as such. Then as to the second objection, though the act itself may have expired, persons who have acquired rights under it are not to be deprived of those rights because the act has ceased to be in force as a law.

Fisher replied.

LORD ABINGER, C. B. We are of opinion that the replication is good, and there must therefore be judgment for the plaintiff. It is by no means a consequence of an act of Parliament's expiring, that rights acquired under it should likewise expire. Take the case of a penalty imposed by an act of Parliament, would not a person who had been guilty of the offence upon which the legislature had imposed the penalty while the act was in force, be liable to pay it after its expiration? The case of a right acquired under the act is stronger. The 6 Geo. 4, c. 133, provides, that parties who hold such warrants shall be entitled to practise as apothecaries; and we cannot engraft on the statute a new qualification, limiting that enactment.

PARKE, B. With respect to the plea in this case, we will suppose the copy of the statute 55 Geo. 3, c. 192, furnished by the king's printer, to be correct, and the day specified to be the 1st of August instead of the 5th, in which view of it this plea is good, and *prima facie* a sufficient answer to the plaintiff's case. It is objected, that the plea does not contain a sufficient denial of the plaintiff having obtained such a certificate as would authorize him to practise as an apothecary, inasmuch as it alleges only that he was not in practice as an apothecary previously to the 1st of August, 1815, and that he has never since obtained a certificate under the 55 Geo. 3, to entitle him to practise as such, from the Master, Wardens, and Society [241] of the art and mystery of Apothecaries. Mr. Martin contends that that allegation is insufficient, on the ground that it is consistent therewith that the plaintiff might have obtained such a certificate from the Court of Examiners appointed under the act: but it seems to me that the certificate of either amounts to the same thing. It is a certificate under the seal of the corporate body, the mode of obtaining which is pointed out in the statute, and a portion of the whole corporation being empowered to grant it on behalf

of the rest, the certificate must be considered in law as that of the corporate body, and consequently a denial that he had a certificate from the corporate body is tantamount to a denial that he had such a certificate as would qualify him to practise. Assuming, then, the plea to be good, the next question is, whether the replication is sufficient, and it appears to me that it is. The first objection raised by this demurrer is, that the replication does not sufficiently allege that the plaintiff was an assistant-surgeon in the navy before the time when the work was done, and previous to the 1st of August, 1815, inasmuch as it only avers that he was before that time the holder of a warrant as assistant-surgeon therein: but the replication has adopted the very words which are used in the act of Parliament, and I think is a sufficient answer to the plea, inasmuch as a man cannot hold a warrant as an assistant-surgeon, without being an assistant-surgeon. Then comes the question, whether the privilege of practising given by the stat. 6 Geo. 4, referred to in the replication, is one which continues notwithstanding the expiration of that statute. That depends on the construction of the temporary enactment. There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of [242] construction. We must therefore look at this act, and see whether the restriction in the 11th clause, that the provisions of the statute are only to last for a limited time, is applicable to this privilege. It seems to me that the meaning of the legislature was, that all assistant-surgeons, who were such before the 1st of August, 1826, should be entitled to the same privileges of practising as apothecaries, &c., as if they had been in actual practice as such on the 1st of August, 1815, and that their privilege as such was of an executory nature, capable of being carried into effect after the 1st of August, 1826. As to that part of the section relating to the proof by the production of a certificate, although the language of the legislature became perfectly illusory, inasmuch as it left the party to the same mode of proof as before, still the intention was, that no other proof should be required than the production of the certificate; although by using the words, "that the proof should be by the production of a certificate under the seal of the corporate body," the mode of proof was left as it was before. With respect to the vested interests of those persons who held warrants as assistant-surgeons in the navy or army, the intention was, that all who were such, either at the time of the passing of the act, or at any time before the 1st of August, 1826, should be in the same position, with respect to their right to practise as apothecaries, as if they had been in actual practice as such before the 1st of August, 1815. I am the more disposed to think thus, on the ground that the penalties given by this act would probably survive its expiration, and that persons who violated its provisions might afterwards be punished in the way pointed out. If it were not so, any person who had violated those provisions within six months prior to the expiration of the act, would not be liable to punishment at all. It is, however, unnecessary to decide that point: it is enough to say that we think those who were qualified by being assistant-surgeons in the navy before the 1st of August, 1826, re-[243]-tained that qualification notwithstanding the expiration of the statute.

ALDERSON, B. I am of the same opinion. With respect to the difference between the 5th and 1st of August, supposing the latter to be the correct date, still the objection would not be good, for the alteration effected in this respect by 6 Geo. 4, c. 133, is one of a permanent nature, and the objection could only be rendered valid by holding that statute as one in all respects of a temporary character. But I apprehend that, on the true construction of these acts of Parliament, those parts of the 6th Geo. 4, which explain the provisions of the 55 Geo. 3, are in their own nature permanent and effectual, notwithstanding the final clause, which makes the act temporary. Independently, however, of this consideration, I agree in the opinion already expressed by my Brother Parke. It seems to me that those persons who, during the year for which the last act was to continue in force, or previous to that period, had obtained rights under it, had obtained rights which were not to cease by the determination of the act, any more than where a person commits an offence against an act of a temporary nature, the party who has disobeyed the act during its existence as a law is to become punishable on its ceasing to exist.

ROFFE, B. The only important question in this case is the last. The 6 Geo. 4, when it says that the act shall continue in force till the 1st of August next, does not

mean that what is therein enacted should be of no force after that day ; if it were so, the act might be productive of the greatest injustice. A person, by being apprenticed for a certain time, is to be qualified to go before the Examiners ; and the act says that no person shall be entitled to have a certificate unless he has served an apprenticeship. Now the Court would be reluctant to suppose that the legislature [244] meant, that a person authorized to practise during the year the act was in force, should have to go back to a state of apprenticeship, in order to entitle him to continue his practice. I think that although in one sense this act is not in force, yet it is still permanent as to the rights acquired under it.

Judgment for the plaintiff.

HUGHES v. PARKER. Exch. of Pleas. April 29, 1841.—Declaration in assumpsit stated, that the plaintiff bargained to buy of the defendant, and the defendant agreed to sell to him, a dwelling-house and the fixtures therein, for the residue of a term of years then and still unexpired therein, to commence from a certain day, to wit, the 1st of January, 1840, for the sum of £60 : and that thereupon the defendant promised to execute a proper conveyance, to make out an abstract of title, and deliver possession from the 1st of January, 1840, &c. At the trial, the following paper, signed by the defendant, was read in evidence : “I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for £60 :”—Held, that this document imported the sale of an interest in fee-simple, and did not sustain the contract as alleged in the declaration.

[S. C. 1 Dowl. (N. S.) 80 ; 18 L. J. Ex. 297 ; 5 Jur. 730.]

Assumpsit. The declaration stated, that heretofore, to wit, on &c., the plaintiff bargained with the defendant to buy of him, and the defendant agreed to sell to the plaintiff, a certain dwelling-house and the fixtures therein, to wit, for the residue of a certain term of years then and still unexpired therein, to commence on and from a certain day, to wit, the 1st day of January, 1840, for the sum of £60 : and thereupon, in consideration, &c., the defendant promised the plaintiff to make and execute to him a proper conveyance, to make out an abstract of title, and to deliver to him possession of the said dwelling-house and fixtures, and the said residue of the said term, from the said 1st day of January 1840. Breach, that the defendant did not furnish an abstract of title, execute a conveyance, or deliver possession of the said dwelling-house, &c., but sold and disposed thereof to another person.

Pleas, first, non assumpsit ; secondly, that the plaintiff did not bargain to buy, nor the defendant to sell, the said dwelling-house and fixtures, modo et formâ : upon which issues were joined.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Hilary Term, it appeared that the plaintiff agreed with the defendant to take of him two [245] floors of a house in Piccadilly, held by the defendant as tenant of a Mr. Hibbert ; and the following paper, signed by the defendant only, and delivered by him to the plaintiff, was read in evidence :—“I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for £60. J. Parker.” By another memorandum, similar in terms, but signed by the plaintiff, the latter agreed to “take” the premises of the defendant. It was objected for the defendant, that the plaintiff ought to be nonsuited, on two grounds : first, that the written memorandum was not sufficient to satisfy the Statute of Frauds ; secondly, that the contract as laid in the declaration was not proved, the memorandum purporting to sell a fee-simple ; and the Lord Chief Baron thereupon directed a nonsuit, reserving leave to the plaintiff to enter a verdict for £20, or such other sum as the Court should think proper.

Platt having obtained a rule nisi accordingly,

Kelly (with whom was Bramwell) now shewed cause. In the first place, there is a material variance between the contract alleged in the declaration, and that which was proved by the production of the written memorandum. The declaration alleges a contract for the sale and purchase of a house and fixtures for the residue of a term of years : but no such terms are to be found in the memorandum of agreement, which is general in its language, and imports that the interest to be sold was a fee-simple. But

supposing that the agreement is not to be taken as disposing of a fee-simple, then it is uncertain, and does not specify the interest intended to be conveyed at all; it omits, therefore, a material part of the contract, and so fails to comply with the requisitions of the Statute of Frauds. Nor is it competent to the parties to supply by parol evidence the nature of the interest intended to be conveyed; to do so would be [246] an evasion of the statute. It has been held that the price of goods sold is a material part of the bargain, and ought to be stated in the memorandum, to satisfy the Statute of Frauds. *Elmore v. Kingscote* (5 B. & C. 583; 8 D. & R. 343). [He was then stopped by the Court.]

Platt and Montague Smith, *contra*. The Statute of Frauds does not require the agreement itself, but only "some note or memorandum thereof," to be in writing and signed by the party chargeable. [Alderson, B. That is to say, some document whereby the contract may be remembered; but the question now is, what is the contract?] It is a contract for the sale of such interest as the defendant had in the premises, which, from the terms of the agreement itself, is evidently a leasehold interest only. [Parke, B. How does that appear? If I contract to sell a field called Greenacre, to commence on a certain day, those words may well be construed to mean that possession is to be given on that day, and the terms may apply as well to a freehold as to a leasehold property. We may, indeed, suppose it most probable, from the circumstances of the case, and the price stipulated for, that the interest intended to be sold was leasehold: but it might be, on the other hand, that the seller had made a foolish bargain, and conveyed a freehold interest for that inadequate price.] But secondly, the agreement is sufficient to satisfy the requisites of the statute. It purports to be a sale of such interest as the defendant had in the premises; and he is precluded thereby from saying that he had no interest. Or if it be uncertain, the plaintiff had a right, under the circumstances, to supply the defect by parol evidence. He does not seek thereby to enlarge or vary the contract, but only to render certain that which, upon the face of the written instrument itself, is left uncertain. For this purpose parol [247] evidence was admissible: *Ogilvie v. Foljambe* (3 Meriv. 53), *Kennedy v. Lee* (id. 441), *Bateman v. Phillips* (15 East, 272), *Smith v. Doe d. Jersey* (2 Brod. & B. 550), *Doe d. Templeman v. Martin* (4 B. & Adol. 771; 1 Nev. & M. 512).

LORD ABINGER, C. B. I think this case admits of no doubt. The declaration states a specific contract for the sale of the dwelling-house and fixtures, for the residue of a term of years, to commence from a given day. To satisfy this allegation, a contract is produced in evidence, which on the face of it shews that it was a sale of a fee-simple, or, at the least, leaves it uncertain what was the interest intended to be conveyed; and in the absence of any explanation, it must be taken to import a sale of the fee-simple: which is a variance from the declaration. Upon this part of the case, no question arises on the Statute of Frauds: the fact of the proof being at variance with the declaration is a sufficient foundation for our judgment. It is said that a party may contract to sell such interest as he may have in particular premises, and that the other party may agree, in general terms, to buy all his right and title to it, and that this contract may be read in that way. But that was clearly not the intention of these parties: this is manifestly a contract for the sale of some particular interest: if the nature of the interest be uncertain, it should be so stated in the declaration. The objection here arises, not from any uncertainty in the interest itself, but from the uncertain terms in which the interest, certain in itself, is described in the contract. Upon this ground, therefore, without entering into the question raised upon the Statute of Frauds, I am of opinion that there is a variance in this case, and that the rule for setting aside the nonsuit must be discharged.

PARKE, B. I am also of opinion that this rule ought [248] to be discharged. The plaintiff is in this dilemma: either this memorandum imports upon the face of it an agreement for the sale of the fee-simple (as I strongly incline to think it does), in which case the action cannot be maintained; or the contract stated on the face of it varies from that set forth in the declaration, which alleges certain conditions to have been annexed to the contract, such as we cannot import into the written instrument. I quite agree that a party may shew by parol evidence what was the house or other subject-matter intended to be sold; and my judgment does not proceed upon any difficulty in that respect, but upon other considerations. The price bargained for in this case, and the situation of the premises, may no doubt create a strong suspicion that it was not the conveyance of a fee-simple that was intended; but we cannot take

judicial notice that a man would not be likely to sell the fee-simple of a house in Piccadilly for £60: he might possibly be a foolish person, or one who, indulging from fancy a predilection for the particular individual, might be willing to dispose of it to him even for that inadequate price. Although, therefore, there may be reason to suspect that the bargain was for a shorter term, we have no means of knowing with any certainty what that term was; and the condition as to its commencing from the 1st of January, 1840, is equally applicable to almost any interest which the defendant might have in the premises.

ALDERSON, B. This is, in truth, on the face of it, an agreement for the sale of the fee-simple: but whether that be so or not, there is a great difference between the sale of an entire interest, although uncertain, and the uncertain sale of a certain interest.

ROLFE, B., concurred.

Rule discharged.

[249] CHAPMAN v. BOWLBY. Exch. of Pleas. May 1, 1841.—A testatum fi. fa. indorsed to levy £2584, issued on the 14th of January, 1841, under which, on the 20th of January, the sheriff seized the defendant's goods. While the officer continued in possession, the defendant entered into an agreement with the plaintiff, that on payment to him of the sum of £500, the officer should withdraw, and that the judgment should stand as a security for the payment of the residue of the debt in monthly sums of £200 each; in default in payment of any of such monthly instalments, the plaintiff to be at liberty immediately to re-enter into possession. The officer withdrew from possession accordingly, and no return was made to the writ: but default being made in payment of the instalments, a second writ of testatum fi. fa. issued on the 14th of April, indorsed to levy £2701, the amount then due to the plaintiff, under which the sheriff re-entered and took possession of the goods:—Held, that there was an actual levy under the first writ to the extent of £500, and therefore that the second writ was irregular, since it ought not to have issued until the first had been returned, and ought to have recited the first writ, and the amount levied under it.

[S. C. 1 Dowl. (N. S.) 83; 10 L. J. Ex. 299. Adopted, *Sneary v. Abdy*, 1876, 1 Ex. D. 302; *Mortimore v. Cragg*, 1878, 3 C. P. D. 220. Applied, *Ex parte Ford*, 1886, 18 Q. B. D. 371. Discussed, *Roe v. Hammond*, 1877, 2 C. P. D. 306. Referred to, *Lee v. Danger & Company*, [1892] 1 Q. B. 231; *In re a Debtor*; *Ex parte Smith*, [1902] 2 K. B. 260.]

In this case a writ of testatum fieri facias, indorsed to levy on the goods of the defendant the sum of 2584l. 7s. 1d., issued out of this Court on the 14th of January, 1841, directed to the sheriff of the county of Durham, under which, on the 20th of January, the sheriff's officer seized the household goods and furniture in the defendant's house. While the officer continued in possession, the defendant entered into an agreement with the plaintiff, that on payment to the plaintiff of the sum of £500, the officer should withdraw, that the judgment should stand as a security for the payment of the remainder of the debt in sums of £200 per month, and that on default being made in payment of any of these monthly instalments, the plaintiff should be at liberty immediately to re-enter into possession. The sheriff withdrew from possession accordingly, and no return was made to the writ; but default having been made in payment of the monthly instalments, a second writ of testatum fieri facias was issued on the 14th of April, indorsed to levy 2701l. 5s., the amount then due to the plaintiff, and delivered to the sheriff, under which he re-entered, and took possession of the defendant's effects, and received from him, under protest, his poundage upon the first writ. A rule having been obtained on the part of the defendant, calling upon the plaintiff to shew cause why the latter writ should not be set aside for irregularity,

Knowles now shewed cause. The second writ was not, under the circumstances, irregular, by reason of its having been issued before the first had been returned. Where [250] nothing has been realised under the first writ, a second writ may issue before the return of the first. The cases of *Miller v. Parnell* (6 Taunt. 370), and *Laves v. Codrington* (1 Dowl. P. C. 30), undoubtedly decided, that where a seizure has been made under a fi. fa., that writ, although it be abandoned, must be returned before a

ca. sa. can issue; but those decisions appear to be at variance with the cases of *Edmond v. Ross* (9 Price, 5), and *Dicas v. Warne* (10 Bing. 341; 3 M. & Scott, 814), in which it was held that a ca. sa. might issue before the return of a fi. fa., where the latter writ had become ineffectual by reason of a distress for rent or taxes. [Parke, B. If there was any levy under the compulsion of the first writ, it ought to have been returned, and the second writ ought to recite that levy, and then it appears by the writ itself why it was issued for a less sum. The question therefore is, whether there was any levy: and the test of that will be, to consider whether the sheriff was entitled to poundage.] The sheriff was not entitled to poundage, because the money was not paid to him, under the execution, but to the creditor. But further, the defendant is precluded from saying that the second writ is irregular, because he has entered into a binding agreement to allow the plaintiff to retake possession. It is like the case of an agreement by a defendant, that a warrant of attorney given by him shall be revived without a seire facias. [Parke, B., referred to *Knight v. Coleby* (5 M. & W. 274).]

F. Robinson, contra. The rule is, that whenever the first writ has been carried into effect, a second writ shall not issue without reciting the first. How can it be said that the first writ was not carried into effect here? By compulsion of the process the defendant has paid a sum of £500, in consequence of which the sheriff has gone out of [251] possession, and the execution has been withdrawn. The money was not the less paid under the writ, because it was not paid through the hands of the sheriff. In *Edmond v. Ross*, and *Dicas v. Warne*, there was no valid seizure, and therefore no pressure on the defendant by means of the execution. Here it is not pretended that the sheriff did not make a valid seizure; and it is quite immaterial whether any thing is actually realised by the seizure beyond the expenses: *Hodgkinson v. Whalley* (2 C. & J. 86).

LORD ABINGER, C. B. This is a case in which the sheriff had possession of the goods under a valid writ; and it has been decided, that where that is so, and there is afterwards a compromise between the parties, upon which the sheriff withdraws, he is nevertheless entitled to his poundage: *Alchin v. Wells* (5 T. R. 470). The second writ was therefore irregular, the first not having been returned. The cases cited by Mr. Knowles are distinguishable. The rule must therefore be absolute.

PARKE, B. I am also of opinion that the second writ was irregular, because the first had not been returned, the sum of £500 having been levied by virtue of the first writ. It is true there was an agreement between the parties, that the plaintiff should re-enter on default being made in payment of the instalments; but there is nothing in that agreement which precludes the defendant from objecting to the irregularity of the future process. The law on this subject is clear. If a writ of fieri facias issues, under which any thing is levied, that writ must be returned, and any subsequent process must issue for the whole sum due, minus the amount that has been so recovered, and must recite the first writ. In *Miller v. Parnell*, the Court held, that a plaintiff who has issued and executed a fi. fa. cannot abandon it and sue out a ca. sa., [252] before he has returned it. It has been suggested that that decision is overruled by *Dicas v. Warne*; but that case is distinguishable, because there was in fact no execution, the goods being already under a distress for taxes. Here the sheriff entered upon the possession of the goods, and by the compulsion of the levy, the defendant has been compelled to pay the sum of £500, part of the debt. According to the case of *Alchin v. Wells*, the sheriff became thereby entitled to poundage, and so also it constituted a levy. That being so, the first writ ought to have been returned, and the second ought to have recited the first, stating the amount recovered under it, and should have been indorsed to levy the whole debt, minus that amount.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

SHELTON AND OTHERS v. BRAITHWAITE. Exch. of Pleas. April 22, 1841.—A bill of exchange, drawn by the defendant, was indorsed by him to the plaintiffs, S. & Co., who carried on business in partnership at Smethwick, four miles from Birmingham; by them to the Birmingham and Midland Counties' Bank, and by them to W. It became due on the 17th of August, and was dishonoured. On the 18th W. returned it to the bank at Birmingham, who received it on the 19th.

The plaintiff S. had previously given directions at the bank, that all communications for his firm should be made to him at Tremadoc, in Carnarvonshire (in which neighbourhood he was engaged in mining concerns). The bank accordingly, on the 20th of August, sent notice of dishonour by post to S. at Tremadoc, which he received there on the 21st: and by the post of the 22nd he sent notice to the defendant:—Held, that the notice to S., and therefore that to the defendant, was duly given.—A declaration by indorsee against drawer of a bill of exchange, accepted payable at the Bloomsbury branch of the London and Westminster Bank, stated that the bill was presented “at the said Bloomsbury branch of the London and Westminster Bank on the day when it became due.” The defendant having sued out a writ of error, on the ground that the declaration did not sufficiently state a presentment to the acceptor, the Court gave the plaintiffs leave to issue execution notwithstanding the writ of error.—The defendant having thereupon abandoned the writ of error, the Court refused afterwards to give the plaintiffs the costs of the above application.

[S. C. 1 Dowl. P. C. 354; 11 L. J. Ex. 54; 5 Jur. 1200. For former proceedings, see 7 M. & W. 436.]

Assumpsit by indorsees against drawer of a bill of exchange for 156l. 18s. 9d., dated the 14th of May, 1840, drawn by the defendant upon and accepted by A. Braithwaite, payable, three months after date, at the Bloomsbury branch of the London and Westminster Bank. The [253] declaration alleged that the acceptor did not pay the said bill, although the same was duly presented at the said Bloomsbury branch of the London and Westminster Bank, on the day when it became due. Plea, that the defendant had not received due notice of dishonour. At the trial before Rolfe, B., at the Middlesex Sittings in Hilary Term, it appeared that the bill was indorsed by the defendant to the plaintiffs, who carried on business under the title of the “Patent Rivet Company” at Smethwick, about four miles from Birmingham, and by them to the Birmingham and Midland Counties’ Bank, who indorsed it to one Williams. It became due on the 17th of August, 1840, when it was presented for payment, and dishonoured. On the 18th it was returned to the Bank, who received it at Birmingham on the 19th. The plaintiff Shelton had previously given directions at the bank, that all communications for the Patent Rivet Company should be made to him at Tremadoc, in Carnarvonshire, whither he had gone on business, being engaged in a mining concern in the neighbourhood. The Bank accordingly sent notice of dishonour of the bill to him at Tremadoc, by the post, which reached him there on the 21st of August: and on the 22nd, he, Shelton, sent notice of dishonour by post to the defendant. It was objected for the defendant, that this notice was too late; that the Bank ought to have given notice directly to the plaintiffs at Smethwick, instead of sending it to the plaintiff Shelton at Tremadoc, in which case the defendant would have received notice a day sooner. The learned Judge reserved the point, and a verdict passed for the plaintiffs. In the same term,

Gurney moved pursuant to the leave reserved, and obtained a rule nisi to enter a nonsuit: (a) against which

[254] M. D. Hill and Cowling now shewed cause. This notice was sufficient to charge the defendant. The plaintiffs were not guilty of any laches, in requiring that notices should be sent to Shelton at Tremadoc, whither the course of his mercantile engagements had called him. The bill ought to follow the indorser, wherever he may be; neither is he in strictness bound to inform the other parties to the bill where he is to be found: *Baldwin v. Richardson* (1 B. & C. 245; 2 D. & R. 285). The Court then called on

Gurney and Ogle, contra, who insisted that the plaintiffs had been guilty of laches in causing the notice of dishonour to be sent to the plaintiff at Tremadoc, instead of its going direct to Smethwick, his ordinary place of residence, and that the defendant had thereby received notice of the dishonour later than it would have reached him in the latter case. The case of *Cross v. Smith* (1 M. & Sel. 545) shewed that the notice would have been sufficient if sent to the plaintiffs’ place of business at Smethwick, notwithstanding the absence of one of the partners. They cited also *Doe d. Elliott v.*

(a) He moved also on the ground that the notice of dishonour was defective in point of form, but on that ground the rule was refused. See 7 M. & W. 436.

Hulme (2 Man. & R. 433), where a notice to quit in the names of several joint lessors, partners in trade, but signed by one of them only, was held valid.

LORD ABINGER, C. B. I am of opinion that there is no ground for this rule. The question is, whether the plaintiffs could have defended an action against themselves by the Bank. They could not; because notice was sent to a particular place pointed out by one of themselves. If that notice had been given in fraud of the defendant or any other party, that should have been found by the jury. If there are several parties in a firm, and one of them goes to Brighton for a week, and gives notice to their banker to send all letters for the firm to him there, that will be [255] sufficient, unless there is fraud. An indorsee is not bound to be always at his place of residence: he may not expect the bill will come back. I think that if the plaintiffs are bound by the notice they have received, all prior parties are also bound, in the absence of fraud.

ALDERSON, B. I am of the same opinion. It is clear that the Bank at Birmingham had received due notice; and the question comes to this, whether the defendant is discharged in consequence of insufficient notice to the plaintiffs; and I am of opinion that the notice was sufficient, unless the plaintiffs have in some way disqualified themselves from receiving notice so soon as they otherwise would. They have not so disqualified themselves. The plaintiff Shelton, being, so far as appears, about to be resident at Tremadoc, some time previously to his going there, directs the Bank to send all letters to him at Tremadoc, and they do so accordingly. That appears to me to be sending a notice in a reasonable manner, and as men of business would naturally act. The question which, upon the motion for this rule, the Court thought worthy of consideration, is answered by the facts. It was then supposed that the plaintiff Shelton had his residence at Smethwick, and that instead of receiving notices there, he had given directions that letters should be sent to him at Tremadoc, where he was going on a visit, and that thereby time was lost, and prior parties placed in a worse situation than if notice had been sent to his ordinary residence. I do not know that even that would have made the notice bad; but the facts turn out differently.

ROLFE, B. I am of the same opinion. I thought that the direction to send letters to Tremadoc was reasonable; and I have little doubt that the jury would have so found. In fact, it appears that time was gained instead of lost by sending at once to Tremadoc, rather than send-[256]-ing to Smethwick, from whence the letter might have had to go to Tremadoc.

Rule discharged.

The defendant having afterwards sued out a writ of error, assigning as ground of error that the declaration did not sufficiently aver a presentment of the bill to the acceptor—

Cowling obtained a rule to shew cause why the plaintiffs should not be at liberty to issue execution, notwithstanding the allowance of the writ of error, on the ground that it was frivolous and for delay.

May 8.—Ogle shewed cause, and contended that the statement in the declaration, that the bill was presented at the London and Westminster Bank, was not sufficient, but that it ought to have stated a presentment to the acceptor there; and that all the forms were so. [Parke, B., referred to *Gill v. Mather* (2 C. & J. 254; S. C. in error, 8 Bing. 214; 1 M. & Scott, 387).] That was before the stat. 1 & 2 Geo. 4, c. 78. At all events, the point was not so entirely unworthy of consideration that the Court would grant this rule.

The Court, however, thought the objection frivolous, and made the rule absolute.

The writ of error was thereupon abandoned by the defendant; and in Trinity Term, Hill obtained a rule to shew cause why the Master should not tax the plaintiffs their costs of the last-mentioned rule. Against which, in Michaelmas Term, (Nov. 26)—

Ogle shewed cause, and insisted, that, if the plaintiffs considered themselves entitled to these costs, they ought to have applied for them when the former rule was disposed of, and could not now have them allowed.

[257] Hill, contra, urged that it was not until the abandonment of the writ of error that the Court could say conclusively and determinately that it was brought for delay; and therefore they could not have allowed the costs upon the former rule, without trenching on the jurisdiction of the Court of Error: but that it being now

clear that the writ of error was frivolous, and merely for delay, and so a contempt of this Court, the defendant ought to be visited with the costs: otherwise the plaintiffs, who had proceeded properly throughout, would nevertheless lose a portion of their costs.

LORD ABINGER, C. B. There is no colour for this rule. If the plaintiffs had no right to the costs when the former application was made, they cannot be entitled to them now. Suppose the point had been determined in favour of the defendant on the writ of error, could he have come to the Court for his costs? Here the plaintiffs came for the costs of an application, which was to relieve them from the risk of suing out execution themselves: that was an application for a favour, of which they ought to bear the costs.

PARKE, B. I doubt very much whether the plaintiffs were at any time entitled to these costs, because they applied to the Court in order to save themselves from pursuing the ordinary course, which might have exposed them to some peril: but at all events they should have asked for them when they made application for leave to issue execution. They were entitled to that rule only on shewing that the writ of error was for delay; and if it was, they should have asked for the costs then.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged, with costs.

[258] HARRIS AND ANOTHER v. TURTLE. Exch. of Pleas. April 30, 1841.—Service upon one of several plaintiffs of the defendant's intention to apply for his discharge under the 48 Geo. 3, c. 123, s. 1, is sufficient for a rule absolute in the first instance.

[S. C. 9 Dowl. P. C. 803; 10 L. J. Ex. 298; 5 Jur. 439.]

The defendant having lain in prison for more than a year for a debt not exceeding 20l., Hance now moved that he should be discharged out of custody, under the 48 Geo. 3, c. 123, s. 1. There were two plaintiffs in the action, and notice of the application had been served upon one of them only; the question was, whether that was a sufficient notice, under the rule of H. T. 2 Will. 4, s. 94, to entitle the defendant to have the rule made absolute in the first instance. By the above-mentioned rule it is provided, that a rule or order for the discharge of a debtor, who has been detained in execution a year for a debt under 20l., may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Per Curiam. We think the notice is sufficient, and that you are entitled to a rule absolute.

Rule absolute.

CAIRNS v. ROBINS AND MILLS. Exch. of Pleas. May 4, 1841.—Goods were forwarded by a carrier's waggon to A. in London, and delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there accordingly for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, and sent to A. with the goods, stated that "any goods that should have remained three months in the warehouse without being claimed, or on account of the nonpayment of the charges thereon, would be sold to defray the carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent and expenses." The carrier had often before carried goods for A., but no goods of his had before lain in the carrier's warehouse:—Held, that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss; and therefore, that A. might recover against him the value of the goods, on a declaration in assumpsit alleging that they were delivered to the defendant to be safely kept for the

plaintiff, for certain reasonable compensation and reward to be therefore paid by him.

[S. C. 10 L. J. Ex. 452. Referred to, *Mitchell v. Lancashire and Yorkshire Railway Company*, 1875, L. R. 10 Q. B. 260.]

Assumpsit. The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendants, had caused to be delivered to the defendants two packages of the plaintiff of great value, to wit, &c., to be by the defendants safely and securely kept for the plaintiff, for certain reasonable compensation and reward to be therefore paid to them by the plaintiff, the defendants promised the plaintiff that they would safely and securely keep the said packages, and would deliver the same to the plaintiff when thereunto requested:—Breach, that, by the carelessness, negligence, and improper conduct of the defendants, one of the said packages was wholly lost to the plaintiff. There was also a count on an account stated. Pleas, first, non assumpsit; secondly, that the said package was not lost to the plaintiff through the carelessness, negligence, or improper conduct of the defendants, in manner and form, &c.; on which issues were joined. At the trial before Gurney, B., at the Middlesex Sitings after Hilary Term, the facts appeared to be as follows:—

In the month of March, 1837, the two packages in question were sent from Chorley, in Lancashire, by a waggon of the defendants, who are common carriers, directed to the plaintiff in London. They were delivered accordingly to the plaintiff, who sent them back to the defendants' warehouse, with directions that they should remain there to await his orders. They remained there for more than a year, until one of them was lost out of the warehouse; to recover the value of which this action was brought. One of the printed bills issued by the defendants, which had been delivered to the plaintiff with the goods, was put in. The heading of it contained a notice that "any goods or packages that shall have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse rent and expenses." The plaintiff was a regular customer of the defendants, but it appeared that no [260] goods of his had before lain in their warehouse in a similar manner. One of the witnesses, a servant of the defendants, stated, that it was not the practice of the defendants to charge their customers with warehouse-rent; that they considered the carriage of the goods as a sufficient remuneration for the warehouse-room also.

It was contended for the defendants, upon these facts, that the averment in the declaration, that the goods were delivered to be kept by the defendants for reward, was not proved; that, under the circumstances, the defendants were mere gratuitous bailees, and therefore not answerable except for gross negligence, of which there was no proof. The learned Judge, in summing up, stated to the jury, that although no specific charge had been made for warehouse-room, yet if the charge for the carriage was considered by the parties as constituting a sufficient remuneration for the warehousing also, that would make the defendants bailees for hire, to keep the goods safely, within the terms of the declaration. The jury found for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them upon the first issue.

In the former part of this term, Platt obtained a rule nisi accordingly, or for a new trial, on the ground of misdirection: against which

Cresswell and Compton now shewed cause. The question is, whether there was not evidence to go to the jury to sustain the first count of the declaration, which avers that the goods were delivered to the defendants, to be safely kept by them for a reasonable reward to be therefore paid to them by the plaintiff. Now it is clear that the plaintiff delivered the goods, and the defendants accepted them, to be kept for the plaintiff, and to be re-delivered to him upon request. The only remaining question then is, whether there was evidence to shew that for this the defendants were entitled to a reasonable reward. Now it appeared that the plaintiff [261] had often before forwarded goods from Chorley to London by the defendants' waggons, but had never received back goods which had been warehoused by the defendants: the warehousing by them in London was, therefore, as between these parties, a perfectly new transaction, not depending upon any previous usage. If this were all that appeared in the case—

the defendants being persons notoriously carrying on business as carriers, and this being part of the trade they so carried on—the law would imply a promise to repay them a reasonable reward for so doing. But it was left to the jury to say whether the payment for the carriage was considered as being a reward for the warehousing also, sufficient to satisfy the terms of the declaration; and the jury have found that that was the contract between the parties. It is clear that the defendants were treated throughout as paid agents. The memorandum in the heading of the bill produced in evidence clearly imports, that, after the three months at all events, the defendants should receive payment for the keeping of the goods. If they have the right to charge warehouse-rent at all, how can they say, or how can it be said against them, that they are mere gratuitous bailees? [Alderson, B. referred to *Garside v. Trent and Mersey Navigation Company* (4 T. R. 581).] No question of gratuitous bailment arose in that case. The whole question here is, whether there was not evidence to go to the jury of the defendants having received the goods to keep for the plaintiff, for reward; if so, the breach was admitted. The averment in the declaration does not necessarily imply direct payment, but merely points out the kind of contract to which a particular degree of responsibility for negligence applies, as contra-distinguished from a mere naked bailment.

Platt and Petersdorff, *contra*. The contract stated on the record was not proved; or at least, the jury, under the direction given to them by the learned Judge, have not [262] found it as laid. The declaration alleges a peculiar species of bailment, to keep and re-deliver on request, and to be paid for that duty. There was no evidence of that obligation, to re-deliver at all events and unconditionally; what was proved was, at most, merely a qualified undertaking, to deliver the goods subject to the defendants' obligations as warehousemen. They are to re-deliver, provided no circumstances intervene to relieve them from the performance of their general obligations. The obligation, therefore, described in the declaration is general and unqualified; that of the defendants was of a restricted and limited character. But how can a reward which they are to receive as carriers, be made to apply to them when exercising a totally distinct capacity, and subject to different obligations? In order to make a reward recoverable, there must be a *locatio operis faciendi*, or a *locatio eustodiæ*. Where a carrier has also been a warehouseman, questions have often arisen how far he was responsible in case of fire. On that subject Mr. Justice Story says (Story on Bailments, 290, (edit. 1839)), "Suppose that a person acts both as a common carrier and a warehouseman, it sometimes becomes a matter of great nicety to decide in which character he is chargeable; for as the responsibility of the two characters is very different, he may in one character be liable for a loss, from which he would be exempt in the other. For example, a common carrier is liable for losses by fire, not occasioned by inevitable casualty; whereas a warehouseman is not liable for any losses by fire, unless he has been guilty of ordinary negligence." The bills put in in this case stated only the terms on which the defendants received the goods to carry. But at the time of the loss, they were not in the exercise of their duty as carriers, and no responsibility as such then attached to them. The keeping of the goods was an accommodation without charge, the remuneration for the carriage being considered sufficient. The goods had actually been deli[263]-vered, and the duty of the defendants as carriers was complete. The question is, are the facts proved such as to justify a conclusion in point of law of liability on the part of the defendants: for it was not left to the jury to say whether they thought there was a bailment for reward in respect of the custody, which is the contract stated on the record. It was clearly a question for the jury whether that contract subsisted or not.

LORD ABINGER, C. B. I am of opinion, that when this case comes to be considered, there is no ground for making this rule absolute. The printed paper put in evidence sufficiently shews a contract, and such a one as to give the defendants a right to exact a warehouse rent for the bales on hand, at least after a certain time. But I go further, and think that the evidence of the defendants' servant also sufficiently shewed a contract for reward. A distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many of the canal companies: and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk

also. I think, if the jury had found their verdict upon this ground alone, it would be sufficient to support the declaration; but upon the other ground, it cannot be doubted that it is sufficiently proved. Suppose the goods had not been lost, and the plaintiff had demanded them, the defendants would, under the terms of their notice, clearly have had a right to demand warehouse rent before they parted with the goods. It means this—for three months we will receive and keep the goods, and consider the payment for the carriage sufficient for so doing; but after three months we shall demand warehouse-rent. That is quite sufficient to sustain this verdict.

[264] ALDERSON, B. I am of the same opinion. The only question is, whether the allegation, that these goods were delivered to the defendants to be safely kept by them for a reasonable reward in that behalf, has been proved. It appears to me that there was evidence whence the jury might reasonably find, that, in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months: the compensation so paid being a compensation not only for carrying, but for warehouse-rent also. The authorities which have been cited are not to the point. The question is, were the defendants gratuitous keepers of these goods, or keepers of them for a reasonable compensation? It seems to me that there was abundant evidence for the jury in support of the latter view, and that the jury have found a right verdict.

GURNEY, B., concurred.

Rule discharged.

JONES v. LEWIS. Exch. of Pleas. May 4, 1841.—If, upon an interpleader rule obtained by the sheriff, the claimant does not appear, and is therefore barred, the sheriff is not entitled to costs against the claimant.

[S. C. 10 L. J. Ex. 320; 3 Jur. 873.]

In this case an interpleader rule had been obtained on behalf of the sheriff, and the claimant not appearing upon the rule, his claim was barred. Whateley, for the sheriff, applied for costs against the claimant. The Court doubted whether they had power to grant them; and at a later period of the day,

LORD ABINGER, C. B., said,—In the interpleader rule moved by Mr. Whateley this morning, he, on behalf of the sheriff, pressed us for costs against the claimant, who did not appear, and was therefore barred. We had some doubt on the subject at the time; and on looking further into the act of Parliament, we find we have no power to grant the costs under such circumstances. The act (sect. 3) speaks only of giving costs between the defendant and the plain-[265]-tiff, that is, the parties who are ultimately made defendant and plaintiff; but the only power we can exercise on the application of the sheriff is to bar the claimant if he does not appear.

ALDERSON, B., GURNEY, B., and ROLFE, B. concurred.

Rule accordingly.(a)

THE EARL OF HAREBOROUGH v. SHARDLOW. Exch. of Pleas. May 4, 1841.—Where a new trial is granted *ex debito justitiæ*, the party is not bound to proceed upon the rule within any limited time.

[S. C. 10 L. J. Ex. 320.]

In this case a new trial was granted, on the application of the plaintiff, in Trinity Term, 1840, on the ground of misdirection (7 M. & W. 87). The cause not having yet been tried again, although two assizes had passed,

Humfrey, for the defendant, now moved for a rule to shew cause why the rule for a new trial should not be rescinded. But

Per Curiam. That may be done where the party has anything to do before trying the cause again, as where it is granted on payment of costs: but here the rule was granted absolutely, and no condition has been broken on which the Court granted it.

(a) See *Lambert v. Cooper*, 5 Dowl. P. C. 547.

It is the same as if the trial had not taken place ; in which case you must have taken the cause down by proviso.

Rule refused.(b)

[266] *FARMER v. MOUNTFORT*. Exch. of Pleas. May 4, 1841.—A writ of trial issued, directed to the Recorder of the Court of Pleas of the borough of Northampton, commanding him to summon a jury of his county, duly qualified according to law, to try the issue joined between the parties. The cause was tried by a jury of persons resident within the borough, and not in the list of jurors for the county of Northampton, although, as it was alleged, duly qualified to be so:—Semble, that the writ was irregular, in requiring the Recorder to summon a jury from the county : but held, that, at all events, it had not been regularly obeyed, the jury not having been taken from the county list.

[S. C. 1 Dowl. (N. C.) 46 ; 10 L. J. Ex. 268 ; 5 Jur. 1040. And see further, 9 M. & W. 100.]

In this case Humfrey had obtained a rule, calling upon the plaintiff to shew cause why the trial of this cause before the Recorder of Northampton, and all subsequent proceedings thereon, should not be set aside, or why the judgment should not be arrested. It appeared from the affidavits, that a writ of trial had issued in this cause, directed to the Recorder of the Court of Pleas of the town and borough of Northampton, whereby he was commanded to summon twelve good and lawful men of his county, duly qualified according to law, to try the issue joined between the parties. In the affidavits in support of the rule, it was sworn that the jurors by whom the cause was tried were resident within the borough of Northampton, and were jurors for the borough only, and not in the list of jurors for the county of Northampton, and had not in fact been summoned from the county. The affidavits in opposition to the rule stated, that the jurors by whom the cause was tried were jurors for the trial of issues, &c., for the county of Northampton, and duly qualified to serve as jurors for that county. At the trial, the defendant's attorney protested against the trial of the cause by the Recorder, on the ground that his authority was co-extensive with the borough of Northampton only, and that he had no jurisdiction in the county, and no authority to summon a jury from the county generally, as he was directed by the writ of trial to do. The trial however proceeded, and the verdict passed for the plaintiff.

Flood now shewed cause against the above rule. This rule was applied for on the ground, that, under the words of the stat. 3 & 4 Will. 4, c. 42, s. 17, which directs that the writ of trial shall issue, "directed to such sheriff," (the words "or judge," which are inserted in other parts of the clause, not being added here)—"commanding him to try [267] such issue or issues by a jury to be summoned by him," the Recorder of Northampton had no power to summon a jury of any description, and therefore that the writ, being wrongly directed, is void. The answer to this objection is twofold : first, this is not a motion to set aside the writ ; and secondly, the Recorder, as Judge of a court of record, has, as incidental to his jurisdiction, authority to summon a jury for the trial of causes before him, even though no writ be directed to him for that purpose. The Court here called upon

Humfrey, in support of the rule. There has been a mistrial in this case. The Recorder is directed by the writ to summon a jury from the county, which he has no authority whatever to do. But even if the writ is regular, it has not been obeyed ; for it appears that the jurors who were summoned, and tried the cause, were jurors for the borough only, and were not on the list of jurors for the county.

(b) See *Buckle v. Hollis*, 2 Chit. R. 398. In *Hawtayne v. Bourne*, [Vacation Sittings after last Hilary Term] in which a new trial was granted by this Court on the ground of misdirection, Cockburn, for the plaintiff, applied that the evidence of a witness who had died since the former trial, might be read from the judge's notes ; but the defendant's counsel objecting, the Court said that they had no power to allow it without consent, this being a new trial obtained as of right, on the ground of misdirection ; and that the same rule must apply as if it were the grant of a venire de novo on a bill of exceptions.

Flood. The affidavits in opposition to the rule state that the jurors who tried the cause were duly qualified to serve as jurors for the county. If in fact they had not the requisite qualification, that should have been made ground of challenge at the trial, pursuant to the provisions of the Jury Act, 6 Geo. 4, c. 50, s. 27. [Alderson, B. The 14th section of that act appears to import that none can be returned to serve as jurymen but those whose names are in the list.] There is nothing to shew that a jury *de circumstantibus* may not be taken from persons who are not on the list. [Alderson, B. Is there any authority that it may? I am not satisfied from the 37th section that that may be done.] The Recorder has no means of access to the jury list; the sheriff is not compellable to attend with it before him, as before a Judge of assize. It is a sufficient compliance with this writ, that the trial has taken place before a jury, who are sworn to have been duly qualified to serve as jurors for the county.

[268] LORD ABINGER, C. B. I am of opinion, that, even supposing this writ to be regular, it has not been regularly obeyed. Possibly the writ is not regular; but at all events it is clear that there has been no trial by persons taken from the list of jurors for the county. The objection made at the trial was, that the Recorder had no power to summon a jury according to the terms of the writ: but it now appears that he did not in fact summon them according to the terms of the writ. The writ requires him to summon a jury of men of the county, duly qualified; and looking at the act of Parliament, I think the meaning of that is, that the jurors to try the cause must be taken from the jury list for the county. I do not think this is a case in which any challenge was necessary. The rule must therefore be absolute.

ALDERSON, B. I also think this rule must be absolute. The objection in this case is two-fold: first, that the writ is irregularly directed; and secondly, that its directions have not been complied with. I do not say whether the writ is irregular or not: it may be, that the Judge had a right to send the cause to be tried by that jury; the provision in the statute, which authorises the issuing of writs of trial to be tried before any Judge of any court of record, looks as if it was meant that he should have the power of summoning a jury, for that particular occasion, from those who, under the general Jury Act, may be compelled to try ordinary cases. I am rather disposed to think, however, that the writ is irregular, and that its direction should have been to summon a jury from those persons whom, in the ordinary course of his duty, the Recorder would summon for the trial of issues in his Court. On that point, however, I give no definite opinion. But the writ, which directs the jury to be summoned from "good and lawful men of the county, duly qualified according to law," must mean that they are to be taken from those [269] persons who are competent to serve on the trial of issues within the county, namely, from those whose names appear on the ordinary jury lists. But here it appears that the Recorder summoned a jury from the list of jurors for the borough, and not for the county: he has not, therefore, obeyed the writ. It is said, indeed, that the borough jurors are the same persons as sit on the trial of issues in the county, and that they are duly qualified to serve for the county; but that does not answer the affidavit on the other side, which states that they were not upon the jury list for the county. I think, therefore, that there has been a mis-trial, and that the rule must be absolute to set aside the proceedings.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

FELL v. KNIGHT. Exch. of Pleas. April 30, 1841.—Although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose.

[S. C. 10 L. J. Ex. 277; 5 Jur. 554.]

Case. The declaration stated, that the defendant, before and at the time of the committing the grievance thereafter mentioned, was an innkeeper, and did keep a certain common inn for the reception and accommodation of travellers, that is to say, a certain common inn, called the Fox and Hounds, situate and being at Syston, in the

not detain the person of his guest, or take off his clothes, in order to secure payment of his bill.

M. D. Hill and Humfrey, *contra*. It is not necessary, in order to support an action against an innkeeper for refusing to afford necessary food and lodging to a guest, to prove that he has offered in every instance to pay money for what he has required: that would be quite contrary to the ordinary custom in such cases, and would be [275] productive of great inconvenience. The case of *Rex v. Jones* (7 Car. & P. 213) shews that there may be circumstances which render such a tender unnecessary. That was an indictment against an innkeeper for refusing to receive a traveller, and it was objected that the indictment ought to have averred that the guest had made an offer of payment for what he required; but Coleridge, J. said, "With respect to the non-tender of the money by the prosecutor, it is now a custom so universal with innkeepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn. Indeed, in the present case no objection was made that the prosecutor did not make a tender, and they did not even insinuate that they had any suspicion that he could not pay for whatever entertainments might be furnished to him. I think, therefore, that that cannot be set up as a defence." Now here the defendant had received the plaintiff into the inn, and he was not refused accommodation because he could not pay, but because he required a bedroom to sit up in. [Alderson, B. Suppose an innkeeper refuses to open his door, how in that case can you tender him money?] If an innkeeper asks for money, or refuses to supply food or lodging until he is paid for it, then a tender may be necessary, but not otherwise. The declaration is therefore good. Secondly, the plea is no answer to the action. The reasonableness of the accommodation offered to the plaintiff may be a question for the jury, but where particular facts are pleaded specially, as an answer to the declaration, it becomes a question for the Court whether they amount to an answer in law. Now the justification pleaded for the refusal to allow the plaintiff a bedroom to sit up in, is not that such a room was improper for that purpose, but that it would be dangerous to the house on account of fire for the plaintiff to [276] do so. That might be a reason for taking away the candles, but it was no excuse for refusing him the room, and turning him out of the house.

LORD ABINGER, C. B. I am of opinion that the plea is sufficient. I do not think a landlord is bound to provide for his guest the precise room the latter may select. Where the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle-light in a bedroom, provided he offers him another proper room for the purpose? The plea shews, that the landlord did every thing that was reasonable. The short question is, is a landlord bound to comply with the caprice of his guests, or is he justified in saying, you shall not stay in a room in this way, and under these circumstances? I think he is not bound to do so. All that the law requires of him is, to find for his guests reasonable and proper accommodation: if he does that, he does all that is requisite. I am also inclined to think, notwithstanding the case which has been cited of *Rex v. Jones*, that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was ready to pay; he should state further, that he was willing and offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows, so that no tender can be made; but I rather think those facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment of my Brother Coleridge, in the case cited: but it is not necessary to decide that point in the present case. This rule must be discharged.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

[277] RUSSELL AND ANOTHER, Assignees of Nicholl, a Bankrupt, v. BELL AND ANOTHER. Exch. of Pleas. 1841.—Assumpsit by the assignees of a bankrupt for goods sold and delivered by the bankrupt, with counts for money paid, had and received, and on an account stated. The defendant pleaded by way of set-off, that before notice of any act of bankruptcy, and before the issuing of the fiat,

and before action brought, the defendant gave credit to the bankrupt, by accepting certain bills of exchange for his accommodation, and at his request, without any consideration or value, which said bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were likely to end in debts from the bankrupt to the defendants: and that afterwards, and before the commencement of the action, the defendant paid the said bills:—Held, a good set-off under the 6 Geo. 4, c. 16, s. 50, on the ground that a mutual credit was shewn. Held, also, that the assignees could not reply a fraudulent delivery of the goods.

[S. C. 1 Dowl. (N. S.) 107; 10 L. J. Ex. 300.]

Assumpsit by the assignees of Joseph Nicholl, a bankrupt, for goods sold and delivered and money paid by the bankrupt, money had and received to his use, and for money found to be due on an account stated with him.

The defendant pleaded, except as to £320, parcel &c., and except as to £140, parcel &c., non assumpsit. Secondly, as to the said sum of £140, parcel of the monies in the first, second, third, and fourth counts of the said declaration mentioned, and not being any part of the said sum of £320, parcel &c., in the next plea mentioned, the defendants say, that the plaintiffs ought not to maintain their aforesaid action thereof against them, because they say, that long before they, the defendants, had any notice that any act of bankruptcy had been committed by the said Joseph Nicholl, and long before any fiat of bankruptcy issued against the said Joseph Nicholl, and before the commencement of this suit, to wit, on the 10th of August, 1839, and on divers other days and times between that day and the 18th day of September in that year, the defendants gave credit to the said Joseph Nicholl to a large amount, to wit, to the amount of 586l. 19s., by accepting for the accommodation of the said Joseph Nicholl, and at his request, and without any consideration or value paid or given to them the defendants for so doing, divers, to wit, three several bills of exchange drawn respectively by the said Joseph Nicholl upon the defendants, for the sum of 200l., 189l. 17s., and 197l. 2s. respectively, and payable respectively to the order of the said Joseph Nicholl, which said several bills respectively the said [278] Joseph Nicholl, afterwards, and before any notice to the defendants of his said bankruptcy, to wit, on the several days and times last aforesaid, negotiated and transferred for value for his own use and benefit: And the defendants further say, that the said credits so respectively given by them the defendants to the said Joseph Nicholl as aforesaid, were credits of a nature extremely likely to end in debts from the said Joseph Nicholl to the defendants, and amounted in the whole to a large sum of money, to wit, the sum of 586l. 19s.: And the defendants further say, that afterwards, and before the commencement of this suit, to wit, on the 19th day of November in the year last aforesaid, and on divers other days and times between that day and the 21st day of December in that year, they, the defendants, were called upon and forced and obliged to, and did necessarily pay and satisfy the said several bills of exchange respectively, to certain persons then respectively being the holders of the said several bills, that is to say, the said bill of exchange for £200 to certain persons using the name, style, and firm of Barelay & Company; the said bill of exchange for 189l. 17s. to certain persons using the name, style, and firm of Barnett & Company; and the said bill of exchange for 197l. 2s. to the Governor and Company of the Bank of England; and thereupon the said Joseph Nicholl then, and before the commencement of this suit, was, and still is indebted to the defendants in a large sum of money, to wit, the sum of 586l. 19s., being the amount of the said several bills of exchange, as and for money paid by the defendants for the use of the said Joseph Nicholl at his request, which said sum of money is the same identical sum in and for the amount of which the defendants had given credit to the said Joseph Nicholl as aforesaid; which sum of money, so due and unpaid and unsatisfied to the defendants as aforesaid, exceeds the damages sustained by the plaintiffs, by reason of the non-performance by the defendants of [279] the said several promises in the said first, second, third, and fourth counts, so far as the same relate to the said sum of £140, parcel &c., and out of which said sum of money so due, unpaid, and unsatisfied to the defendants as aforesaid, they, the defendants, are ready and willing, and hereby offer to allow and set off the full amount of the said damages, according to the form of the statute in such case

made and provided. Verification. And as to the said sum of £320, parcel &c., in the said first plea mentioned and excepted, and not yet pleaded to, the defendants pay the same into Court.

Special demurrer to the second plea, assigning the following causes: that the said second plea does not confess and avoid or deny the causes of action in the first, second, third, and fourth counts; and the defendants do not shew by that plea, that the bankrupt gave any credit to the defendants in respect of the causes of action in those counts; and that no mutual credit is shewn between the bankrupt and the defendants, but merely that the defendants gave credit to the bankrupt. Joinder in demurrer.

W. H. Watson, in support of the demurrer. The plea is bad. It does not contain any confession and avoidance, nor does it shew any mutual credit. It only shews credit given by the defendants, but none by Nicholl. The bankrupt may have had a right of action, but that does not imply that any credit existed mutually between them. [Parke, B. If goods are sold and delivered, and a debt becomes due, it is a credit. Lord Abinger, C. B. How can there be a debt without credit?] A debt may exist without credit. Both cases are contemplated by the Bankrupt Act, 6 Geo. 4, c. 16, s. 50, as being distinct. By that section it is enacted, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and [280] one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt and demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." It is submitted this is not a mutual credit, within the meaning of the act. But assuming that credit may have been given by the bankrupt, there may have been an appropriation of the bills of exchange to the general account, in which case there would be no mutual credit. Mutual credit is very different from mutual debts. In *Key v. Flint* (1 Moore, 451; 8 Taunt. 21), where A., previous to his bankruptcy, deposited a bill of exchange with B., for the specific purpose of raising money thereon, and B. advanced money on the bill: it was held that the assignees of A. were entitled to recover from B. the amount of the bill in an action of trover, they having tendered to B. the money advanced by him, though a general balance remained due from the bankrupt to B., and that this did not form a case of mutual credit within the stat. 5 Geo. 4, c. 30. So, in *Buchanan v. Findlay* (9 B. & Cr. 738; 4 M. & R. 493), where a bill was deposited with the defendant for a specific purpose, it was held that, the bill not having been applied to that purpose, the bankrupt had a right to demand it back, and that such demand having been made before the money was received on the bill, the defendant was liable to the assignees for the amount. [Parke, B. That was for money had and received to the use of the assignees.] Yes, it was so held, because a wrong was committed, and no contract would arise. [Parke, B. *Smith v. Hod-*[281]*-son* (4 T. R. 211) is an authority on both points. It was there held, that if a bankrupt on the eve of his bankruptcy fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm his contract, and then the creditor may set off his debt. It was also held, that where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet, the defendant having paid the amount after the commission issued, and before the action brought by the assignees, he was entitled to set off the same under the words "mutual credit," in 5 Geo. 2, c. 30, s. 28. That case appears to me to be precisely in point, and has never been overruled.] How can the plaintiffs reply to this plea? [Parke, B. You cannot reply a fraudulent delivery of the goods, because you have waived the tort.]

Per Curiam. There must be judgment for the defendants.

Judgment for the defendants.

Crompton was to have argued in support of the plea.

THOMPSON v. GIBSON AND ANOTHER. Exch. of Pleas. May 6, 1841.—In an action on the case for a nuisance to the plaintiff's market, which was the last cause tried at an assizes, the verdict was found for the plaintiff with nominal damages, and the Judge thereupon immediately adjourned the Court to his lodgings, and quitted the Court. No application was made in Court for a certificate under the 3 & 4 Viet. c. 24, that the action was brought to try a right; but the plaintiff's counsel followed the Judge to his lodgings, and there, within a quarter of an hour after the delivery of the verdict, obtained from him such certificate:—Held, that it was well given.

[S. C. 11 L. J. Ex. 241; 5 Jur. 390. Applied, *Folkard v. Metropolitan Railway Company*, 1873, L. R. 8 C. P. 471. For former proceedings, see 7 M. & W. 456; 151 E. R. 845 (with note).]

On the trial of this cause (which was an action on the case for a nuisance to the plaintiff's market) before [282] Coltman, J., at the Westmoreland Summer Assizes, 1840, the jury found a verdict for the plaintiff, with nominal damages. The verdict was given at the close of the last day of the assizes, and the Court was immediately adjourned to the Judge's lodgings. No application for a certificate under the 3 & 4 Viet. c. 24, s. 2, was made in Court; but the plaintiff's counsel almost immediately afterwards went to the lodgings, and within a quarter of an hour after the delivery of the verdict, obtained from the learned Judge a certificate under that act, that the action was brought to try a right, &c.

A rule for a new trial of the cause having been discharged in last Hilary Term (see 7 M. & W. 456), Dundas, for the defendants, applied for and obtained a rule to shew cause why the certificate so granted should not be rescinded, on the ground that it ought to have been granted in Court, immediately after the trial. He cited *Shuttleworth v. Cocker* (1 Man. & Gr. 829; 2 Scott's N. R. 47; 9 Dowl. P. C. 76), *Waggett v. Shaw* (3 Camp. 316), *Holland v. Gore* (3 T. R. 38, n.), *Butler v. Cozens* (11 Mod. 198), *Harper v. Carr* (7 T. R. 448).

Cresswell and Cowling now shewed cause. This certificate was well granted. The words of the statute, "immediately afterwards," cannot mean that the certificate must be granted instantaneously; they must have some latitude, and must be interpreted to mean, that it must be done as soon as is reasonably possible under the circumstances. Suppose the Judge wishes to look through his notes before granting it, may he not have time to do so? Or may he not have an interval for refreshment, or in case he leaves the Court from indisposition? Under the statute 43 Eliz., c. 6, s. 2, where the words are, "if it shall appear to the Judges of the same Court, and be so signified or [283] set down by the justices before whom the same shall be tried," &c. &c., a certificate may be granted even after taxation of costs: *Forall v. Banks* (5 B. & Ald. 536). In the stat. 22 & 23 Car. c. 9, s. 136, the enactment is, that in certain actions, "wherein the Judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that" &c., the plaintiff, in case the damages are less than 40s., shall not recover more costs than damages: and under that statute, a certificate has been held good, though granted several days after the trial: *Johnson v. Stanton* (2 B. & C. 621; 4 D. & R. 156). In the stat. 8 & 9 Will. 3, c. 11, s. 4, the words are, "wherein at the trial of the cause it shall appear, and be certified by the Judge under his hand, on the back of the record," &c. It would have seemed that all this must be done at the same time; that it must appear, and also be certified, at the time of the trial, the nisi prius record being then before the Judge; yet it was held, in *Woolley v. Whitby* (2 B. & C. 580; 4 D. & R. 147), that the certificate might be granted "at any convenient time" before final judgment. In that case Lord Tenterden, C. J., remarks upon the distinction between the first and fourth sections of that act, the words "in open Court" being found in the former, but omitted in the latter. In the present statute, the words "in open Court" are not inserted, and it must be presumed that they were intentionally omitted. In the old Special Jury Act, 24 Geo. 2, c. 18, the provision was, that the party applying for a special jury should pay the costs of it, "unless the Judge before whom the cause is tried, shall immediately after the trial certify in open Court under his hand, on the back of the record, that the same was a cause proper to be tried by a special jury." On these words, Lord Ellenborough thought, in *Waggett v. Shaw*, that an application for a certificate the day

after the trial was too late. In the 6 Geo. 4, c. 50, s. 34, the words [284] "in open Court" are omitted; and the constant practice has since been to grant a certificate for a special jury, although applied for after some interval of time. The proper construction appears to be that put upon the present act by Maule, J., in *Shuttleworth v. Cocker* (1 Man. & G. 840). "I should say that it was the intention of the act to exclude any impression being made on the mind of the Judge, except what was produced at the trial." In that case it was held that a certificate informally drawn up at the time might be amended afterwards, i.e. that a new certificate might, under such circumstances, be granted after the trial. [Alderson, B. My Brother Maule's principle is, that the Judge should act only on the impression received by him in trying the cause, and as soon as conveniently may be afterwards. I do not see how, except on that ground, *Shuttleworth v. Cocker* can be supported.] But even assuming that the certificate must be given before any other business is transacted, here nothing was done after the delivery of the verdict in this case; there was only a mere formal adjournment.

Dundas and Ramshay, in support of the rule. The safest rule of interpretation is to abide by the words of the statute: if they are departed from, it is impossible to tell what latitude of construction may ultimately be arrived at. It is probable that these words were adopted for the express purpose of preventing the loose construction which had been put by the Courts upon the former statutes relating to costs. They all point to a proceeding in Court. Here there had been an adjournment, and the application was made ex parte at the Judge's lodgings, after the business of the assizes were over. The application ought at all events to be made instantly, and the Judge should at once say whether he will certify, or take time to consider. [Lord [285] Abinger, C. B. I do not see that the act makes it necessary that there should be any application by counsel; it seems to me that it was rather intended to exclude it. And if the Judge waits for counsel to apply, that is not literally "immediately afterwards."] The only statutes relating to certificates in which the word "immediately" occurs, are the 8 & 9 Will. 3, c. 1, s. 1, (as to which see the remarks of Lord Tenterden, C. J., in *Woolley v. Whitby*), 24 Geo. 2, c. 18, s. 1, and 6 Geo. 4, c. 50, s. 34; and upon the construction of the statute of 24 Geo. 2, an application for a certificate the day after the trial has been held too late; *Waggett v. Shaw*. In *Shuttleworth v. Cocker*, Coltman, J., says—"With regard to the time at which the certificate is granted, I agree that it would be dangerous to depart from the words of the act; and that the sounder construction of those words would probably be, that the certificate should be given immediately, before the adjournment of the Court." And Bosanquet, J., says—"With regard to the time of granting the certificate, I strongly incline to think that it must be done immediately after the cause is tried, and that it should not be left to a future period, whether long or short, unless, the application being made immediately, the Judge desires time to consider." In *Reg. v. Robinson* (M. T. 1840, 10 Law J. Rep. (N. S.), Q. B. 9), the Court of Queen's Bench held, upon the construction of the statute 9 Geo. 4, c. 31, s. 27, which provides that if, on the hearing of a case of assault before justices, they shall deem the offence not to be proved, they shall dismiss the complaint, and shall forthwith make out a certificate under their hands of the fact of the dismissal, and deliver it to the party against whom the complaint was made,—that the certificate, to be operative, must be applied for before the justices separated by whom the matter was disposed of. [Lord Abinger, C. B. That is a certificate, not of an opinion, but of a fact. I should, however, be some-[286]-what disposed to doubt the propriety of that decision. Alderson, B. Suppose the justices wilfully omit giving the certificate, they can only be compelled to do it by mandamus; how can it in that case be done forthwith, in the sense put upon the statute by the Court?] This certificate ought to be granted before anything has intervened so as to prevent the Judge from applying his mind with the same precision to the subject. In *Gillett v. Green* (7 M. & W. 348; 9 Dowl. P. C. 219), Parke, B., says, that it may even be a question whether a Judge has power to grant the certificate after another cause has been called on. If it may be postponed until after he has left the Court, much mischief may result, in the case of undersheriffs, and other inferior judges, from the solicitations to which they may be subjected in the mean time from the parties interested.

LORD ABINGER, C. B. I think this rule must be discharged. With regard to the argument which has been last urged, of the danger that may arise in trusting this

discretion to inferior judges, the answer is, that writs of trial are never directed to them in any case where a right is in question, but only in cases of debt. It is certainly impossible to say that there is no doubt on the construction of this act of Parliament; but such is the case with respect to many, nay most, acts of Parliament. If they could be construed literally, consistently with common sense and justice, undoubtedly they ought: and if I could see, upon this act of Parliament, that it was the intention of the legislature that not a single moment's interval should take place before the granting of the certificate, I should think myself bound to defer to that declared intention. But it is admitted that this cannot be its interpretation: we are therefore to see how, consistently with common sense and the principles of justice, the words "immediately after-[287]-wards" are to be construed. If they do not mean that it is to be done the very instant afterwards, do they mean within ten minutes, or a quarter of an hour, afterwards? I think we should interpret them to mean, within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the Judge, so as to disturb the impression made upon it by the evidence in the cause: and I am disposed to adopt the construction put upon the clause by my Brother Maule, that the certificate is to be "the result of the Judge's impression at the time." I read the clause as if the word "thereupon" had been found in it—that the act is to be done "immediately thereupon"—that is, upon no other matter than the facts of the cause, and as soon as conveniently may be after the verdict. If the statute had required that the certificate should be given in open court, then I should have thought the Judge ought to sign it *sedente curia*: and so also if it had said that it must be on the application of counsel; but that clearly is not made necessary. I am not influenced, therefore, by the argument that there ought to be an opportunity given for counsel to discuss the case before the Judge, and I decide the case as I should have done if the Judge himself, after retiring to his lodgings, had directed his associate to bring him the record for the purpose of indorsing his certificate, within a quarter of an hour after the verdict. It appears to me that that would be quite sufficient to satisfy the reasonable interpretation of the statute; and this case is in effect the same. The learned Judge gave the certificate "immediately thereupon"—upon the impression produced by the evidence in the cause, and nothing else, without any other intervening discussion. I think, therefore, that it was well given, and that this rule must be discharged.

ALDERSON, B. I am of the same opinion. I find there is an express decision of Lord Hardwicke to the same effect, [288] on the interpretation of this very word "immediately," in a case of *Her v. Francis* (Cases temp. Hardw. 114). His Lordship there says—"It was said, that the word 'immediately' excludes all intermediate time and action; but it will appear that it has not necessarily so strict a signification. Stephens, in his Thesaurus, expounds the word 'immediately,'—'cito et celeriter;' so Cooper's Dictionary renders, in English, 'immediately,'—'forthwith, by and by;' and Minshew gives it as various meanings, and refers it to the word 'presently.' Nor is its signification more confined in legal proceedings, as appears from the case of *Pybus v. Milford* (2 Leon. 77) which was cited to the contrary, which says thus—"Though the word immediately, in strictness, excludes all mesne time, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." Also the statute of 27 Eliz. c. 13, s. 11, enacts, 'that no person shall have an action against the hundred, except he shall, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants of some town near the place;' and in all declarations on that statute, the averment of such notice is thus, 'quod immediatè post feloniam, the plaintiff gave notice, &c.:' and so are all the precedents in Coke's Entries, tit. Hue and Cry, throughout; which shews that the word 'immediatè' there means only with convenient speed; and convenient speed used has accordingly been always allowed to be evidence of that averment: and likewise writs of habeas corpus returnable immediatè, mean only with as much convenient speed as may be." If, therefore, the words "immediately afterwards" are to be construed "within such convenient time as is requisite for doing the thing," the question is whether or not, where the Judge adjourns on the finding of the verdict to his lodgings, and there, the counsel having [289] come to him, grants the certificate within a quarter of an hour, he has not done it within such convenient time. I think he has, and therefore that this certificate was properly granted, which is all that we are called upon in this case to decide.

ROLFE, B. I am entirely of the same opinion. I think the words used by my Brother Maule afford the best test as to the proper construction of the statute, coupling with it the additional qualification, that it is to be done with all convenient speed. In strict construction, the words "immediately afterwards" exclude the lapse of any interval of time, but their meaning, with reference to a case like the present, must be, that the certificate shall be granted as speedily as conveniently can be. Then I agree that that was done here.

Rule discharged.

SHIELD v. QUICK. Exch. of Pleas. May 5, 1841.—Where a defendant pleaded *nunquam indebitatus* to the whole declaration, and a special plea concluding with a verification, and to which therefore counsel's signature was requisite, but delivered them without counsel's signature:—Held, that the plaintiff might treat the whole pleading as a nullity, and sign judgment as for want of a plea.—Judgment for want of a plea was signed on the 17th of April, and a summons was taken out for setting it aside, which was discharged on the 23rd. Execution issued on the 27th, and on the 28th defendant moved the Court to set aside the judgment for irregularity:—Held, that the application was too late.

[S. C. 10 L. J. Ex. 270, and (nomine *Shield v. Twigg*) 9 Dowl. P. C. 751; 5 Jur. 488.]

Assumpsit on an apothecary's bill, and for medicines supplied, with counts on an account stated.

The defendant pleaded *nunquam indebitatus* to the whole declaration, and to part of the declaration a special plea concluding with a verification. The last plea, according to the practice, required counsel's signature, and that being wanting, the plaintiff signed judgment on the 17th of April for want of a plea. A summons had been obtained for setting aside the judgment for irregularity, [290] which was discharged on the 23rd of April. On the 28th, Petersdorff obtained a rule to shew cause why the judgment should not be set aside for irregularity, on the ground that the plea of *nunquam indebitatus*, which did not require counsel's signature, was pleaded to the whole declaration, and therefore was an answer to the action. On the 27th the plaintiff had issued execution.

Jervis now shewed cause. The defendant was too late in making this application. Judgment was signed on the 17th, and the summons having been discharged on Friday the 23rd, the defendant ought to have applied on the Saturday or Monday following, and not to have waited until the 28th before he did so; in the mean time execution has been issued. [Alderson, B. The defendant ought to have come within a reasonable time, and before any other step was taken.] Secondly, the special plea ought to have been signed by counsel, and the omission to get that done rendered the whole pleading a nullity. Under the old practice, when the pleadings were filed, the officer of the Court could not have received these pleas, under the rule of the Queen's Bench, E. T. 18 Car. 2, unless they were signed by counsel, and the plaintiff would have been entitled to treat the whole as a nullity (Tidd's Prac. 9th ed., 640). That rule is, that "no special pleas or demurrers in law in any cause before this Court now depending, or hereafter to be prosecuted, shall be received by the clerks of the papers of this Court, before such pleas or demurrers in law shall be signed under the proper hand of some counsel in that behalf retained." In *Grant v. —* (2 Chitty's Rep. 319), where the signature was indorsed on the back of the plea instead of being subscribed to it, the plea was held to be a nullity. *Macher v. Billing* (1 C. M. & R. 577; 3 Dowl. P. C. 246) is directly in point. This Court there held that an unsigned plea of the Statute of Limitations was a nullity. It can [291] make no difference that there is a plea to the whole declaration, which does not require to be signed. The only question is, whether the pleading delivered required to be signed. If it did, then the plaintiff has no other remedy but to sign judgment.

Petersdorff, contra. Where a plea is good and valid in itself, it cannot be treated as a nullity, because it is pleaded together with one which is imperfect for want of counsel's signature. It is an irregularity only, not a nullity. The plaintiff ought to have taken out a summons to set aside the plea which does require signature. The rule of 18 Car. 2 applied to the filing of pleas, and is inapplicable to the modern practice of delivering them. In *Macher v. Billing*, there was no valid plea which went

to the whole cause of action, which distinguishes that case from the present. In *Spencer v. Cartlick* (3 Dowl. P. C. 247, n.), the declaration contained two counts, one on a promissory note, and the other on an account stated: and the defendant pleaded a plea of no consideration to the first count, and the general issue to the last. There the plaintiff having signed judgment on the whole declaration for want of a plea, Patteson, J., expressed an opinion that it was signed for too much, and set it aside. In *Pepperell v. Burrell* (1 C. M. & R. 372), Alderson, B., said in the course of the argument, "The plea concluding with a verification, not being signed by counsel, may be a nullity, but what becomes of the general issue?" The effect of discharging the rule would be, that one bad plea would render the other good plea void altogether.

LORD ABINGER C. B. This rule must be discharged. I think that if plaintiffs, in cases like the present, were not allowed to treat the whole pleading as a nullity and sign judgment, they would be placed under great difficulties. [292] What is a plaintiff in such a case to do? If he makes up the issue, and delivers the pleas as he has received them, he thereby waives the irregularity; if he takes out a summons, and goes before a Judge to set aside the bad plea, he loses time, and his adversary gains a delay to which he is not entitled. Then would any pleader advise his client to make up the issue, putting in only the pleas which are in form? Under these difficulties, the only remedy is to allow the party to sign judgment at once, and leave it to the other side to come in and have it set aside on terms, if the Court sees fit to adopt such a course. We have here a certificate from one of the Masters of this Court, (for some of the present Masters were clerks in Court under the old system,) as to what was the ancient practice on this subject, when all pleas were filed instead of being delivered between the parties; and he certifies to us, that pleas filed without the signature of counsel, when that was requisite, were considered as no pleas at all. Now, although the Court has been thrown open, and the practice changed into a delivery between the attorneys of the parties, no rule has been made to change, nor do we see any reason to change, the ancient practice on the subject; and consequently, if a party deliver without counsel's signature a plea which requires it, together with others which do not require signature, the whole may be treated as a nullity. If there were any decided case to the contrary, I should have deferred to its authority; but none of those which have been referred to are in point, and the loose dictum thrown out in one of them by one of my learned Brothers now present, cannot be taken as a declaration of the opinion of the Court. I think also the application was made too late. I think the motion ought to have been made on Saturday, or at latest on Monday.

ALDERSON, B. I am of the same opinion. What I said in the case of *Pepperell v. Burrell* was a mere suggestion [293] thrown out to counsel in the course of the argument, and has been properly answered in the judgment just given by my Lord Chief Baron. Where a plea, which requires counsel's signature, is delivered without it, though there are other pleas which do not require signature, the plaintiff may treat the whole as a nullity. That appears to have been the practice under the old system, by analogy to which, the parties to whom pleas are delivered under such circumstances ought also to have the power of rejecting the whole. That gets rid of the difficulty, with which I should otherwise have been much pressed, in deciding this question. Is the party, to whom the pleas are delivered, to be obliged to make a selection between the good and bad pleas, and determine whether each particular plea is a nullity or not? If he accepts the bad plea, and, instead of signing judgment, proceeds to reply to it, he waives the irregularity; that he certainly ought not to be called on to do; and if he proceeds to set it aside, delay and expense will be imposed on him. I also concur in the opinion of my Lord Chief Baron, that this application was, under the circumstances, made too late.

ROLFE, B. I am of the same opinion. I at one time felt myself pressed by the argument of Mr. Petersdorff; but when we come to compare the present with the old practice, all doubt on the subject disappears. When a defendant delivers his pleas regularly and properly, he is under no difficulty; but if he neglects to comply with this condition, he is not entitled to throw on the plaintiff the burden of pointing out the part which is a nullity, and of moving to have it corrected or set aside.

Rule discharged.

[294] POTTER v. NICHOLSON. Exch. of Pleas. May 5, 1841.—Under the stat. 1 & 2 Vict. c. 110, s. 9, the attestation of the attorney to a cognovit must not only state that he is the attorney for the party executing it, but also that he subscribes his name as such attorney.

[S. C. 9 Dowl. P. C. 808; 10 L. J. Ex. 311; 5 Jur. 511.]

Pashley, on a former day, had obtained a rule calling on the plaintiff to shew cause why the cognovit given by the defendant in this action should not be set aside, on the ground that the execution of it was not attested in the manner prescribed by 1 & 2 Vict. c. 110, s. 10. It appeared that the attestation was in the following form:—"Joseph Bamford, one of the attornies of her Majesty's Court of Exchequer of Pleas at Westminster, attending for the said William Nicholson at his request, to, and did inform him of the nature and effect of the above cognovit before the execution thereof by him."

Knowles shewed cause. The 9th section of the statute enacts, "that no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." That provision is merely an extension of the rule of Hilary Term 2 Will. 4, and under that rule it has been held that it is sufficient for the attorney to declare by parol that he acts as such for the defendant:—*Wilson v. Price* (4 Dowl. P. C. 213). It must be admitted that the rule does not contain the word "thereby," which is inserted in the statute; but they are not materially different, and the Court will put the same construction on both.

Pashley, in support of the rule. The objection to the [295] attestation is, that it does not state that the attorney "subscribes as such attorney." *Poole v. Hobbs* (8 Dowl. P. C. 113) is an authority expressly in point. There the attestation was in this form—"Witness, George Edwards, defendant's attorney, named by him and attending at his request;" and it was held to be insufficient, for not proceeding to declare that he "subscribes as such attorney." Coleridge, J., after taking time to consider, said, "This declaration of the statute is founded on and is an extension of 1 Reg. Gen. H. T. 2 Will. 4, s. 72. The last, and, for the present purpose, the material clause of the section, differs from the corresponding clause of the rule in the insertion of the word 'thereby'; and the preceding words to which this refers are these, 'which attorney shall subscribe his name as a witness to the due execution.'" And he adds, "The legislature has determined to prevent the necessity of any recourse to parol evidence to ascertain whether the witness is the attorney of the party or not, and in its anxiety to secure that, has also gone on additionally to require that in his attestation he should state that he makes it as such attorney. It is certain, that in terms this has not been complied with in the present instance, nor has any equivalent language been used; the witness indeed states that he was named by the defendant, and attended at his request, but those are two conditions imposed in an earlier part of the clause, not necessary to be stated here, but having reference to a different part of the transaction. I would not, however, be supposed by this remark to intimate an opinion that any equivalent terms would be sufficient; there is always danger in accepting anything in lieu of a literal compliance with the statute: such a practice, at least, tends to make the construction uncertain, and too often ends in frittering away the provisions, while, on the other hand, no compliance is so simple and easy [296] for the practitioner as a literal one." The Court then called on

Knowles, *contrà*. The question is, are the Court bound by that decision? In *Robinson v. Brooksbank* (4 Dowl. P. C. 395), it was held by this Court, that it is not necessary that the attorney who attends on behalf of a prisoner to explain and attest a cognovit, should make the declaration required by the rule of Hilary Term 2 Will. 4, s. 72, in writing on the cognovit. It is true, that was a decision upon the rule, which provides, *inter alia*, that the "attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant,

and state that he subscribes as such attorney." The only difference between the rule and the statute is, that in the latter the word "thereby" is used. [Lord Abinger, C. B. The word "thereby" carries it farther, and seems to require that by the attestation he should do so; that case, therefore, is not inconsistent with the one which has been cited. I think it would be better to adhere to that authority.] If an omission of this kind in the attestation is to render the instrument invalid, there will be great difficulty in sustaining a *cognovit*.

LORD ABINGER, C. B. The introduction of the word "thereby" into the statute is very important. It shews an intention to carry the rule farther, by requiring that the declaration by the attorney of his being the attorney of the person executing the *cognovit*, and the statement that he "subscribes as such attorney," shall actually be part of the attestation itself. The word "thereby" seems to have been used *ex industria* to procure that form of attestation. I think we are, therefore, governed by the statute; and in addition to that, as it is always desirable to have some certain rule in matters of this kind, we had better abide [297] by the decision of my Brother Coleridge, and hold that this attestation is not a sufficient compliance with the statute. The rule will therefore be absolute, but without costs.

ALDERSON, B. I am of the same opinion. The words and directions of the statute are very plain, and if parties will only follow them, no inconvenience will arise.

Rule absolute, without costs.

DIXON v. THOROLD. Exch. of Pleas. May 5, 1841.—A notice of motion for leave to sign judgment on a *scire facias* was left with a person at a house at H., who stated herself to be the defendant's housekeeper, that defendant was somewhere in London, and that she could not account for his absence, except that he was concealing himself in order to avoid his creditors:—Held sufficient.

[S. C. 9 Dowl. P. C. 827; 10 L. J. Ex. 303.]

Montagu Chambers moved for leave to sign judgment on a *scire facias*, for default of appearance. The affidavit on which he moved stated, that the witness had called at a house at Hunsden, where he saw a female who told him she was the defendant's housekeeper; that the defendant was somewhere in London; and that she could not account for his absence, except that he was avoiding legal process. The deponent thereupon left the notice with her. This, he submitted, was sufficient to shew that the defendant was concealing himself in order to avoid his creditors.

Per Curiam. That is sufficient; you may sign judgment.

Motion granted.

[298] RICHARDSON v. JACKSON. Exch. of Pleas. May 7, 1841.—Where a creditor, on a tender being made, refused to receive the money on account of more being due:—Held, that he could not afterwards object to the tender, on the ground that the party making it required a receipt. And quære, whether that circumstance would otherwise have invalidated the tender.

[S. C. 9 Dowl. P. C. 715; 10 L. J. Ex. 303.]

Debt for goods sold and delivered, with counts for work and labour, and on an account stated.

Pleas, except as to 3l. 11s., payment; and as to that sum a tender.

The cause was tried before the under-sheriff of Middlesex, when a witness was called who proved that he went to the shop of the plaintiff, whose sister he there saw, and told her that he had called on behalf of the defendant to settle his account, and at the same time produced a book, and pointed out an error in the account: that she looked at it, and said that she could not say any thing about it without her brother were present. He then offered her 3l. 11s., when she said that her brother had looked over the book, and there was one or two pounds more owing. The witness then put the 3l. 11s. on the table, but she said she could not take that amount; he then said, "here is the money, give me a receipt for it."

The under-sheriff left the case to the jury, and they found their verdict for the defendant.

Chadwicke Jones having obtained a rule to shew cause why there should not be a new trial, on the ground that the tender was not good in law,

Cole now shewed cause. The objection to receiving the money was not that a receipt was asked for, but that there was more money due than the sum tendered. The tender was therefore perfectly good. In *Cole v. Blake* (Peake, N. P. C. 179), Lord Kenyon held that if, on a tender being made, the creditor insists on having a larger sum of money, he cannot afterwards object to the formality of the tender, on account of the debtor having required a receipt.

[299] C. Jones, *contra*. The tender was insufficient. In order to support a plea of tender, the defendant is bound to shew an unqualified offer of the money. He has no right to impose as a condition for paying the money that the creditor shall give him a receipt. In *Laing v. Meader* (1 C. & P. 257), the defendant took the money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt, I will pay you the money." That was held by Abbott, C. J., to be no proof of tender. He says, "The payment of the money must be unconditional. A party has no right to say, 'I will pay you the money if you will give me a stamped receipt;' but he ought, according to the 43 Geo. 3. c. 126, to bring a receipt with him, and require the other party to sign it." [Parke, B. The Stamp Act is now repealed as to all sums under £5, and therefore that dictum is inapplicable to this case.] The rule of law is, that the tender must be quite unconditional.

PARKE, B. I am of opinion that this rule ought to be discharged. The case of *Cole v. Blake* is a sufficient authority to warrant the Court in disposing of this application. There Lord Kenyon says undoubtedly, "that it had been determined that a party tendering money could not in general demand a receipt for the money." But where no objection is made on that account, but the creditor refuses the money because he considers the amount is not sufficient, Lord Kenyon held that he could not afterwards object to the tender because the party making it required a receipt. Here it appears the jury were satisfied that the sum tendered was sufficient to satisfy the plaintiff's demand. The rule must therefore be discharged.

ALDERSON, B. I do not wish to be understood as deciding that this is not a good tender, without reference to the particular circumstances of the case.

[300] ROLFE, B. I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death the representatives may be deprived of all evidence of the payment.

Rule discharged.

MONDEL v. STEELE. Exch. of Pleas. May 7, 1841.—An examination of witnesses *vivâ voce* before the Master, under 1 Will. 4, c. 22, cannot be had before issue joined.

[S. C. 9 Dowl. P. C. 812; 10 L. J. Ex. 314; 5 Jur. 511. See pp. 640 and 858, *post*.]

Assumpsit for a breach of contract in not building a ship. Issue not having yet been joined, Cleasby obtained a rule under the stat. 1 Will. 4, c. 22, calling upon the defendant to shew cause why the plaintiff should not be at liberty to examine two witnesses *vivâ voce* before the Master. It appeared by the affidavits, that the persons proposed to be examined, who were sworn to be material and necessary witnesses for the plaintiff, were the captain and an apprentice aboard a ship about to sail for South Australia in the course of a few days, probably before the time for pleading would expire, and who were not expected to return for two years.

Martin shewed cause in the first instance, and contended that it was the settled practice of the Courts not to grant an application of this nature before issue joined.

Cleasby in support of the rule. There is no such rule as that stated, and the stat. 1 Will. 4, which gave the Court the power to make the order, says nothing as to the time. [Alderson, B. How can you know that these persons will be material and necessary witnesses, when you cannot know what will be the issue to be tried? Rolfe, B. It may be that the defendant may plead a release, or some plea of that kind.] The party applying for the order does [301] it on his own responsibility, and at the risk of having to pay all the costs should the evidence turn out to be immaterial.

ALDERSON, B. How could you indict a witness for perjury, when he is sworn

and examined to the issue joined, there being no issue joined at the time the examination takes place? I have often had applications of this kind before me at Chambers, and have always told the parties that they were premature if before issue joined. My Brother Rolfe, however, says that it is the practice in Chancery to allow interrogatories to be taken the moment a bill is put upon the file. The object of the act was certainly to invest courts of law with the same powers in this respect as are possessed by courts of equity. The matter had better stand over for the present, and we will consider it.

Cur. adv. vult.

May 7.—On this day, Cleasby stated to the Court that in the case of *Spalding v. Mure*, cited in 2 Tidd's Prac. 814, the Court of King's Bench had allowed a commission under the 13 Geo. 3, c. 63, s. 44, for the examination of witnesses in India, before issue joined. He then offered to undertake, in the event of the rule being made absolute, that the examination should not proceed until after issue joined.

LORD ABINGER, C. B. There must by an issue joined before the examination is taken.

PARKE, B. You must have an issue as to which the witnesses may be examined, unless the other party will dispense with it.

It was then agreed that the rule should be absolute, the plaintiff undertaking not to proceed with the examination until after joinder of issue.

Rule absolute accordingly.

[302] MUNTZ v. STURGE. Exch. of Pleas. May 8, 1841.—By the 2 Will. 4, c. 45, s. 68, it is enacted, that at every contested election, &c., the returning-officer shall, if required thereto by or on behalf of any candidate, on the day fixed for the election, and if not so required may, if it shall appear to him expedient, cause to be erected, for taking the poll at such election, different booths, &c. And the 71st section provides, "that all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates:"—Held, that the "contested election," referred to in the 68th section, is the poll, and the candidates referred to in the 71st are candidates who go to or demand a poll. Therefore, where a candidate was put in nomination, but afterwards declined going to the poll:—Held, that he was not liable to any part of the expenses of erecting booths, &c.

[S. C. 10 L. J. Ex. 234. Referred to, *Davies v. Lord Kensington*, 1874, L. R. 9 C. P. 726.]

This was an action of debt for work and labour and materials, money paid, and on an account stated. The defendant pleaded payment into Court of 66l. 12s. 1d., and non indebitatus ultra; to which the plaintiff replied, indebitatus ultra. The particulars of demand were as follows:—

| | £ | s. | d. |
|---|------|----|----|
| 15 Booths | 231 | 0 | 0 |
| 15 Deputies | 31 | 10 | 0 |
| 15 Poll Clerks | 15 | 15 | 0 |
| Stationery for Booths, Poll Clerks, &c. | 35 | 18 | 0 |
| Advertising Herald | 3 | 6 | 0 |
| Crier | 1 | 0 | 0 |
| 15 Appointments of Deputies | 15 | 15 | 0 |
| 15 Ditto Poll Clerks | 15 | 15 | 0 |
| Indentures | 10 | 10 | 0 |
| | £360 | 9 | 0 |

The cause was tried at the last Warwickshire Assizes, before Tindal, C. J., when a verdict was found for the plaintiff for 120l. 3s. (being one-third of each of the several sums mentioned in the particulars), subject to the opinion of the Court on the

following case; the Court to say what sums, if any, the plaintiff is entitled to recover in this action.

The plaintiff was mayor of Birmingham, and returning-officer for that borough. A vacancy having occurred in the representation of Birmingham, a writ was issued in January, 1840, for the election of a new member. The precept having been served on the plaintiff, notice was given by him that the day of nomination was fixed for the 23rd of January, at the Town Hall. Previous to and on the 20th of January, George Frederick Muntz and the [303] defendant had declared themselves as candidates, and circulated addresses to the electors. It was also announced by another party that a third candidate would be put in nomination on the day of election, but no name was mentioned. Committees were formed, and an active canvass commenced on their behalf; and it appeared to the mayor and his legal adviser, Mr. Wills, that a very strong contest was likely to take place. Wills, on the 20th of January, had interviews with the representatives of the respective candidates upon the subject of the election, and the preparations necessary to be made for the contest which was anticipated. [The case then sent out a conversation on that day between Wills and Mr. Morgan, one of the defendant's agents, during which the latter stated, that the defendant certainly meant to go to the poll unless there was a decided shew of hands against him on the day of nomination.] No arrangement was come to, but Mr. Wills subsequently on the same day sent a guarantee for the defendant's signature, which was returned by Mr. Morgan accompanied by the following letter to Mr. Wills. [The letter was dated 21st January, 1840, and stated, that the defendant's friends thought he ought not to incur more responsibility till the sense of the electors had been ascertained at the nomination, and expressed a readiness to pay in full any expense already incurred if no poll should take place, or if otherwise, that the committee were prepared to pay their proportionate part.] The following agreement was ultimately entered into:—

“January 22nd, 1840.

“Gentlemen,—I hereby contract to erect 15 booths, 20 × 20 feet, including platform, returning officers' seat, poll clerks' table, and seat table covered with green or red cloth, one-half roofed-in, and three doors, to be completed by eight o'clock on Friday morning the 24th inst., for £15 per booth, with the understanding, if the parties do not go to the poll, the sum of 60l. be paid to me in full of all the [304] demands for the expenses already gone to, or which may be incurred in preparing for the same.

“WILLIAM SMITH.

“P. H. Muntz, Esq., Mayor,

“R. Harris, Esq., High Bailiff,

“J. Clarke, Jun., Esq., Low Bailiff,

“Returning Officers of the Borough of Birmingham.”

“Birmingham, Jan. 22nd, 1840.

“We accept the above offer.

“P. H. MUNTZ, Mayor.

“R. HARRIS, High Bailiff.

“J. CLARKE, Jun., Low Bailiff.”

The number of electors at Birmingham was upwards of 4500, and it was necessary to prepare not less than fifteen booths for the purposes of the polling.

The plaintiff delayed entering into the agreement with the builder until the latest moment at which it was possible for the booths to be completed by the day of election; the amount charged for the same in the particulars is a reasonable charge: and the portion of the expense incurred previously, and up to the nomination of the candidates, did not exceed £150.

On the 23rd of January the nomination took place, and the defendant was first nominated, with his own consent, then Mr. G. F. Muntz, and then Sir Charles Wetherall, the candidate before referred to but not named, and they were respectively seconded. Mr. Muntz attended in person, and addressed the electors, but Mr. Sturge and Sir Charles Wetherall did not appear. A shew of hands then took place for the three candidates, Muntz, Sturge, and Sir Charles Wetherall, which was in favour of Mr. Muntz, upon which a poll was demanded by the friends of Sir Charles Wetherall;

and the person who had proposed the defendant immediately withdrew his name as a candidate, and declined to go to the poll. Whether the withdrawal of the defendant took place immediately before or after the [305] demand of a poll by Sir Charles Wetherall, is uncertain; but in fact no poll was demanded on behalf of the defendant, nor was any poll taken or had on his behalf. A poll took place as between Mr. Muntz and Sir Charles Wetherall, and Mr. Muntz was ultimately elected. Neither the defendant nor his friends took any part of the election after he was so withdrawn. In addition to the expense of booths, the other expenses mentioned in the particulars were incurred by the plaintiff, to the amount of 129l. 9s., making the whole of the sum of 360l. 9s., and this action was brought to recover from the defendant one-third of that amount.

The points marked for argument were:—By the plaintiff: whether the defendant is bound to pay one-third part of the expenses necessarily incurred in preparing for the poll. By the defendant:—That the defendant is not liable for any portion of the sums mentioned in the particulars, by reason that the statute 2 & 3 Will. 4, c. 45, s. 68, 71, &c., only applies to candidates by whom, or on whose behalf, a poll is demanded; and at all events, that the defendant is only liable to a proportion of the expenses incurred up to the nomination.

Humfrey, for the plaintiff. The defendant is liable under the provisions of the Reform Act. By the 68th section of that act, it is enacted, “that at every contested election of a member or members to serve in any future Parliament, &c., the returning-officer shall, if required thereto by or on behalf of any candidate, on the day fixed for the election, and if not so required he may, if it shall appear to him expedient, cause to be erected for taking the poll at such election, different booths for different parishes, districts, or parts of such city or borough, &c.” One question in this case will be, whether this was a contested election, within the meaning of that section. It is submitted that it clearly was. The legislature could never have intended to impose upon the returning-officer himself [306] the expense of erecting booths, and preparing for the poll, and yet such would be the effect of holding that the contest mentioned in the 68th section must be taken to mean a contest at the poll; for it is of every day’s occurrence for candidates at an election not to go to the poll at all, and yet the returning officer must make preparations in time. The 67th section provides that, “at every contested election, the poll shall commence on the day fixed for the election, or on the day next following, or at the latest on the third day, unless any of the said days shall be Saturday or Sunday, and then on the Monday following.” So that, if a candidate appeared on the day fixed for the election, and demanded a poll, the returning officer would have, at the most, forty-eight hours to erect the booths, and make the necessary preparations, which must be quite insufficient for the purpose. And by the latter act, 5 & 6 Will. 4, c. 36, s. 2, the time is still more limited, since it provides that the poll shall take place on the day after that fixed for the election. It is obvious that the discretion given to returning officers by the 68th section, as to the erection of booths, must be exercised before the day fixed for the election, and yet that discretion can only be exercised “at a contested election.” That shews that the contest there spoken of does not mean a contest at the poll. By the 71st section it is provided, that “all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates.” The defendant was a candidate within the meaning of that section. He had declared himself as a candidate, and had circulated addresses to the electors. In *Morris v. Burdett* (2 M. & Selw. 217), Lord Ellenborough describes candidates as “persons offering themselves to the suffrages of the electors;” and it is submitted the defendant came within that description, and is therefore liable.

Erle, contra. The question is, whether the plaintiff is [307] to recover from the defendant or from the other candidates, and that will depend upon whether the defendant was a candidate at a contested election, within the meaning of this act. If not, then, however he may be considered a candidate in the popular sense of the word, he is not liable within the 71st section, which applies only to persons who are candidates at a contested election. That such is the meaning appears from the words of the proviso, “that if any person shall be proposed without his consent, then the person so proposing him shall be liable to defray his share of the said expenses, in like manner as if he had been a candidate:” that means candidate at the poll. [Alderson, B. The words of the 67th section are, that “at every contested election,

&c., the poll shall commence on the day fixed for the election," &c. Does not that shew that there may be a contest before the day of election? Does not the contested election commence with the nomination? Surely the utmost that can be said is, that it commences with the demand for a poll. The defendant may have been a candidate in one sense, but as he withdrew before the actual contest commenced, and declined to go to the poll, he is not a candidate at a contested election. [Alderson, B. Is not the shew of hands a contest?] No; the taking the poll is the only regular mode of separating the electors from the non-electors. [Alderson, B. The 68th section must mean the day of nomination, not the day of election. It says, "the returning officers shall, if required thereto by or on behalf of any candidates, on the day fixed for the election," &c.] Still there would be ample time to prepare the booths. The later statute cannot affect the question of the construction of the former one. Under the Reform Act, the mayor being allowed to hold the poll the next day or the day after, or the third day, he would have ample time to prepare the booths. It may be admitted that the defendant was a candidate, but as soon as a [308] contested election occurred, he ceased to be any longer so by withdrawing. The judgment of Sir W. Scott in the case of *Anthony v. Leger* (1 Hagg. Cons. Rep. 13), as to the election of churchwardens, is applicable to the present case:—he uses the word "election" with reference to the poll. He says, "Where a poll is demanded, the election commences with it, as being the regular mode of popular election; the shew of hands being only a rude and imperfect declaration of the sentiments of the electors." And he adds, "I am of opinion, therefore, that when a poll is demanded, it is an abandonment of what was done before; and that every thing anterior is not of the substance of the election, nor to be so received." In the former acts, 11 Geo. 1, c. 18, s. 1, and 9 Geo. 4, c. 59, s. 1, the words "poll demanded" are used instead of "contested election." The time allowed by the Reform Act is amply sufficient to make the necessary preparations after the day of election is fixed: besides, it is not absolutely necessary that any booths should be erected, for the 71st section gives the returning officer power, instead of erecting booths, to hire houses or other buildings for that purpose.

Humfrey, in reply. It is expressly found in this case that fifteen booths were necessary, and that the plaintiff delayed entering into the agreement with the builder until the latest moment at which it was possible for the booths to be erected by the day of election. In large towns, like the one in the present case, it might be impossible to procure a sufficient number of vacant houses or buildings. The late act, 5 & 6 Will. 4, c. 36, assists in the interpretation of this act. The second section provides that the polling shall commence at eight o'clock in the forenoon of the day next following the day fixed for the election. Now suppose the speeches were to last until ten o'clock at night, is the [309] mayor to sit up all night to see if he can hire houses, or endeavour to get booths erected? According to the argument for the defendant, he must necessarily do so. In the 9 Geo. 4 and the other acts referred to, there is no restriction as to the time when the election should take place; there was, therefore, no necessity for any preparation before the demand of a poll; but by the 68th section of the present act, "public notice of the situation, division, and allotment of the different booths shall be given two days before the commencement of the poll by the returning officer;" and he must therefore prepare for a contest before he can know, with any degree of certainty, whether there will be one or not.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. This was a special case argued before us last week. It was an action brought by the mayor and returning officer of the borough of Birmingham, to recover one-third part of the expense of erecting booths, and employing poll clerks, at the election which took place there in the month of January, 1840, of a member of Parliament. The defendant had been put in nomination on the day appointed for that purpose, but the show of hands being against him, he declined the contest. A poll was demanded on behalf of Sir Charles Wetherall, and was taken at the booths erected by order of the mayor, between Sir Charles and Mr. Muntz, who was the successful candidate. For some days previous to the 23rd, the defendant and Mr. G. F. Muntz had declared themselves candidates, and circulated addresses to the electors, and it was announced that a third candidate, not then named, would be put in nomination on the day of election.

The question is, whether the defendant was a candidate within the meaning of the Parliamentary Reform Act, 2 & 3 Will. 4, c. 45.

[310] By the 68th section of that act, it is enacted, "that at every contested election for any borough, the returning officer may, if it shall appear to him expedient, cause booths to be erected for taking the poll," and various provisions are made for ascertaining at what booths the different electors shall vote, and public notice of the situation, division, and allotment of the different booths shall be given two days before the commencement of the poll, by the returning officer.

By the 71st section it is enacted, "that all booths shall be erected by the returning officers at the joint and equal expense of the several candidates, subject to certain limitations as to price: and all deputies and poll clerks appointed by the returning officer, shall be paid at the rate specified in the act, at the expense of the candidates: provided, that if any person is proposed without his consent, then the person proposing shall be liable as if he was a candidate." Under these clauses, it was contended on the part of the plaintiff, that the defendant is liable to pay one-third part of the sum necessarily expended in taking the poll, the amount of which (£360) was admitted to be reasonable. It was contended that the defendant comes strictly and literally within the provisions of the act. The plaintiff rested his case on three propositions—first, there was a contested election; secondly, the defendant was a candidate; and thirdly, the £360 was necessarily expended by the plaintiff in pursuance of the act.

We are however of opinion, that the plaintiff has failed in making out the second of these propositions, namely, that the defendant was a candidate, within the meaning of that word as used in the 71st section. Undoubtedly, before the nomination, the defendant had been, according to the facts stated in the case, in a popular sense at least, a candidate. But we are of opinion, that the contest referred to in the 68th section is a contest by a poll, and the candidates referred to in the 71st section are candidates at [311] a poll; and consequently, that the defendant having, immediately after the show of hands, declined to go to the poll, never was a candidate within the meaning of the act.

It was urged upon us by the plaintiff's counsel, that this cannot be the true construction of the act, inasmuch as the returning officer is necessarily obliged to incur a large portion of the expense before the day fixed for the nomination; it being often impossible to erect the necessary booths between the time of the nomination and the actual commencement of the poll; a difficulty which is increased since the passing of the 5 & 6 Will. 4, c. 36, whereby the duration of the poll is limited to one day, and the number of electors who can vote at any one polling place is confined to 300. It must be admitted, that the construction which we put on these clauses may, in some cases, possibly, though not very probably, cast on the returning officer the burthen of preparing, at least for the erection of booths, when there may be never any person answering the description of a candidate eventually liable to reimburse him. But at most this only shews, that in certain rare cases the post of returning officer may be one of an onerous character; and the legislature may well have considered that to be a far less evil than it would be to prevent proper persons from being proposed, under the fear that the proposers might afterwards become liable to the expense of a poll, in which they may have taken no part. We may further observe, that the same enactment which makes the candidates liable to the expense of the booths, also makes them liable to the expense of the deputies and poll clerks employed in taking the poll. It is difficult to believe that the legislature could have meant to throw the burthen of these latter expenses on any persons except those for whose benefit they have been incurred, namely, the candidates who come to the poll; and this, therefore, is strongly confirmatory of the construction we put on the word "candidate," as used in the 71st section.

[312] Our attention was pointed in the argument to the passage in the 68th section, which directs the returning officer to give two days' notice before the commencement of the poll, of the situation, division, and allotment of the different booths.

This certainly shews that, in some cases, the returning officer must erect, or at all events have made preparations for erecting, booths, before he knows whether there will or will not be any necessity for them; but, as we have already stated, we do not feel the argument of the plaintiff, resulting from that state of things, as amounting to any thing like a *reductio ad absurdum*.

In the present case the plaintiff will be subjected to no burthen or difficulty whatever, according to our view of the case. The two candidates, or rather one of the candidates and the proposer of the other, are clearly bound to indemnify him against the whole of his expenditure.

Judgment for the defendant.

COY v. LORD FORESTER. Exch. of Pleas. May 8, 1841.—Where, in an action of trespass for hunting over the plaintiff's land, the defendant pleaded not guilty by statute, the Court, on an affidavit of the plaintiff that he could not discover the statute under which the defendant meant to justify, made absolute a rule upon the defendant, to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin.

[S. C. 10 L. J. Ex. 262.]

This was an action of trespass for hunting over the plaintiff's land, to which the defendant pleaded not guilty (by statute). On a former day in this term, Whitehurst moved, on an affidavit of the plaintiff that he could not discover the statute under which the defendant intended to justify, for a rule to shew cause why the defendant should not state to the plaintiff the particular statute under which the plea was pleaded, or why the words "by statute" should not be struck out of the margin of the plea.

[313] Bovill now appeared to shew cause against the rule: but

The Court ordered that the defendant should point out, within three days, the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin of the plea.

Rule absolute accordingly.

RICKARDS v. PATTERSON. Exch. of Pleas. May 8, 1841.—A plaintiff having obtained an order for taxation of his attorney's bill of costs, it was taxed accordingly, but the allocatur was not served on the plaintiff in the regular way, but was sent to him by post, and no demand was made on him for the amount. The attorney afterwards obtained, on an ex parte application, an order on the plaintiff to pay the amount found by the Master to be due, which, without any notice of it to the plaintiff, he made a rule of Court, and issued a fi. fa. thereon, under the 1 & 2 Vict. c. 110, s. 18:—Held, that the execution was irregular.

[S. C. 1 Dowl. (N. S.) 52; 10 L. J. Ex. 272.]

In this case the plaintiff, on the 9th of January last, obtained a Judge's order for the taxation of the bill of costs of his attorney, Mr. Dangerfield, and the bill was taxed accordingly. A summons to review the taxation was taken out by the plaintiff, and heard before Alderson, B., and dismissed. Mr. Dangerfield thereupon applied for an order upon the plaintiff to pay the amount which had been found by the Master to be due: but upon the statement of the plaintiff's attorney that he had cause to shew, if a summons were issued for this purpose, the learned Judge refused to make any order, stating that a summons must be taken out, and he would then hear the case. The Master's allocatur was not served on the plaintiff in the regular way, but was sent to him by the post, and no demand of payment was ever made upon it. Mr. Dangerfield, however, subsequently made an ex parte application, on affidavits, to the same learned Judge at chambers, for an order upon the plaintiff to pay the amount found by the Master to be due: and an order being made accordingly, Dangerfield, without serving it upon the plaintiff, or giving him any notice of it, made the order a rule of Court, and issued a fieri facias thereon, under the provisions of the 1 & 2 Vict. [314] c. 110, s. 18, under which the plaintiff's goods were taken in execution.

A rule having been obtained on the part of the plaintiff, calling upon Mr. Dangerfield to shew cause why the order and rule of Court, and the writ of fieri facias, should not be set aside for irregularity, with costs,

Thesiger now shewed cause. This order, and the proceedings founded upon it, were not irregular. An order for the payment of money found to be due by the

Master, on taxation of an attorney's bill, may be made without any previous summons having been taken out: it must be presumed that every valid objection which could be made to the issuing of such an order, had been taken before the Master on the taxation. Nor is personal service necessary in such case, as it is in the case of an attachment, where the liberty of the party is to be affected by the proceeding. It appears to have been the object of the act of Parliament in some measure to supersede the necessity of service, by giving the rule of Court the effect of a judgment.

E. James, *contra*. Whatever may be laid down as the general rule of proceeding in these cases, it is clear that this particular order ought not to have been obtained without a previous summons, since Mr. Dangerfield was distinctly informed, in the presence of the learned Judge, that cause would be shewn if a summons were taken out, and the Judge, on that very ground, refused an order in the first instance. But without reference to the circumstances of this particular case, the hardship of such a proceeding is obvious. Before the statute 1 & 2 Vict. c. 110, no attachment could be granted without a previous personal service of the allocatur. But now, if the course taken in this case be held regular, the consequence will be that a party's goods may be taken in execution merely upon the sending of the allocatur to him through the post, [315] without any notice at all of the issuing of any order or rule of Court as a foundation for the execution. In *Neale v. Postlethwaite* (1 Q. B. 243), a rule for the payment of the amount of a taxed bill of costs was made absolute only upon notice to the party, and upon cause shewn. Where an award directs the payment of a sum of money, and the agreement of reference having been made a rule of Court (the sum not being mentioned therein), execution issues on such rule, that has been held to be irregular: *Jones v. Williams* (11 Ad. & Ell. 175): and the Court there intimates that the proper mode of proceedings, in such case, is by a rule to shew cause why the party should not pay the sum mentioned in the award.

LORD ABINGER, C. B. This rule must be made absolute. I am sure the learned Judge would not have made this order, if he had been apprised that no demand of payment had been made, and that there had been no service of the allocatur, except by putting it into the post. It seems to me, that before process is awarded against the goods of a party, under this act of Parliament, the same steps should be taken as would have been necessary in a proceeding against his person by attachment; or, at all events, that he should have some distinct notice of the proceedings. It is quite clear that no attachment would have issued in a case like the present. The rule must be absolute, with costs.

PARKE, B. The question here is, what is the proper course to be adopted for the purpose of obtaining executions against the property of debtors, founded upon orders which are made rules of Court, under the provisions of the recent statute. In the case of *Jones v. Williams*, the question was, whether a *fieri facias* could issue for non-payment of a sum of money found to be due by an award, and also [316] for the costs, the agreement of reference having been made a rule of Court: and the Court held that it could not. It seems to have been argued, that, the parties having agreed to abide by the award, and the agreement having been made a rule of Court, and the award made in pursuance of that agreement having directed the payment of a sum of money, the award was incorporated by relation in the rule of Court, and therefore an execution might issue. But Lord Denman, C. J., in delivering the judgment of the Court, says, "There is no difficulty in giving effect to the act of Parliament as to awards, if a proper case is made out; and that is, by calling on the delinquent party to shew cause why he should not pay a certain sum of money pursuant to an award. If that rule be made absolute, an execution may issue for the sum distinctly specified in the rule so obtained." That shews that an *ex parte* order is irregular, and that the proper course of proceeding is by a rule to shew cause. If it were otherwise, in cases of awards, execution might be issued without any opportunity whatever of a hearing being given to the party to be affected by it.

ALDERSON, B. I am of the same opinion. I took a correct view of the case in the first instance, when I told the parties that I should not make an order *ex parte*, but that a summons ought to be taken out.

ROLFE, B. concurred.

Rule absolute with costs, to be deducted from the amount in the hands of the sheriff.

[317] *BILL v. BAMENT*. Exch. of Pleas. May 8, 1841.—Where an affidavit was sworn in the usual way at a Judge's chambers, but through mistake was not laid before the Judge, and therefore the jurat was not signed by him, it was held irregular, and an order obtained upon such affidavit for a *capias*, and all the proceedings thereon were set aside; although after some days (but after the execution of the *capias*), the affidavit was laid before the Judge, and signed by him.

[S. C. 10 L. J. Ex. 302; 5 Jur. 510. See further, 9 M. & W. 36.]

Wheateley had obtained a rule to set aside an order of Alderson, B., made under the stat. 1 & 2 Vict. c. 110, s. 3, for the arrest of the defendant, together with the *capias* issued thereon, the bail-bond, and all subsequent proceedings, for irregularity, with costs: the objection being, that the jurat of the affidavit upon which the application for the order was granted, was irregular. The jurat was as follows:—"Sworn by &c., at my Chambers in Rolls Gardens, the 24th day of March, 1841, before me, ———;" but there was no signature of the Judge. It appeared that the affidavit, when sworn, had been marked by the Judge's clerk with his initials, but through mistake not then presented to the Judge for signature; but some days afterwards, and after the arrest of the defendant, it was presented to the learned Judge (Alderson, B.), who signed it as of course, on seeing the initials of his clerk.

E. James shewed cause. This case is quite different from that of a mistake or deficiency in the body of the affidavit, or of the jurat. They are the act of the deponent or his attorney, and must be complete before the affidavit is a perfect document; and they have only themselves to blame if it be done incorrectly. But the signature of the Judge is affixed after the affidavit is sworn, and is in no respect essential to its validity: it is a mere memorandum by the Judge that the affidavit has been sworn. [Alderson, B. The Judge's signature is part of the jurat.] Perjury may equally be assigned upon the affidavit, although the Judge's signature be omitted. [Alderson, B. No doubt; but the question here is, whether the subsequent signature of the Judge can have a retrospective effect so as to validate intermediate acts.]

Wheateley, in support of the rule, insisted that the case [318] did not differ from that of any other irregularity on the face of the jurat; that in such cases it was not permitted even to shew to the Court, by affidavit, that all was regularly done; and that there ought to be on the files of the Court, before the issuing of the *capias*, such a document as would warrant the order of the Judge, and that it could not afterwards be made good by relation.

LORD ABINGER, C. B. Unless we can be convinced that this was such an affidavit as the plaintiff could proceed upon without a Judge's signature being affixed to it at all, we must admit the objection. The signature being added subsequently, after the issuing of the *capias*, does not cure the original omission. The rule must be absolute with costs, but no action to be brought.

PARKE, B. This order was not only made, but acted upon and executed, upon an imperfect affidavit. If the subsequent signature of the Judge could have the effect of making it good by relation, all errors in the jurat might be corrected afterwards in a similar manner, and we should not know where to stop.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute accordingly.

[319] *WEBBER v. HUTCHINS*. Exch. of Pleas. May 8, 1841.—A writ of *fi. fa.*, whereby the sheriff is directed to levy a sum different in amount from that mentioned in the judgment, although smaller, is irregular; unless the reason of the variance be shewn on the face of the writ.—And the Court will not amend the writ, where the rights of third persons have intervened: as where the defendant has become bankrupt since the execution of the writ.

[S. C. 1 Dowl. (N. S.) 95; 10 L. J. Ex. 354.]

This was an action of debt, in which final judgment having been signed for want of a plea, for the sum of 33,348l. 14s., the aggregate sum laid in the declaration, and 10l. 13s. 8d. costs, a testatum fieri facias was issued thereon, whereby the sheriff was directed to make of the goods of the defendant 3348l. 15s. 8d., and 10l. 13s. 8d. for

costs. The writ was executed on the 3rd of March; on the 16th, a counter claim having been made to the goods, the sheriff applied for relief under the Interpleader Act, and an order was made thereon, the proceedings being then supposed to be regular. Subsequently, the defendant became bankrupt, and at the instance of his assignees, on the 20th of April, James moved for and obtained a rule, calling upon the plaintiff to shew cause why this writ and all proceedings thereon should not be set aside for irregularity, with costs.

Platt and Petersdorff shewed cause, and contended that the writ was not irregular merely by reason of its being to levy a smaller sum than that for which judgment was signed; that the only cases where writs of execution had been set aside on the ground of a variance in the amount from the judgment, were, where they were indorsed to levy a larger sum than was warranted by the judgment: there being in that case no judgment to justify the allegation in the writ, that the sum therein mentioned had been recovered. But at all events, this application ought to have been made earlier. It would be said that the rights of the assignees had intervened; but the cases on that subject were applicable only where the execution would prejudice bail, who were altogether third parties; whereas assignees could have no greater rights than the bankrupt himself. They cited *McCormack v. Melton* (1 Ad. & E. 331; 3 Nev. & M. 801).

[320] Kelly (with whom was E. James) in support of the rule, having mentioned the case of *Hunt v. Passman* (4 M. & Selw. 329), as shewing that the Court could not amend the writ where the defendant had become bankrupt, and the rights of his assignees had intervened, was stopped by the Court.

PARKE, B. The writ must agree in the mandatory part of it with the judgment. If the plaintiff sues out execution for a part only of the sum recovered by the judgment, he may direct the sheriff accordingly by a private memorandum; but if the judgment and the writ do not agree, the reason of the variance ought to appear on the face of the writ. Then we cannot make any amendment, the rights of the assignees having intervened, and they having come to the Court in proper time.

The other Barons concurred.

Rule absolute.

[321] GIBSON AND OTHERS, Assignees of Harris, a Bankrupt, v. CARRUTHERS. Exch. of Pleas. May 3, 1841.—Assumpsit by the assignees of T. H., a bankrupt. The declaration stated that T. H., before he became bankrupt, at the request of the defendant, bargained for and agreed to buy from the defendant 2000 quarters skreened Odessa linseed, at the rate of 30s. 10d. per quarter, free on board at Odessa, the shipment to be made on board the buyer's vessel, on arrival at Odessa, which vessel was to be forthwith chartered for thence, and the amount of invoice was to be paid on handing over the same and the bill of lading to the buyers in London, in ready money, less two and a half per cent. discount. The declaration then averred that T. H. did, after the making of the promise and before his bankruptcy, forthwith dispatch a vessel to Odessa, chartered by him, which vessel arrived at Odessa within a reasonable time; that the vessel arrived at Odessa after the bankruptcy of T. H., and within a reasonable time after such arrival was ready and willing to receive the linseed on board, and that one N. H., the master of the vessel, was ready and willing to deliver to the defendant bills of lading for the linseed, of which the defendant had notice, and was requested by the said N. H., the agent of the plaintiffs in that behalf, to deliver the linseed on board the vessel; that the defendant refused to deliver the linseed on board, or any part thereof, by reason whereof the plaintiffs, as assignees of T. H., had sustained damage. The declaration then went on to allege that, although the defendant had notice of the bankruptcy, and that the plaintiffs being duly appointed his assignees, were, within a reasonable time, ready and willing, and then tendered and offered to pay for the linseed, and then requested the defendant to hand over to them bills of lading for the linseed in London, or to deliver the linseed to their assignees in London, yet the defendant wholly refused so to do.—Plea, that the plaintiffs did not, within a reasonable time after the bankruptcy of T. H. and the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract for the purchase of the linseed, and to

abide by the terms thereof :—Held, on special demurrer to the plea—per Parke, B., Gurney, B., and Rolfe, B., Lord Abinger, C. B., dissentiente—1st. That the declaration disclosed a good cause of action, and that the plaintiffs were entitled to recover.—2ndly. That the matter contained in the plea formed no answer to the action.

[S. C. 11 L. J. Ex. 138. See *Schotsmans v. Lancashire and Yorkshire Railway*, 1867, L. R. 2 Ch. Ap. 335; *Berndtson v. Strang*, 1868, L. R. 3 Ch. Ap. 590; *Ex parte Rosevear China Clay Company: In re Cock*, 1879, 11 Ch. D. 569; *Kendal v. Marshall*, 1883, 11 Q. B. D. 368; *Cussaboglou v. Gibbs*, 1883, 11 Q. B. D. 806; *Bailey v. Thurston*, [1903] 1 K. B. 144.]

Assumpsit. The declaration stated, that theretofore, and before the said Thomas Harris became a bankrupt, to wit, on &c., the said Thomas Harris, at the special instance and request of the defendant, bargained for and agreed to buy of and from the defendant, about 2000 quarters skreened Odessa linseed, warranted to be of good and merchantable quality, and equal to the average shipments of the season, at the rate of 30s. 10d. per quarter, free on board at Odessa, the quantity to be computed at the rate of 100 chetwerts to seventy-two quarters, the shipment to be made on board the buyer's vessel on arrival at Odessa, which vessel was to be forthwith chartered for thence, and the amount of invoice was to be paid on handing over the same and the bill of lading to the buyers in London, in ready money, less two and a half per cent. discount. The declaration then averred mutual promises between Harris and the defendant, according to the terms of that agree-[322]ment: And the plaintiffs aver that the said Thomas Harris, confiding in the said promise of the defendant, did, after the making of the said promise and before his said bankruptcy, forthwith dispatch to Odessa aforesaid a certain vessel called the "Stensture," then chartered by the said Thomas Harris for that purpose, which said vessel arrived at Odessa aforesaid within a reasonable time in that behalf, to wit, on &c., of all which the defendant, at Odessa aforesaid, then had notice: and the plaintiffs aver that the said vessel called the "Stensture" arrived as aforesaid at Odessa aforesaid, after the said bankruptcy of the said Thomas Harris and not before, and within a reasonable time after such arrival, and from thence for a long and reasonable time in that behalf, was ready to receive on board at Odessa aforesaid the said linseed; and that one Nicholas Henrick Hedman, then being the master of the said vessel, was ready and willing to deliver to the defendant bills of lading for the said linseed, making the same deliverable to the defendant or his order, of all which the defendant then, to wit, on &c., had notice, and was then requested by the said N. H. Hedman, the agent of the plaintiffs in that behalf, to deliver and ship on board the said vessel the said linseed; yet, although the said promise of the defendant, at the said time of the said bankruptcy, was and remained, and from thence hitherto continued and still is wholly unsatisfied and unrevoked, and although a reasonable time for the delivery and shipment of the said linseed had long elapsed before the commencement of this suit, the defendant did not nor would, when so requested as aforesaid, or at any time, ship or deliver the said linseed, or any part thereof, on board the said vessel, or any other vessel, in pursuance of his said promise, but then and from thence hitherto wholly neglected and refused so to do. By reason whereof the plaintiffs, assignees as aforesaid, have lost and been deprived of divers great gains and profits, which they might and would [323] have derived from the receipt and sale of the said linseed, and from the loading and shipping of the same, and the conveying thereof on board the said vessel, and have suffered great damage from the said vessel not being loaded with the said linseed, and being detained at Odessa aforesaid for a long time, to wit, two months; and although the defendant, before the making of the request hereinafter mentioned, to wit, on &c., had notice of the said bankruptcy of the said Thomas Harris, and that the plaintiffs were duly appointed assignees of his estate and effects as aforesaid, within a reasonable time after the arrival of the said vessel at Odessa aforesaid, to wit, on &c., and from thence for a long and reasonable time, were ready and willing, and then tendered and offered, to pay the defendant for the said linseed, at the rate and in manner aforesaid, and then requested the defendant to hand over to them bills of lading for the said linseed in London aforesaid, or to deliver to them, assignees as aforesaid, in London aforesaid, the said linseed; yet the defendant did not nor would, when so requested, or at any time, hand over, and hath not hitherto

handed over to the plaintiffs, assignees as aforesaid, the said bills of lading, or any bill or bills of lading, for the said linseed, and hath not, from the time of the making of the said promise, delivered to the said Thomas Harris before his bankruptcy, or to the said plaintiffs, assignees as aforesaid, since the bankruptcy of the said Thomas Harris, the said linseed or any part thereof, or any linseed in pursuance of his said promise, but hath hitherto wholly neglected and refused so to do.

Plea. That the plaintiffs, as the assignees of the said Thomas Harris, did not at any time, within a reasonable time after the bankruptcy of the said Thomas Harris and the arrival of the said vessel off Odessa as aforesaid, give notice to the defendant of their intention to adopt the said contract for the purchase of the said linseed, and to abide by the terms thereof; but on the contrary thereof, [324] the plaintiffs therein wholly failed and made default, and by reason thereof the defendant then became and was wholly discharged from all liability to fulfil the same. Verification.

Special demurrer, assigning for causes, that the defendant has not by his said plea traversed or denied any matter of fact alleged by the plaintiffs; but has introduced matters of fact not alleged or necessary to be alleged, and upon which no material issue can be taken; and also for that the plea is uncertain, in alleging that the plaintiffs wholly failed and made default, without setting forth, with sufficient clearness, in what matter or thing the plaintiffs so failed or made default; and also for that the said plea is argumentative, in alleging that the defendant became wholly discharged from all liability to fulfil the said contract, without setting forth any sufficient ground for such discharge; and also for that the said plea is uncertain and illusory in the form in which it is alleged that the plaintiffs, as assignees as aforesaid, did not give notice of their intention to adopt the contract; and also for that the said plea is no answer to the first breach, but is in other respects uncertain, evasive, argumentative, and insufficient.

The objections insisted upon by the plaintiffs were:—that the fact of the plaintiffs not having given notice of their adoption of the contract, is no answer to the first breach, viz., not loading the linseed on board the vessel. Also, that the plea is bad in not alleging that the defendants were ready and willing to load the linseed on board the vessel, in case they had received notice: and that it is also bad for the special grounds set forth in the demurrer.

The defendant contends, first, that the action ought, under the circumstances alleged, to have been brought in the name of the bankrupt, and not in the name of the assignees. Secondly, that there is a misjoinder of breaches, in this, that the first gives the plaintiffs, as assignees, no [325] right of action, whereas the last breach may do so. Thirdly, that the request to deliver the linseed, in the first breach, is not shewn to have been made by any person with competent authority, and in behalf of the plaintiffs in their capacity of assignees; nor does it appear that they then were assignees, but it alleges that the defendant had notice of the bankruptcy, and therefore alleges the very ground on which he was entitled to object to deliver according to the contract.

The case was argued in Michaelmas Term last, by Cleasby, for the plaintiffs, and by R. V. Richards, for the defendant.

The arguments are so fully stated and discussed in the judgments delivered, that it is not necessary to detail them at length; but the following cases were cited and commented upon:—*Wright v. Fairfield* (2 B. & Adol. 727), *Schondler v. Wace* (1 Campb. 487), *Hancock v. Caffyn* (8 Bing. 358; 1 M. & Scott, 521), *Smith v. Coffin* (2 H. Bl. 444), *Boorman v. Nash* (9 B. & Cr. 145), *Marsh v. Wool* (id. 659), and *Lawrence v. Knowles* (5 Bing. N. C. 399; 7 Scott, 381).

The Court took time to consider, and there being a difference of opinion amongst the Judges, they now delivered their judgments seriatim.

ROLFE, B. The plaintiffs in this cause are the assignees of Thomas Harris, a bankrupt.

The declaration states, that Harris, before his bankruptcy, agreed to buy from the defendant about 2000 quarters of linseed, free on board at Odessa, at 30s. 10d. per quarter, the shipment to be made on board the buyer's vessel on arrival at Odessa, which vessel was to be forthwith chartered for thence, and the amount of the invoice was to be paid on handing over the same and the bills of lading to the buyers in London.

The declaration then states mutual promises by Harris [326] and the defendant,

according to the terms of that agreement, and goes on to aver that Harris, in part performance &c., dispatched a vessel to Odessa, which arrived there in a reasonable time, and was ready to receive the linseed on board; that before its arrival Harris had become bankrupt; but the master of the ship was ready and offered to receive the linseed on board, and to give bills of lading pursuant to the agreement; that the defendant refused to deliver the linseed on board, or any part thereof, by reason whereof the plaintiffs, as assignees of Harris, have suffered damage, &c. The declaration then goes on to state that the plaintiffs afterwards, within a reasonable time after the arrival of the vessel at Odessa, gave notice to the defendant of their being ready and willing to pay for the linseed on delivery in London according to the agreement; yet the defendants refused to deliver, &c., &c.

To this declaration the defendant has pleaded, that the plaintiffs did not, within a reasonable time after the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract.

The plaintiffs have demurred to this plea, and have assigned several causes of demurrer, all founded on the principle that the plea attempts to raise an immaterial issue.

On the argument of this case in last Michaelmas Term, it was contended on the part of the defendant, first, that the declaration does not state a case which gives a right of action to the assignees; and secondly, that if it does, then the plea discloses a good defence.

I am of opinion that neither of these propositions can be supported.

As to the first point, the validity of the declaration: it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt, and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are [327] likely to be beneficial or onerous to the estate. In no case can the party who contracted with the bankrupt set up the bankruptcy against the assignees, as a reason for not doing what he has agreed to do. Where, indeed, the payment of money or performance of any other duty by the bankrupt forms a condition precedent to the doing of the act which the contracting party has agreed to do, there, unless the money is paid or duty performed, either by the bankrupt or his assignees, it is plain, on principles altogether independent of any questions arising from bankruptcy or insolvency, that no obligation exists on the other party to perform his part of the engagement. But no objection of this sort can be set up, except in the case of a mere contract for the sale and delivery of goods, until the time has arrived when the party seeking the benefit of the contract fails to do something which according to its provisions he ought to do. Until default, no such objection arises, even where the whole matter rests in fieri; but much less can such a course be pursued where, as in the present case, the declaration shews that a part, and probably no inconsiderable part, of the contract has actually been already performed by the plaintiffs, or rather by the bankrupt whom the plaintiffs represent. For it will be observed, that in this case the first act to be performed under the contract was the sending of a ship to Odessa. This was actually done at the cost and risk of the bankrupt. If the argument of the defendant be well founded, the bankrupt or his estate must sustain the loss occasioned by his having thus far fulfilled his part of the contract.

It was endeavoured to liken this to a case of stoppage in transitu, to which it was supposed to bear a strong analogy. But it does not appear to me that any such analogy exists. Where a vendor of goods has put them into the hands of a carrier, in order to their being by him forwarded and delivered to the vendee, then, if the vendee before actual delivery to him becomes insolvent, the vendor has a right [328] to resume the possession with which he had previously parted. It may be conceded, that the same circumstances which would justify a seller in stopping the goods in transitu, will also warrant his retaining them before the transitu has commenced, where nothing remains to be done but to deliver the goods to the purchaser. But here the proposed transit of the linseed from Odessa to London was not, as it seems to me, a transitu within the meaning of the doctrine relative to stoppage in transitu. I consider it to be of the very essence of that doctrine, that during the transitu the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession. In this case the linseed was to be brought to London, not in the ordinary course of

delivery by a seller to a buyer, but under the terms of a special contract, which reserved to the defendant, the seller, the exclusive control over it by means of the bills of lading. It was one of the terms of the contract, that the defendant should in a certain stipulated mode cause the linseed to be transported to London, in order that it might there be by him delivered at a price agreed upon to the bankrupt. This the defendant was bound to do, in the same way as if he had agreed to do any other act; as for instance, to build a ship, to manufacture goods, or the like; and he had no right to anticipate that when he had performed his part of the contract, the bankrupt, with whom he had contracted, would not by himself or his assignees perform what he had agreed to do. If the contract was beneficial to the bankrupt, the assignees would of course adopt it; if it was onerous, then the defendant would have to look to the bankrupt himself, the sole party with whom he contracted, and whose liability would continue notwithstanding the bankruptcy, as was established by the case of *Boorman v. Nash* (9 B. & C. 145). On these [329] grounds I think the declaration discloses a state of facts which gives the plaintiffs a right of action.

Supposing this to be so, then the only other question is, whether the plea states matter which destroys the right of action appearing on the declaration: I think it does not. All beneficial interests in the bankrupt are by operation of law transferred to the assignees, including such a right of action as exists in the present case. The assignees have the right of adopting or repudiating the contracts of the bankrupt, according as they may think them likely to prove beneficial or the contrary. The proposition implied and asserted by this plea is, that the assignees are not entitled to the benefit of the bankrupt's contracts, unless, within a reasonable time, they give notice of their intention to adopt them. But for this proposition I find no warrant either in the statutes or the decided cases. All that the assignees are bound to do, is, to fulfil the bankrupt's part of the engagement when the proper time arrives. If they expressly waive the contract, or without any express waiver, if at the proper time they omit to do what, by the terms of the contract, they are bound to do, in the first case they certainly will, and in the second they probably may, absolve the other party from all obligation towards the assignees. But in such a case the proper course for the defendants would be to plead, not that the assignees had not given notice of adopting the contract, but that they had repudiated it, of which the express waiver certainly would, and the implied waiver, by omitting to do what they ought to do, might, under the circumstances, afford sufficient evidence. In this case it is not alleged by the plea that there was any express waiver, or any implied waiver, by omitting to perform any part of the contract, which, as representing the bankrupt, they were bound to perform; and on the contrary, it is clear, from the pleadings, that they were always ready to do all which the bankrupt would have been bound to do: and I therefore think that nothing is [330] stated in the plea defeating the plaintiffs' right of action as disclosed in the declaration, and consequently that judgment ought to be for the plaintiffs.

GURNEY, B. The case of the plaintiffs stands upon the 12th and 63rd sections of the Bankrupt Act, 6 Geo. 4, c. 16. The 12th section of the act specifies the property of the bankrupt which the commissioners shall have power to dispose of. "All his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known."

The 63rd section vests the bankrupt's property in his assignees. The words are, "all the present and future estate of the bankrupt, wheresoever the same may be found or known, and all debts due or to be due to the bankrupt." Although the words in these two sections are not precisely the same, they must be considered as denoting the same matters.

The object of the act, as stated by Lord Tenterden, in the case of *Wright v. Fairfield*, is to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate.

What, then, is this case? The declaration states that Harris, the bankrupt, had entered into a contract with the defendant, that he (the bankrupt) would charter and send a vessel to Odessa to receive a cargo of linseed; that the defendant contracted to deliver the said cargo on board, upon the arrival of the vessel at Odessa, and that bills of lading were to be made out to defendant's order, and the bankrupt contracted to pay for the linseed in ready money, on receiving the invoice and the bills of lading in London. That in part fulfilment of this contract, the bankrupt did charter and send

a vessel to Odessa to receive the cargo; that, prior to the arrival of the vessel at Odessa, the bankruptcy of Harris occurred; that the master of the vessel, as agent for the assignees, requested the defendant to ship [331] and deliver the linseed, which he neglected and refused to do.

It is contended by the defendant, that the bankruptcy absolved him from the performance of his part of the contract.

I do not think that it had that effect.

If the bankrupt had not chartered and sent the vessel to Odessa, he would have been, notwithstanding his bankruptcy, liable to an action for a breach of contract. Here he had performed his part of the contract, so far as it could at that time be performed. He had chartered and sent a vessel. He must thereby have incurred considerable expense. If he could not, in his own name, have insisted on the performance of the contract, because he was divested of his property and his rights, I think that it follows that his assignees, who had become his representatives, may enforce the contract, it being a contract beneficial to the estate, and one in which the creditors had an interest.

The defendant was not required to place the property in the hands of the bankrupt, or even in the hands of the assignees; and, to come in for a dividend, the defendant would have still preserved his control over the cargo, inasmuch as the bills of lading were to be in his own name, and the cargo was not to be delivered in London until payment was made in ready money.

It is contended by the defendant that this resembles the case of stoppage in transitu. Stoppage in transitu stands alone in our law. It is founded in strict justice. A person who has sold and sent off goods to a purchaser may, on the bankruptcy or insolvency of the purchaser, repossess himself of the goods, if he can do so before they have arrived at the end of their journey. This is to prevent his goods from being thrown into the mass of an insolvent estate, leaving him to come in for a dividend with the creditors in general, who would thus have the benefit of his goods.

[332] The case before the Court bears no resemblance to this. This linseed, if it had not been stopped by the defendant, would not have gone towards a dividend in the bankrupt's estate, leaving the defendant to come in for his share of that dividend; but the estate would, as in justice it ought, have received the benefit of a beneficial contract made by the bankrupt, and which contract has become beneficial by means of the expense which he incurred in chartering and sending the vessel to Odessa.

If the declaration is sufficient, the only remaining question is, whether the defendant's plea is an answer to it, and I think that it is not.

The plea is, that the plaintiffs (the assignees) did not, within a reasonable time after the bankruptcy, give notice to the defendant of their intention to adopt the contract. That is no answer to the plaintiffs' declaration, which alleges that he had notice of the arrival of the vessel at Odessa, and that the master of the vessel, as agent for the assignees, within a reasonable time after the arrival, requested him to ship the cargo, which he neglected and refused to do.

For these reasons, I am of opinion that the judgment should be for the plaintiffs.

PARKE, B. In this case the assignees sue on a contract made between the defendant and the bankrupt, by which the bankrupt contracts to charter and send a vessel from London to Odessa, and the defendant to sell, and ship on board there, on the arrival of the vessel, a cargo of linseed, the bills of lading for which were to be made deliverable to the defendant's order (so as to preserve his lien for the price), and the bankrupt was to pay the price in ready money, on receiving the invoice and bills of lading in London. The declaration assigns as a breach, the non-shipment of the cargo at Odessa, where the vessel arrived after the bankruptcy, of which it is stated the defendant had notice. [333] The plea avers, that the assignees did not, within a reasonable time after the bankruptcy, and after the arrival at Odessa, give notice to the defendant of their intention to adopt the contract; and there is a demurrer to this plea, which raises two questions—first, whether the matter contained in the plea is an answer to the action—and secondly, whether the declaration discloses a good cause of action.

I am of opinion that the assignees are entitled to recover.

There can be no doubt that the effect of the assignment under 6 Geo. 4, c. 16, ss. 12 & 63, is to vest in the assignees, to use the language of Lord Tenterden in *Wright v. Fairfield* (2 B. & Ad. 732), every beneficial matter belonging to the bank-

rupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees: such, in short, as would pass as part of his personal estate to his executors if he had died, which would not include that description of contract (Evans's Stat., vol. 4, pp. 2, 328) where the personal skill or conduct of the bankrupt would form a material part of the consideration. In order to enforce these contracts, it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or contemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contracts, than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones nor anticipating the period of performance on either side.

If the assignees do all that the bankrupt ought to have done, they may recover against the contractor the damages which the bankrupt himself could have recovered if he had performed his contract; if they omit to do so, they lose the benefit of the contract, and the other contracting party [334] has his remedy against the bankrupt, to which the certificate is no bar: *Boorman v. Nash* (9 B. & C. 145).

To apply this to the present case, the bankrupt having already performed the first part of his contract, by sending a ship to Odessa, the next thing was that the ship should be ready to receive the cargo on board. This was also done, and as the defendant refused to load the ship, there was a breach of contract, for which the assignees could sue, for the performance of it would have been beneficial to the bankrupt's estate, and would have been the only mode by which the outlay in chartering and sending the vessel could be repaid. The assignees were not bound to pay, or to be ready to pay, the price until the arrival of the cargo in London, and delivery of invoice and bill of lading—a period which had not yet arrived. This part of the case appears to me to be perfectly clear, and consequently the plea, which is framed on the supposition that the law requires the assignees to give express notice, in a reasonable time after the bankruptcy, of their adoption of the contract, is bad. The law only requires them to perform the bankrupt's part of it as and when he should have done it himself.

But it is said that the declaration itself discloses a sufficient reason for the non-performance of the contract, because it states the bankruptcy, and notice of it, before the time for loading the cargo; and it is said that by analogy to the doctrine of stoppage in transitu, the defendant might, on the receipt of that notice, decline to proceed to fulfil the engagement on his part.

But the doctrine of stoppage in transitu applies only to the case of goods sold and delivered; for the delivery to a carrier or middle man is a delivery to the party, and in cases of bankruptcy and insolvency, the law, founded on an equitable principle, permits the unpaid vendor, at any [335] time before the arrival of the goods at their place of destination, or the vendee's actual possession, to resume possession, and put himself in the same position as if he had not parted with it (whether it enables him also to rescind the contract, is a point yet unsettled (see *Clay v. Harrison*, 10 B. & C. 99), and which I need not now discuss).

But this privilege in case of bankruptcy or insolvency, (for it belongs to both alike), has never yet been extended further than to allow resumption of possession after the contract was complete by delivery, and to undo as it were the delivery; there is no trace of any authority for saying, that bankruptcy or insolvency excuses the party contracting with the bankrupt from performing any other unexecuted part of his contract.

To allow a person to retire from his agreement before it is executed, and the goods ready to be delivered, is to deprive the bankrupt, and those who represent him, of all power to have the goods, on payment of the stipulated price, and would work the greatest injustice where the bankrupt had already incurred expense.

If there were a contract to build a vessel for the bankrupt, he supplying a part of the timber, and paying the price by instalments, the last on delivery, and the bankruptcy occur after the timber has been supplied, and some instalments paid, and before the vessel is complete, it could not be contended for an instant, that the builder could refuse to complete his contract on the ground of that bankruptcy, and render all the previous expense of the bankrupt unavailing; and yet that case is in principle similar to the present. The bankrupt has incurred the expense of chartering a ship;

is the defendant to be at liberty to refuse to perform what he has engaged to do, on the speculation that the bankrupt or his assignees will not pay? The amount of the bankrupt's expense is immaterial, [336] and it might happen, in the case of articles of great bulk, that the cost of the vessel out and home constituted a very large part of the value of the goods here; is the bankrupt to incur the expense, and the defendant to be at liberty to refuse to deliver on board and throw the whole of it on the estate?

It appears to me, that these questions must be answered in the negative.

The only authority cited in the argument for the position, that, in case of an unexecuted contract, an intervening bankruptcy excuses the performance, is the case of *Marsh v. Wood* (9 B. & C. 659). It is enough to say, that it was decided on the ground that the property in the subject-matter of the dispute was, by the bankruptcy, taken out of the bankrupt, and the submission was therefore no longer mutual, and not on the principle that bankruptcy dissolves the contract.

For the above reasons I am of opinion, that the plaintiff is entitled to our judgment on this demurrer.

LORD ABINGER, C. B. This case arises upon the pleadings, which present the following state of facts:—That the bankrupt Harris had agreed to buy of the defendant about 2000 quarters of Odessa linseed, at the price of 30s. 10d. per quarter, free on board, to be delivered by the defendant at Odessa on board of a ship which Harris was to charter for the purpose of receiving the same; the invoice and bills of lading were to be sent by the defendant to London, and the price was to be paid by Harris upon their delivery to him in cash: that the bankrupt did accordingly charter a ship, which arrived at Odessa after he became bankrupt, of which, as well as of the bankruptcy, the defendant had notice, and that he afterwards was applied to by the master of the vessel, as agent of the plaintiffs, to ship the goods, which he refused to do.

[337] Upon this contract it is manifest that the defendant was to part with the possession of his goods of great value, upon the faith that the buyer, at a future day, when the bills of lading should arrive in London, would pay him for them. If he had actually shipped the goods before he had notice of the bankruptcy, and the bankruptcy had occurred afterwards, I think he might have stopped the goods in their progress to the buyer, had it been in his power to do so; and if the goods had actually arrived at their destination, he might still have refused to hand over the bills of lading and invoice till the price was paid. The question then is, whether under the actual circumstances he was compellable by law, knowing that the bankrupt could not pay him, to expose himself to the risk of freight and insurance, and sending his goods perhaps to a falling market, upon the chance only of its suiting the interest or the pleasure of the assignees to pay him. For it has not yet been contended that they were bound, or could have been compelled, to pay him.

I am of opinion that it follows from the right of the vendor to stop the goods in transitu, if he hears of the bankruptcy of the vendee before their delivery, that he has, *a fortiori*, a right to refuse to part with the possession of them at all, if he has notice of the bankruptcy whilst they remain in his actual possession. I think that the mere insolvency of the vendee would have been a bar to any action brought by him under these circumstances; and if he could not, by reason of his mere insolvency, have maintained an action for the refusal to ship the goods, that no right to maintain such an action vested in his assignees by the event of his subsequent bankruptcy.

Having the misfortune to differ with the other members of this Court upon this question, I think it right to go somewhat more fully into the subject than I should otherwise have done.

Although the question of stoppage in transitu has been [338] as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, the common law has adopted. This was strongly insisted upon by Mr. Justice Buller, in his celebrated judgment in the House of Lords, in the case of *Lickbarrow v. Mason* (4 Bro. P. C. 57). It has also been said by Lord Kenyon, that it was a principle of equity adopted by the common law to answer the purposes

of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that are gone by, were unanimous in repudiating it as the offspring of a court of equity. The first case that occurred upon this subject affords some authority for the opinion of Mr. Justice Buller and Lord Kenyon. It is the case of *Wiseman v. Vanleput* (2 Vern. 203), in 1690. That was a bill filed by the assignees of the bankrupt against the vendor. The Lord Chancellor directed an action of trover to be brought by the plaintiffs, upon which they recovered a verdict. It is clear, therefore, that the rule had not at that time been adopted at law. The Lord Chancellor however adopted it in equity, and, notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of *Snee v. Prescott* (1 Atk. 24). Lord Hardwicke again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point; and he expressly founds his decree upon the evidence of the custom of merchants, as well as upon the justice of the case. This decision occurred about the year 1742 or 1743. The next case is that of *Ex parte Wilkinson*, in 1755, referred to in *D'Aquila v. Lambert* (Ambler, 399), [339] which took place in 1761. There the Lord Chancellor again grounded his decree on the usage of merchants, and stated that the several previous decisions which had taken place to the same effect, had given great satisfaction to the merchants. Numerous cases have followed at law, shewing that the right of stoppage in transitu, under certain circumstances, is now part of the common law.

Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. It is to be observed, however, that the right of stoppage in transitu is not peculiar to the law of England. It existed, I believe, in the commercial states of Europe. The cases I have already referred to, shew that it was practised in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough, and mentioned by him in his judgment in the case of *Lickbarrow v. Mason* (1 H. Bl. 364). That it is the law of Russia was also proved in the cases of *Inglis v. Usherwood* (1 East, 515), and of *Bohrling v. Inglis* (3 East, 381). It appears also, on reference to the *Chapitre de la Faillite*, in the Code Napoleon, that the law of France on this subject is in all points similar to our own. It is known that this celebrated code is chiefly a digest of the law of France as it existed before the Revolution. Indeed the right of stopping in transitu had, before the composition or digest of that code, acquired the name in the French law of "Revendication." It may, therefore, be presumed to be a part of the law of merchants which prevails generally on the continent. The proof of which, from time to time, combined with its manifest justice and utility, has at length introduced it into the common law of England, of which the law merchant properly understood has always been reckoned to form a part.

In considering, therefore, new questions that may arise on this branch of the law, I think it safer to rely on the [340] course and effect of the actual decisions that have taken place, than upon the reasoning and dicta by which it has been attempted, not very successfully, to develop the principle, and to make it conformable in appearance and dress, if I may say so, with the family of English law into which it has been adopted.

The first remark I would make is, that amongst the vast number of cases discussed upon this subject, this is, as far as I know, the first upon which the assignees of a bankrupt vendee of goods have brought an action upon the contract of sale against the vendor for non-delivery.

There is, indeed, an example of an action of trover by the assignees of the bankrupt vendee against the vendor, in the case of *Hanson v. Meyer* (6 East, 614). That action appears to have been founded upon some of the decisions, that a delivery of part of the goods sold by an entire contract was a delivery of the whole, and that the vendor could neither stop in transitu nor retain the remainder, because the property of the whole became indefeasibly vested in the vendee by the delivery of a part. The plaintiff therefore brought an action of trover to recover the remaining part of a parcel of starch sold by an entire contract, which had not been actually delivered before the bankruptcy of the vendee, who had whilst solvent received the greater part. The Court, however, decided against the plaintiff, upon the narrow ground, that the starch was by the contract to be weighed before it was delivered, and this remainder, not

being weighed, could not be said to be delivered. It is impossible to read that case without being satisfied, that if the starch had been weighed, the decision would have been the same. However, as far as it goes, it is a decision that the assignees of the bankrupt vendee can have no property, as against the vendor, in any part of the goods which have not been actually delivered, or of which the transitus has not terminated.

[341] But by the law of England, the contract for the sale of goods, and a delivery to a carrier in compliance with the sale, transfers the property from the vendor to the vendee, and the property of a bankrupt vests in his assignees. Nevertheless, neither the vendee, if he become insolvent, nor his assignees, if he become bankrupt, can maintain an action of trover against the vendor or his agent, if the vendor, before the arrival of the goods at their destination, take measures to prevent their delivery to the vendee or his assignees.

Without stopping to inquire whether this right of the vendor to stop the goods in transitu be an equitable lien retained by him, or a privilege resulting from the latent *jus proprietatis*, or a power reserved to him by implication to rescind the contract in certain cases, or (which is perhaps the most reasonable) an arbitrary rule adopted for the advantage of trade,—I would ask, of what avail is the exercise of the right, if the insolvent vendee, or, he being a bankrupt, his assignees, may bring an action against the vendor upon the original contract of sale, and claim damages for the non-delivery of the goods? Is not the inconsistency of these rights on the one side and on the other a sufficient proof that they cannot both exist?

But it is said that the phrase “stoppage in transitu,” *ex vi termini*, implies that a transitus must commence before it can be exercised. In other words, that a vendor, in order to secure himself from the loss of his goods, by delivering them to a bankrupt vendee, must send them away, that he may exercise the right of bringing them back again, or of preventing their delivery. That if he agrees to sell goods upon credit, and the vendee becomes insolvent before they are delivered, he cannot refuse to deliver them to the vendee or his assignees, upon the application of the one or the other in person; but he may prevent the delivery to either, if he will only take the trouble before they apply to make the goods set out upon their journey—[342] that he must deliver them to a carrier, in order to prevent their delivery to the vendee.

Surely the absurdity of this conclusion is a sufficient refutation of the argument. It is indeed true that a stoppage in transitu, literally speaking, can have no place before a transitus commences. But the reason why a vendor possesses the right to stop in transitu is, that he is not bound to deliver to an insolvent vendee or his assignees. If he were so bound, he could not stop them in transitu, the right to do which proves, *a fortiori*, a right to refuse to part with the possession, in case of insolvency of the vendee. If indeed it were true that the assignees of a bankrupt might maintain an action to recover damages for the non-delivery of goods sold to the bankrupt, numerous cases must have occurred in which it would have been their interest to do so. But not only has no such action been brought, but I am not aware of any dictum to that effect previously to that of Lord Tenterden, in the case of *Boorman v. Nash*, where, in support of an action clearly maintainable against the bankrupt for damages which could not be proved under his commission, by reason of his refusal to accept oils sold to him before his bankruptcy, to be delivered at a period which arrived after his bankruptcy, that learned Judge is made to say that the contract was not rescinded by the bankruptcy (which in one sense is true), and that the assignees might have enforced it if they had thought fit; from which last part of that dictum I must beg leave entirely to dissent, as being altogether inconsistent and irreconcilable with any principle on which the right of stoppage in transitu can be founded. Generally speaking, bankruptcy is no discharge of the bankrupt from an executory contract made before the bankruptcy, and which he is free to perform afterwards. There may possibly be many cases which ingenuity may suggest, where, from the nature of the contract and the circumstances attending it, the solvent party as well as the [343] bankrupt may be liable in equity and at common law to the performance of it, or to the payment of damages. Each of these cases will depend on its own circumstances, which no doubt will develop some rule or principle of law or equity, by which the particular case is to be governed.

But there is a certain class of contracts, in which it is manifest that bankruptcy must put an end to all claim of the bankrupt or his assignees to the performance of

them by the solvent party. The contract of partnership is a familiar instance; and in every case where the motive or consideration of the solvent party was founded, wholly or in part, upon his confidence in the skill or personal ability of the bankrupt, if the bankrupt, from his circumstances, is unable to perform his part, the assignees, as it appears to me, are not entitled to substitute either their own capacity, or skill, or credit, for that of the bankrupt. Suppose, for example, that a man of wealth, by way of encouraging bankers whom he wishes to patronize, should agree with them for a certain term of years to keep his cash with them, upon the faith of which agreement they take a shop, purchase strong boxes, and incur other expenses necessary to carry on the trade. Upon their bankruptcy, their assignees would surely have no right to insist upon keeping his cash for the remainder of the term, or upon their right to find him a banker. An instance of another kind, but depending on the same principle, occurred between the late Sir Walter Scott and his booksellers, who had become bankrupts.

He had engaged to write a novel, which they were to have the benefit of publishing, in consideration of which they were to pay him £4000, for which they had given him their acceptances in anticipation. Before the work was finished they became bankrupt, whereupon Sir Walter Scott took up all the bills he had negotiated. Upon the conclusion of his work, when it was ready for the press, the assignees contended, that by virtue of the contract they [344] had a right to the profit of publishing it, which they were ready to undertake. Sir Walter Scott suggested several grounds to shew that the credit, the skill, the judgment, integrity, and personal character and reputation of a publisher were matters of great importance to an author, on which the success and reputation of his works might greatly depend, and therefore insisted that, the consideration for his contract having respect to the personal credit and qualities of the bookseller, he was by their bankruptcy discharged from his contract. I must own that his reasoning appeared satisfactory to me; but a more obvious illustration of the principle on which it rested would have been afforded by reversing the case, and supposing that Sir Walter Scott had been the bankrupt and his booksellers solvent, would they have been content to pay their £4000, and take the risk of publishing a novel written by the assignees of the novelist? Without, therefore, presuming to suggest any rule that would govern all possible contracts upon the event of the insolvency of either party, I shall confine myself to the single case of a contract for the sale of goods, where the bankruptcy or insolvency of the buyer intervenes before the period for the payment has arrived, and before the goods have come to the actual possession of the buyer or his assignees, or to the ultimate place of their destination. In other words, I confine myself to the single case where the right of stoppage in transitu, after the transit has commenced, may be exercised: and it appears to me very plain, that wherever that right may be exercised, it is a proof, *a fortiori*, that the vendor is discharged by the insolvency of the vendee from the obligation of delivering the goods at all, and consequently from the obligation of making the transitus commence.

If it be necessary to look for any principle on which this right depends, it may be found in the implied condition in every sale of goods, that the buyer if he lives, or his estate if he dies, will be able to pay for them. To him [345] and to his ability alone the vendor trusts, and he is not bound to take the credit of any other man. He may, if he think fit, dispatch the goods to the assignees upon their request, and take them for his paymasters; but if he does so he makes a new contract with them. In the case where the vendor is not to part with his personal possession of the goods till he is paid, it is clear that neither the bankrupt nor his assignees can have the goods without payment. There credit is no part of the contract, and the position of the vendor is not changed by the insolvency. But where the goods are to be paid for at a future day, or where the vendor is to part with the actual possession of them by sending them by a carrier, though he is to receive the money upon delivery after their arrival, in either of these cases he trusts to the credit of the bankrupt: the assignees are not bound to pay for the goods when they arrive. The vendor has not contracted either to give them credit, or to take the risk of their responsibility or their pleasure. The only consideration for his agreement to dispatch the goods is the credit he gives to the personal ability of the vendee to pay for them when they arrive, and if that consideration fails, the contract is voidable at his pleasure. By the law of France, to which I have already referred, it is provided

that the syndics of the insolvent are entitled to a delivery of goods stopped in transitu, if they will pay the vendor the full price the bankrupt has agreed for. This is a positive rule; and it must be understood that they are to make actual payment, and not to substitute their credit or that of any other man for that of the bankrupt, for that would be a new contract. The rule applies to a case of actual stoppage in transitu, where, to a certain extent, the vendor has acted upon the credit of the vendee, and not to the case of a notice of bankruptcy before the goods are dispatched.

It is no new principle in the law of England to say that a contract is void on the ground of fraud. Many cases [346] have occurred where contracts of purchase, made with the fraudulent intent to cheat the vendor, and dispose of the goods at a swindling price to raise money, have been deemed void. In some cases such contracts have been made the foundation of criminal charges of felony or fraud. If a man, intending bankruptcy, were to purchase goods for the mere object of making a better dividend, or of preferring a favourite creditor, without the least intention of paying for them, I presume, upon the clear proof of such facts, the vendor would be held absolved from his contract. Now bankruptcy and insolvency are presumably founded in intention and fraud, and the law, which protects the vendor in such a case from the loss of his goods, by delivery of them to a bankrupt or insolvent, may very properly be considered as proceeding on the principle, that a contract to purchase goods by one, who shortly after becomes bankrupt or insolvent, was a fraudulent contract, and void as against the vendor, though not against the vendee, who could not set up his own fraud to avoid his contract. I consider the absence of all example of the assignees of a bankrupt vendee bringing an action for the non-delivery of goods, a very cogent proof of the opinion which has prevailed on this subject. But there is a case of an action brought by an insolvent vendee against the vendor, the decision of which goes the full length of establishing the position I have laid down, that the insolvency of the vendee discharges the vendor from the obligation of parting with the goods upon credit. It is the case of *Reader v. Knatchbull*, tried at the Sittings at Westminster after Hilary Term, 1786, before Mr. Justice Buller. "The plaintiff declared upon an agreement by the defendant to deliver to him a quantity of Manchester cottons. The defence was, that after making the contract the plaintiff had compounded with his creditors. Mr Justice Buller directed the jury, that if they believed the plaintiff was really in such a situation as to be unable to [347] pay for the goods, that was a good defence in point of law to the action; and the jury accordingly found a verdict for the defendant." A note of this case will be found in the report of *Tooke v. Hollingworth* (5 T. R. 218).

This authority ought to be deemed conclusive upon a question in which common sense and common justice point to the same conclusion. Now to apply the principle to the present case. Is it a case in which the vendor, after the commencement of the transitu, might have stopped the goods, and prevented their delivery to the bankrupt? That it is so is proved by the case of *Bohlingk v. Ellis*, already cited, in which, though the vendee, by the contract, was to charter a ship and send it for the goods, and though the goods were accordingly shipped in that vessel, it was held that the vendor might still exercise the right of stopping in transitu; that case is indeed exactly similar to the present, in all points but one, which makes this a stronger case for the exercise of the right, and that point is, that, by the contract, here the vendor was to retain the bills of lading in his own hands till they were exchanged for the money. It is the case, therefore, of a contract to sell goods to be delivered at a future time, before which the vendee becomes bankrupt. If, therefore, the vendor should ship the goods before he has notice of the insolvency, he has a right to stop their delivery to the insolvent, who cannot pay him for them. Is he bound, then, after previous notice of the bankruptcy, to send the goods upon the chance that the assignees may take them and pay him? Surely not; the assignees are under no obligation to pay him; they may refuse to take the goods and leave them on his hands. He is, therefore, according to the opinion of the other members of this Court, reduced to this dilemma, that he is bound to send the goods to London, there to take the chance of market, which, if favourable, may tempt the assignees to receive them, and pay the price; if unfavourable, must bring a loss upon him, even of the whole, should the price not be equal to the freight. Whereas the very object of his contract was, to sell for a fixed price, and have nothing to hazard.

Under these circumstances, it appears to me that he was discharged by the insolvency of the vendee from the obligation to send forward the goods at all: that according to the case above referred to, he would have had a good defence against the insolvent, had he, being insolvent, brought an action for the refusal to ship the goods before his bankruptcy; and consequently that no cause of action for not shipping the goods vested in the assignees.

I observe the declaration is so framed as to embrace the alternative of a right of action in the assignees upon the original contract, and a right of action derived from their notice that they would perform the contract in place of the bankrupt. But if no right of action existed in them to compel the shipment of the goods, the declaration is bad; and I am of that opinion.

But if it could be supposed, which I think it cannot, that any right of action could arise out of their notice that they were ready and willing to receive and pay for the goods, then, as such notice must have been given in reasonable time, the plea which alleges that it was not given in reasonable time must be good, so that in either case the judgment on the demurrer ought to be for the defendant.

I would add only one remark, to distinguish the case of an executor from that of an assignee. A party contracting to sell goods must contemplate the existing and continuing solvency of the vendee till the goods are paid for, but he cannot contemplate the continuance of his life, so as to make that an implied condition of the delivery. He contracts, therefore, in point of law, with the vendee and his executors, but not with the vendee and his assignees.

Judgment for the plaintiffs.

[349] VACATION SITTINGS AFTER EASTER TERM.

JONES v. WILLIAMS AND OTHERS. Exch. of Pleas. May 11, 1841.—Trespass for breaking and entering the plaintiff's house and seizing his goods. Plea, that the defendant brought an action against the plaintiff, which was referred to arbitration by an agreement afterwards made a rule of Court; that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which he refusing to do, the defendant issued a writ of *fi. fa.*, and levied on the plaintiff's goods. Replication, that by a rule of Court it was ordered that the said writ should be set aside for irregularity. Rejoinder (by way of estoppel) that, after the making of that rule of Court, the plaintiff ruled the sheriff to return the writ of *fieri facias*:—Held, on special demurrer to the rejoinder; first, that the replication was good, and that it was unnecessary to aver that the rule of Court was acted on.—Secondly, that the plaintiff, by ruling the sheriff to return the writ, was not estopped from shewing that it was not a good writ, for although it might be bad as against the party suing it out, it might still be good as respected the sheriff; and that the filing of record did not affirm the existence of a void writ; and therefore that the rejoinder was bad.—Thirdly, that the 1 & 2 Vict. c. 110, does not authorize a party to issue execution for money awarded by an arbitrator.—Fourthly, that the words in the 18th section, “monies or costs, charges or expenses,” mean money decreed or ordered to be paid, together with the costs, &c., to be ascertained on taxation by the officer of the Court, and that no order to pay costs is requisite after taxation.

[S. C. 9 Dowl. P. C. 702; 10 L. J. Ex. 253; 5 Jur. 895. In Queen's Bench, 1839, 11 R. & E. 175; 4 P. & D. 217. Followed, *Widgery v. Tepper*, 1877, 6 Ch. D. 369. Referred to, *Taylor v. Roe*, [1894] 1 Ch. 417.]

Trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods and chattels. Plea, that before the said time when &c., the plaintiff commenced an action of debt against the defendant John Williams, during the pendency of which action it was, by a certain agreement in writing made between the plaintiff and defendant, after reciting &c., mutually agreed to refer the said action, and all matters in dispute in the said cause, to the award, arbitrament, and final determination of R. G. T. [The plea then set out the agreement, the material provisions of which were as follows:] And it was further agreed, that the costs before then incurred by the parties to the said agreement in the said cause, or in anywise respecting the said

disputes and differences, and such as had been incurred up to and inclusive of the day of that agreement, including the costs and charges of witnesses who had been subpoenaed by either party to attend the trial of the said cause, and the costs of their travelling home, and the costs of preparing the said agreement and the said award, and of carrying the same respectively into effect, and the costs and charges of the said arbitrator, and the costs and charges attendant on or incurred in the said reference by the said parties, their advocates and wit-^[350]nesses, should abide the event of the said reference and of the said award, to be taxed as between attorney and client, and to be paid by such party against whom a balance of the accounts should appear to be due by the award, at such time and in such manner as the said R. G. T. by his award should direct. And it was agreed that the arbitrator should be at liberty to examine, ascertain, and settle the accounts as claimed in the particulars of the plaintiff's demand, and the defendant J. W.'s set-off in the said action; and the arbitrator was to be at liberty to direct the payment of any balance which he might find to be due from those particulars, either from the plaintiff to defendant J. W., or from defendant J. W. to the plaintiff, at such time and in such manner as the said arbitrator should think fit: as by the said agreement, reference being thereunto had, will fully appear.

The plea then stated, that the arbitrator awarded that there was a balance due upon the accounts from the plaintiff to defendant J. W., amounting to 69l. 8s. 11d., which sum, together with the costs, charges, and expenses, the arbitrator directed to be paid by the plaintiff to the defendant J. W. on the 1st September then next: it then alleged that the agreement was made a rule of Court: that after the making of the award, and before the said times when &c., the costs, charges, and expenses, so made by the said agreement to abide the event of the said award, were duly taxed as between attorney and client, at a large sum of money, to wit, the sum of £239, whereof the plaintiff afterwards had notice, and was then requested by the defendant J. W. to pay him the said sum of 69l. 8s. 11d., together with the costs, charges, and expenses so taxed as aforesaid, amounting in the whole to the sum of 308l. 8s. 11d., according to the tenor and effect of the said rule of Court, and of the said award and submission, but the plaintiff wholly neglected and refused to pay the same or any part thereof: that afterwards, and before the said times when &c., the said rule of Court being in full force and effect, and the ^[351]said last-mentioned monies remaining unpaid and unsatisfied, the defendant J. W., for the obtaining satisfaction of the said monies in his own right, and the other defendants as the attornies of the defendant J. W. and by his command, sued and prosecuted out of the Court of Queen's Bench a certain writ of our Lady the Queen, called a writ of testatum fieri facias (setting out the writ), which said writ so indorsed, afterwards, and before the execution thereof, was delivered by the defendants to one D. H., who then and from thence, until, at, and after the execution of the said writ, was sheriff of the said county of Montgomery, to be executed in due form of law, by virtue of which said writ the said D. H. broke and entered the said premises, for the purpose of levying the said monies so directed to be made by the said writ as aforesaid, which are the same trespasses, &c. Verification.

Replication, that after the suing and prosecuting out of the said Court of the said writ of fieri facias, by a rule of the said Court then duly made and intituled in the said cause, and also intituled &c., it was ordered by the said Court that the said writ of fieri facias and all subsequent proceedings should be set aside for irregularity with costs; and it was referred to one of the Masters to tax such costs, which costs, when taxed, should be paid by the defendant to the plaintiff or his attorney, as by the said last-mentioned rule of the Court of our Lady the Queen before the Queen herself, reference being thereunto had, will fully appear. Verification.

Rejoinder, that the plaintiff ought not to be admitted or received to plead the said replication, because, after the making of the said supposed rule of Court in the said replication mentioned, and whilst the said writ of fieri facias in the said last plea mentioned was in the hands of the said sheriff of Montgomeryshire, and before any return to the said writ had been made by the said sheriff, to wit, on &c., the now plaintiff applied for and caused to be ^[352]issued a certain order of the Right Honorable Sir J. B. Bosanquet, Knight, one of the Justices of Her Majesty's Court of the Bench at Westminster, duly made and intituled in the said cause in the said last plea mentioned, and bearing date &c., whereby it was ordered that the said sheriff, within eight days next after service of that order upon him or his deputy, should peremptorily return the said writ of fieri facias in the said last plea mentioned, which

said order the now plaintiff afterwards, to wit, on &c., caused to be served on one W. D., then being the deputy of the said sheriff; that after the said order had been so served as aforesaid, and within eight days then next ensuing, to wit, on &c., the said sheriff, in obedience to the said order, in due manner returned the said writ, as by the said writ and return thereof, remaining of record in the said Court of our said Lady the Queen before the Queen herself, fully appears. Verification.

Special demurrer, assigning for causes, that the rejoinder contains no answer to the replication, inasmuch as it does not deny that the writ under which the defendants justify had been set aside by the Court from which it issued for irregularity, after which the application by the present plaintiff for the Judge's order to the sheriff to return it (in order to secure its safe custody) did not affirm or admit its validity, or its efficiency as a protection to the parties issuing it.

Tomlinson, in support of the demurrer. The rejoinder is no answer to the replication: it merely amounts to this, that the plaintiff, by ruling the sheriff to return the writ of fieri facias, admits its validity: but that is not so, for the plaintiff might for many reasons have wished to have the writ returned; and the act of ruling the sheriff to return it would not operate as an estoppel. Many reasons might be suggested for having the writ returned, as if the sheriff had been guilty of excess in the execution of it, and that [353] would be a sufficient motive for obtaining its return, in order to found an application to the Court, or to proceed by action on the statute. An estoppel as to matters of fact is "when a man is concluded by his own act or acceptance to say the truth;" Com. Dig. "Estoppel" (A. 1). If the writ is not void on the face of it, the sheriff is protected by it, though the party issuing it may be a trespasser; and all, therefore, that the plaintiff admits by ruling the sheriff to return it, is its existence. If the sheriff justifies under a fieri facias, he need only plead the writ, but the party must shew some authority for it. An estoppel ought to be certain to every intent. The plea also is bad. It shews no authority for issuing the execution. [Alderson, B. The order to pay the money is an order, not of the Court, but of the arbitrator.] The point has already been decided by the Court of Queen's Bench, in *Jones v. Williams* (11 Ad. & Ell. 175; 4 P. & D. 217).

He was then stopped by the Court.

Cresswell, contra. The rejoinder is good, and the replication bad. The latter does not sufficiently shew that the writ was set aside. All that it states is, that an order was obtained for that purpose: it does not say that it was drawn up or acted upon. The plaintiff was at liberty to abandon the rule, and it does not appear that it was followed up in any way. If the replication had shewn that the rule for setting aside the writ had been acted upon, there would have been an end of the writ altogether, because a writ set aside ceases to have any effect, and is the same as if it never existed. Then the rejoinder, by averring that the plaintiff ruled the sheriff to return the writ, shews not only that it exists, but that it is filed of record. The plaintiff might have surrejoined nul tiel record. The filing of record estops the plaintiff from denying the existence of [354] the writ, and if there was any good reason for wishing the writ to be returned, an application might have been made to the Court to impound it. The return of the writ is the plaintiff's own act, and if he use it for one purpose, he cannot disclaim it for others. Whether the plea is good involves a distinct question; viz., whether the 1 & 2 Viet. c. 110 justifies an execution under circumstances like the present. The case of *Jones v. Williams* was not well considered. There the Court say, "It is undoubtedly money payable by something arising out of and connected with the rule; but then can the award be engrafted on the rule, so as to make the money payable by the rule? The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself. But the 18th section of the act does not say, whereby any sum of money shall be ordered to be paid, but "whereby any sum of money shall be payable." The contempt is in not obeying the rule of Court, and not in the non-performance of the award. [Rolfe, B. The 19th section uses the words "monies thereby recovered or ordered to be paid."] One difficulty suggested by the Court, in *Jones v. Williams*, is, that "as the rules are to have the effect of judgments which are to charge the land, the sum to be so charged ought to be distinctly stated in the document which thus charges the land, so that purchasers or creditors may know what it is." The 19th section, however, contemplates the existence of an order which does not ascertain the sum; and according to the practice of courts of equity, the amount of costs never appears on the decree of

the Court. [Parke, B. The 19th section contemplates that everything shall be payable by the rule.]

Tomlinson, in reply. There is no other mode by which the plaintiff could have obtained the writ, than by ruling the sheriff to return it. The fact of its being on the files of the Court does not make it a record; it is simply [355] preserved there as a protection to the sheriff. The same difficulty would have arisen had the return been procured by the defendant Williams. With respect to the objection to the replication, it must be presumed that the rule setting aside the writ is in force, until the contrary is shewn. Then with reference to the plea, in the case put of an attachment, the contempt is not in the non-payment of money, but in not performing the agreement to abide by the award. It never was intended that the statute should apply to such a case as the present, and if it were so held, a party might levy on the goods of another though the award were bad on the face of it. The statute, when it speaks of judgments, refers to final judgments; this proceeding is in the nature of an interlocutory judgment. The construction contended for on the other side would virtually repeal the 9 & 10 Will. 3, c. 15, s. 2, which allows a party a whole term to apply to set aside an award. It is clear that a distinction was intended between money and costs payable by the order, and the forms of writs settled by the Judges adopt that distinction.

PARKE, B. This is an action of trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods and chattels. The defendants justify under a writ of *feri facias*. It appears by the plea that an action was commenced by the plaintiff against the defendant Williams, which action, and all matters in difference in the cause, were, by agreement in writing, referred to a gentleman at the bar, who was to take an account between the parties, and all costs were to be paid by the party against whom a balance of accounts should appear by the award to be due. The plea then alleges, that the arbitrator proceeded with the reference, and finally awarded, that upon the accounts referred to him, there was a balance of 69l. 8s. 11d. due from the plaintiff to the defendant Williams, which sum, together with the costs, charges, and [356] expenses so made to abide the event of the award, the arbitrator directed to be paid by the plaintiff to the defendant Williams on a certain day. It is then alleged that the agreement was made a rule of Court, and that the costs were taxed at the sum of 239l. 8s. 11d., and without shewing any further application to the Court. The plea then states, that the defendant Williams in his own right, and the other defendants as his attornies, issued a *testatum feri facias*, commanding the sheriff to levy that sum upon the goods and chattels of the plaintiff. To this plea the plaintiff replies, that by a rule of Court it was ordered that the writ of *feri facias* and all subsequent proceedings should be set aside for irregularity, with costs. Then the defendants rejoin, that after the making of the rule of Court the plaintiff ruled the sheriff to return the writ, which the sheriff accordingly did, and the same remains of record. To this rejoinder the plaintiff has demurred, and the first question, independently of the plea, is, whether or not the replication is good. It is objected that the replication merely states, that the Court ordered the writ to be set aside, but that nothing appears to have been done under that order, and it may in fact have been abandoned. I think however that the replication shews *primâ facie* a good answer to the plea. The allegation is, "that by a rule of the Court it was ordered, that the said writ of *feri facias*, and all subsequent proceedings, should be set aside for irregularity, with costs, to be taxed by the Master, as by the rule, reference being thereunto had, will fully appear." It seems to me that that is a sufficient allegation of the existence of the rule of Court; and consequently the effect of it was to set aside the writ of *feri facias*, and to prevent it from being any longer a justification to the defendant (the plaintiff in that action) or his attorney, though it would by law be nevertheless a justification to the sheriff and all persons acting under him. It appears to me, therefore, that the replication is good. Then comes [357] the rejoinder, which is pleaded by way of estoppel, and the question arises whether or not this is a good rejoinder. It is contended, that the plaintiff is by his own act estopped from saying that this is not a good writ, and it is argued that a writ cannot at the same time be both good and bad. But I think that the plaintiff is not estopped from shewing that the writ was set aside; and I am also of opinion that a writ may be at once a good writ for some purposes, though a bad writ for others; that is to say, a writ set aside for irregularity may be good as to

the sheriff and all persons acting under him, and bad as to the persons who sued it out. What, then, does the act of the plaintiff, in ruling the sheriff to return the writ, amount to? It amounts simply to this: that though the writ may be void for some purposes, yet the plaintiff may, if he desire it, make use of it for others. For instance, he may wish to question the propriety of the sheriff's charges for executing it, and may have ruled him to return it, in order to ground an application to the Court, or perhaps to bring an action for extortion. It is enough to say, that he may make some use of a void writ.

The next question is, whether it makes any difference that the writ is filed of record. I think not; the filing of record is not the act of the party, but it is the mode in which the sheriff makes his return. He returns the writ into the proper office, where it is filed of record as a matter of course. The filing of record does not affirm the existence of a void writ; and consequently the rejoinder is bad.

With respect to the plea, I do not wish to be understood as intimating any doubt as to the propriety of the decision of the Court of Queen's Bench in the case of *Jones v. Williams*, for I entirely concur in that decision. Even if this replication were bad and the rejoinder good, the utmost effect of those pleadings would be to admit that there was a good writ; but allowing that to be the case, the party issuing it cannot justify under it, without shewing a valid judgment to support it. Then upon the face of this [358] plea (supposing the decision of the Court of Queen's Bench to be correct, which I think it is,) it appears that a writ of fieri facias issued without any authority to warrant it. The 18th section of the 1 & 2 Vict. c. 110 enacts, "that all decrees and orders of courts of equity, and all rules of courts of common law, &c., whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law. Then the 19th section provides, "that no judgment of any of the said superior courts, nor any decree or order of any court of equity, nor any rule of a court of common law, etc., shall effect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless a memorandum or minute, containing the name and place of abode, &c., of the person whose estate is intended to be affected thereby, and the court and title of the cause and matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the amount of the debt, damages, and costs, or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas, &c." It seems to me, that according to the proper construction of the act, it does not apply to any costs, charges, or expenses, except those which are ordered by the Court to be paid, and that it does not embrace cases in which something is necessary to be done in order to give the party a title to the money, but includes those only in which the obligation to pay the money appears on the face of the judgment, decree, or order. But then it is argued, that where the Court orders the payment of costs, something must be done in order to ascertain their amount before execution can issue. No doubt that is so; but then costs are not liable to the same observation as money, as they stand upon a peculiar footing. When the legislature mentions "money, costs, charges, and expenses," it means money decreed or [359] ordered to be paid, together with the costs, charges, and expenses, to be ascertained in the usual way by the officer of the Court. That point, indeed, it is unnecessary to decide; but I am of opinion, that with respect to costs, it is enough if they are ascertained by the officer of the Court, and that it is not necessary that there should be any order to pay after they are taxed by the officer.

ALDERSON, B. I am of the same opinion; but shall only say a few words as to the validity of the plea, which I think bad, for the reasons given by my Brother Parke. The true construction has been put upon the statute by the Court of Queen's Bench, in the case of *Jones v. Williams*. With regard to the costs, charges, and expenses, it seems to me that they may be ascertained by the officer of the Court, though not specifically mentioned in the rule of Court. All that is required is, that if the Court shall order a sum of money to be paid, and if it also order costs, that means the costs ascertained by the officer of the Court. Independently of the words of the act, which especially refer to costs, charges, and expenses, it seems to me that the Court may very well put such a construction upon the act as to include costs, where there is an order for the payment of a specific sum. But in the case of an award, it would be monstrous to say that any sum of money is payable under the

order of the Court. The order of the Court there is, that the party do submit to the arbitration of A. B., and unless you incorporate the award (which is an act long subsequent) with the rule of Court, it would be making the Court order the payment of a sum of money, the propriety of which depends on the judgment of a third party, and of which the Court knows nothing. If such were the law, the Court might commit the greatest injustice. Suppose a submission to arbitration, and an award in Trinity Term; in the vacation a writ of *capias ad satisfaciendum* might issue, and is the party to remain in custody the whole of the vacation up to Mi-[360]-chaelmas Term, before he can apply to set aside an award which may have been most improperly made against him? The sounder rule is this, that no execution should issue until the Court has ascertained for itself the propriety of the award, and has made an order for the payment of the money awarded.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. The forms of writs settled by the Lord Chancellor, in pursuance of the 1 & 2 Vict. c. 110, afford a strong analogy to guide us in coming to a correct conclusion. In the present case, that statute for the first time gave the effect of a judgment to an order of a court of equity for the payment of money. Let us then see what was done by the Court of Chancery for the purpose of enforcing its decrees by common law process. It is ordered, "that every person to whom, in any cause or matter pending in that Court, any sum of money, or any costs, have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in Court to sue out one or more writs of *fieri facias*, or writ or writs of *elegit*, of the form thereafter stated, or as near thereto as the circumstances of the case may require." There are then given the forms of five different writs of *fieri facias*, and four of *elegit* (see the Forms, 1 Beavan, 51). The first is a writ of *fieri facias*, on a decree or order of the Court for the payment of money. The second is on a decree or order of the Court for the payment of money and interest. The third is on a decree or order of the Court for the payment of money and costs. The fourth is on a decree or order of the Court for the payment of money, interest, and costs. The fifth is on a decree or order of [361] the Court for the payment of costs only. Then follow similar forms of writs of *elegit*. According to all these writs, it is assumed that the amount payable is previously ascertained by the decree or order of the Court. That appears to me to make the distinction pointed out by my Brothers Parke and Alderson; viz., that the statute having provided that a writ may be issued upon an order for the payment of money and costs, it may still issue for costs when taxed by the officer; but that such execution cannot possibly extend to the payment of any money which has not in terms been ascertained by the decree or order. The writs to which I have referred were framed upon great deliberation, and if there were any case in which the order for the performance of an award could be within the statute, it is most probable that a writ for that purpose would be found amongst the forms given by the Court of Chancery.

Judgment for the plaintiff.(a)

[362] SMITH v. ADKINS AND ANOTHER. Exch. of Pleas. May 13, 1841.—Trespass for breaking and entering a dwelling-house of the plaintiff, and evicting him therefrom, &c. Plea, that before and at the said time when &c., the Marquis of H. was seised of and in the said dwelling-house in his demesne as of fee, and being so seised, he, before the said times when &c., to wit, on &c., demised the same to the then churchwarden and overseers of the poor of the parish of A., and their successors, to hold to them and their successors for and on behalf of the parish for one whole year, and so on from year to year, &c.; by virtue of which demise the then churchwarden and overseers entered and became possessed, and the churchwarden and overseers and their successors for the time being have been thenceforth by virtue of the premises, and of the statute in such case made and provided, possessed of and in the said term, &c.; that afterwards, and before the said times when &c., to wit, on &c., the said dwelling-house then being vested in the churchwarden and overseers on behalf of the parish, and then being a tenement provided at the charge of the parish for the habitation of the poor

(a) See *Gibbs v. Pike*, ante, 228; *Rickards v. Patteson*, ante, 313.

thereof, one M. S., then being a poor person, had been permitted by the churchwarden and overseers for the time being to occupy the said tenement, and from thence until and at the time of making the complaint thereafter mentioned, remained in possession thereof, and had refused and neglected to quit the same, and deliver up possession to the churchwarden and overseers of the poor of the said parish, within one month after a certain notice and demand in writing for that purpose, signed by the churchwarden and overseers of the poor of the said parish, which had before then been delivered to the said M. S., the then said M. S. being and continuing in such occupation under and by virtue of the said permission at the time of such delivery.—The plea then stated the preferring of an information by one of the overseers against M. S. before a justice pursuant to the statute, the issuing of a summons thereon, the delivery of the summons to M. S. seven days before the day appointed for the hearing, the neglect of M. S. to appear, and averred that upon proof of the delivery of the summons, the justices proceeded to determine the matter of complaint, and adjudged the same to be true; it then alleged the issuing of a warrant to cause possession of the premises to be delivered to the churchwarden and overseers, pursuant to stat. 59 Geo. 3, c. 12, which was delivered to the defendant A. to be executed; by virtue of which, in order to deliver peaceable and quiet possession thereof to the said churchwarden, &c., he the defendant A., and the other defendant as his servant and by his command, afterwards and within a reasonable time after the adjudication, and after the delivery of the said warrant, to wit, at the time in the introductory part of the plea mentioned, the same being in the day-time, broke and entered the said dwelling-house; and because the plaintiff and his family were then occupying the same, the plaintiff claiming some title thereto under colour of a certain charter of demise, pretended to be thereof made to him by the said M. S. for the term of his natural life, after her said refusal and neglect, whereas nothing passed thereby, and although the plaintiff and his family were then requested so to do, refused to depart and go out of the said tenement, the defendants then gently ejected, expelled, put out and removed the plaintiff and his family from the said tenement, for the purpose of delivering the peaceable and quiet possession thereof to the said churchwarden and overseers, &c.:—and so justified the trespasses complained of. Held, on special demurrer, first, that the seisin in fee of the Marquis of H., at the time of the demise to the churchwarden and overseers, was sufficiently averred.—Secondly, that the churchwardens and overseers are not, by 59 Geo. 3, c. 12, s. 17, made a complete body corporate, but are only empowered “to accept, take, and hold in the nature of a body corporate,” and therefore that it was not necessary to shew the acceptance of the demise by an instrument under a common seal—Thirdly, that it was no objection that the names of the then churchwardens and overseers were not mentioned, as the grant would be good by the name of office to the then individual officers.—Fourthly, that the express colour given by the plea, by the averment of the charter of demise, was sufficient; for that it gave a colour of title, though it was a bad one.

[S. C. 1 Dowl. (N. S.) 129; 11 L. J. Ex. 83.]

Trespass for breaking and entering a certain dwelling-house and garden of the plaintiff, and making a noise and disturbance therein, and pulling down and removing [363] certain fixtures, and trampling upon, uprooting, and severing certain carrots, &c., and ejecting and expelling the plaintiff from the possession of the house, and keeping him so expelled, and taking his goods, &c.

Plea. That before and at the said times when &c., the Right Hon. Francis Charles Ingram Seymour Conway, Marquis of Hertford, was seised of and in the said dwelling-house and garden, with the appurtenances, in which &c. in the declaration mentioned, in his demesne as of fee; and being so seised, he the said marquis, before the said times when &c., to wit, on the 1st day of January, A.D. 1837, demised the said dwelling-house and garden, with the appurtenances, in which &c., to the then churchwarden and overseers of the poor of the parish of Arrow, to have and to hold the same to the then churchwarden and overseers of the poor of the said parish and their successors, for and on behalf of the said parish, for one whole year from thence next ensuing, and fully to be complete and ended, and so on from year to year, as long as

they the said marquis and the churchwarden and overseers of the poor of the said parish for the time being should respectively please ; by virtue of which said demise, the then churchwarden and overseers of the poor of the said parish, afterwards, and before the said time when &c., to wit, on the day and year last aforesaid, entered into and upon the said dwelling-house and garden, with the appurtenances, in which, &c., and became and were possessed thereof ; and the churchwarden and overseers of the poor of the said parish and their successors have been thenceforth, by virtue of the premises, and of the statute in such case made and provided, possessed of and in the said term and tenancy and interest of and in the said dwelling-house and garden, with the appurtenances, in which &c., for and on behalf of the said parish, according to the form of the statute in such case made and provided ; and that afterwards, and before the said times when &c., to wit, on the 1st day of [364] January, A.D. 1838, the said dwelling-house and garden, with the appurtenances, in which &c., then being vested in the churchwarden and overseers of the poor of the said parish as aforesaid, on behalf of the said parish, and then being a tenement, provided at the charge of the said parish, for the habitations of the poor thereof, one Mary Smith, then being a poor person, had been then permitted by the churchwarden and overseers of the said parish for the time being to occupy the said tenement in which &c., and from thence until and at the time of making the complaint hereinafter mentioned, remained in possession thereof, and had refused and neglected to quit the same, and deliver up possession thereof to the churchwarden and overseers of the poor of the said parish within one month after a certain notice and demand in writing for that purpose, signed by the churchwarden and overseers of the poor of the said parish, which had before then, to wit, on the 11th day of June, in the year aforesaid, been delivered to the said Mary Smith, the said Mary Smith then being and continuing in such occupation and possession under and by virtue of the said permission at the time of such delivery, and since the delivery of which upwards of one month at that time had expired, whereupon one Joseph Bayzand, then being one of the overseers of the poor of the said parish as aforesaid, to wit, on the 13th day of July, in the year aforesaid, according to the form of the statute in such case made and provided, duly preferred an information and complaint upon oath against the said Mary Smith, of the premises aforesaid, before the Rev. Francis Palmer, clerk, one of Her Majesty's justices of the peace in and for the said county of Warwick, and thereupon afterwards, to wit, on the same day and year last aforesaid, the said Rev. Francis Palmer, as such justice as aforesaid, according to the forms of the statute in such case made and provided, duly issued his summons under his hand and seal to the said Mary Smith, and thereby then required the said [365] Mary Smith personally to appear before him the said Rev. Francis Palmer, and such other of Her Majesty's justices of the peace as should be present at the Swan Hotel, in Alcester, in the said county of Warwick, on Monday, the 22nd day of July then next ensuing, then to answer the premises, and then caused the said summons to be delivered to the said Mary Smith, upwards of seven days before the said 22nd day of July in the said summons mentioned, to wit, on the said 13th day of July in the year aforesaid ; and thereupon afterwards, to wit, on the said 22nd day of July, at the said Swan Hotel in Alcester, in the county of Warwick aforesaid, the said Mary Smith, having been duly summoned to appear before the said justices as aforesaid, then neglected to appear before the said justices, that is to say, before the said Reverend Francis Palmer and the Reverend Elias Webb, clerk, two of Her Majesty's justices then present, and it was then proved on oath before the said justices, that the said summons had been delivered to the said Mary Smith as aforesaid, and thereupon the said justices did proceed to hear and determine the matter of the said complaint, according to the form of the statute in such case made and provided, and did find and adjudge the same to be true, and thereupon the said Reverend Francis Palmer, and the said Reverend Elias Webb, clerk, so being such justices for the county of Warwick aforesaid, afterwards, and before the said times when &c., to wit, on the day and year last aforesaid, according to the form of the statute in such case made and provided, duly made and issued their certain warrant under their hands and seals, directed to the constable of the parish of Arrow, in the said county of Warwick, and to all other peace officers within the same county, and then charged and commanded them, and every of them, that they should without delay go to, and cause possession of the premises in question, being the said tenement in which &c., in the said declaration mentioned, to be delivered to the church-[366]-

wardens and overseers of the said parish of Arrow, or some or one of them, pursuant to and in compliance with the directions of an act of Parliament passed in the 59th year of the reign of King George the third, intituled, "An Act to amend the Laws for the Relief of the Poor;" which said warrant afterwards, and before the said time when &c., to wit, on the same day and year, was delivered to the defendant William Adkins, who then, and at the time of the making of the said warrant, and from thence until and at the said times when &c., was constable of the said parish of Arrow, in due form of law to be executed: by virtue of which warrant he the said William Adkins, so being such constable as aforesaid, in order to deliver the peaceable and quiet possession thereof to the said churchwardens and overseers of the said parish, and the other defendant William Blackband, as the servant and by the command of the said William Adkins, and aiding and assisting him as constable, afterwards and within a reasonable time after the said finding and adjudication, and after the making and delivery of the said warrant, to wit, at the said time in the introductory part of this plea mentioned, and when &c., the same being in the day-time, broke and entered into the said dwelling-house and garden, with the appurtenances, in which &c., in the said declaration mentioned; and because the plaintiff and his family, who were then occupying the said tenement as in the declaration mentioned, the plaintiff claiming some title thereto under colour of a certain charter of demise, pretended to be thereof made to him by the said Mary Smith for the term of his natural life, after her said refusal and neglect, whereas nothing passed thereby; and although the plaintiff and his family were then requested so to do, refused to depart and go out of the said tenement, the defendants then gently ejected, expelled, put out, and removed the said plaintiff and his family from the said tenement in the said declaration mentioned, for the purpose of delivering the peaceable [367] and quiet possession thereof to the churchwardens and overseers of the said parish:—and so justified the trespasses complained of.

Special demurrer, and joinder in demurrer.

The following were the points stated for argument on the part of the plaintiff:—That it does not appear in the said plea with sufficient distinctness, that the Marquis of Hertford was seised of the messuage &c. at the time of the demise to the churchwardens and overseers, or that the demise was by deed, or accepted by the churchwardens and overseers by deed under their seal: and that it appears in the plea that the demise was granted more than a year before the times when &c., when the demise was only for one whole year, and that no tenancy could be implied in the succeeding churchwardens and overseers, after the expiration of the first year, but the party in actual possession would become tenant at will to the said marquis: and that the names of the persons to whom the marquis demised should have been set forth, and the names of the persons who entered under the demise should have been stated, and the names of the persons by whom Mary Smith was permitted to occupy should have been stated, and of the persons by whom the notice and demand was signed, and of the persons to whom the possession was ordered to be given: and that it is not positively stated that notice and demand in writing to deliver up possession was delivered to the said Mary Smith; and that it does not appear that the persons who signed the said notice were churchwardens and overseers at the time the notice and demand were signed; nor how or in what manner Mary Smith was permitted to occupy, or what was the nature of the tenancy, or under whom and when it commenced; and that it does not appear that Mary Smith was a person who could be turned out of possession according to the statute; nor that Mary Smith had refused to give up possession one month after notice; nor that the justices in the plea mentioned were at the Swan Hotel when Mary Smith neglected to appear; nor that the justices proceeded to determine the complaint at that place. And that the plea does not give colour to the plaintiff, or derive it from the proper party.

The case was argued on the 11th of May, by

Petersdorff, in support of the demurrer. The first objection to the plea is, that it does not aver a seisin in fee at the time of the demise to the churchwardens and overseers. In Com. Dig. "Pleader," E. 5, it is said, "If the defendant, in trespass quare clausum fregit, pleads that it was his freehold, he must say, at the time of the trespass, otherwise it will be bad." The allegation in the plea that the locus in quo is a certain tenement belonging to the parish of Arrow, must be taken most strongly against the defendant; and if it refers to the time when the trespass was committed, it is an immaterial allegation. Another objection is, that the lease does not appear to have

been by deed. By the stat. 59 Geo. 3, c. 12, s. 17, the land is vested in the churchwardens and overseers as a corporate body; and the conveyance, therefore, must be by deed, and accepted by deed under the corporation seal. [Parke, B. Is there any authority for saying that a demise for a year must be by an instrument under seal?] It may not be so in the case of an ordinary individual, but it must in the case of a corporation. But further, the plea affects to give express colour, but the party from whom the colourable right is alleged to have been derived, appears on the face of the plea to be destitute of all right or title, either to retain possession or to enter upon the premises.

Cowling, in support of the plea. As to the first point: in *Rex v. Somerton* (7 B. & C. 463), an indictment charged that A. B., on &c., being the servant of J. H., on the same day &c., [369] one gold ring &c., then and there being in the possession of J. H., and being his goods and chattels, feloniously did steal: and it was held that the fair import of the charge was, that A. B. was the servant of J. H. at the time when the theft was committed. That is in point to the present case. Then as to the question of a demise by deed, the churchwardens are not a corporation properly so called, but merely a quasi corporation. In *Alderman v. Neate* (4 M. & W. 704), it was expressly held that a lease vested in the overseers of the poor by virtue of the stat. 59 Geo. 3, c. 12, s. 17. There Lord Abinger, C. B., in delivering the judgment of the Court, said, "The next question is, whether, supposing this to be a lease, it vested in the overseers of the poor under 59 Geo. 3, c. 12, s. 17. That question has been ingeniously argued before us; we do not, however, consider it as being *res integra*, inasmuch as it has been decided by the Court of Queen's Bench, that the statute does apply in all cases; and as the agreement here is a grant of property to be used as a poor-house, we think it is within the provisions of the statute, and accordingly that the property is vested in the overseers for the time being." Then with respect to the giving of colour, that, it is submitted, is properly done. The defendants do not deny the right of possession.

Petersdorff, in reply. There is a difference between the wording of this plea and that of the indictment in *Rex v. Somerton*, because there the word "then" was used. [Parke, B. Here the word "so" means in his demesne as of fee, and it amounts to an allegation that he was seised at the time of the demise.] Then as to the demise to the churchwardens and overseers, it was held in *Woodcock v. Gibson* (4 B. & C. 462; 6 D. & R. 524) that the 59 Geo. 3, c. 12, s. 17, vests in the churchwardens and overseers of the poor, in the nature of a body corporate, [370] all buildings, lands, and hereditaments belonging to the parish. Besides, it was incumbent on these defendants to make out a title, by shewing distinctly in the plea that a right existed in them. [Parke, B. The first objection cannot be supported. As to the remaining points, we will take time to consider our judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. On the argument of the demurrer to the plea in this case, Mr. Petersdorff took several objections. The first, that the seisin in fee of the Marquis of Hertford, at the time of the demise to the churchwardens and overseers of the poor, was not averred, was overruled by the Court. A second was, that the churchwardens and overseers did not accept the demise by some instrument under a common seal. We think that the answer to this objection is, that they are not made by the act, 59 Geo. 3, c. 12, s. 17, a complete body corporate, but they are only empowered "to accept, take, and hold, in the nature of a body corporate." The use of these terms, and the circumstance that no corporate name is given to them, but that all actions and suits are to be instituted in the natural names of the individuals, with the addition of their name of office, appear to indicate the intention of the legislature to provide for the due care of the parochial property, by vesting it in the churchwardens and overseers for the time being, by what Lord Ellenborough terms a species of parliamentary succession, (*Johnson v. Hodgson* (8 East, 38),) without constituting them a proper body corporate, with all the legal incidents and restrictions belonging to such a body by the common law. It appears to us that the demise to the churchwardens and overseers was sufficient to vest the property [371] in them on behalf of the parish, by their assent and entry, without any acceptance by them by an instrument under the common seal of the supposed corporation, as might have been necessary in the case of a proper corporation, according to the rules of the common law: *Predyman v. Wodry*

(Cro. Jac. 110). Under this head, another objection is stated in the special demurrer, which was not insisted upon on the argument, namely, that the names of the then churchwardens and overseers are not mentioned; but the grant would be good, by the name of office, to those individual officers, which would be a sufficient designation; Com. Dig., Capacity, (B. 4), Grant, (A. 2); though, when they sue or are sued, their individual names must be used, by the 59 Geo. 3.

The only remaining objection necessary to be noticed is, that the express colour is bad; colour is given in the usual mode by the averment of a charter of demise, by which nothing passed. It is contended, that as this is averred to have been after the refusal and neglect of Mary Smith, the person in possession, to deliver up the house, the supposed charter of demise is altogether void, and gives no colour of title. But that objection is unfounded; it does give a colour of title, though it is in reality a bad one, as colour by charter of demise for life without livery always is. The judgment is therefore for the defendants.

Judgment for the defendants.

[372] PICKFORD AND ANOTHER v. THE GRAND JUNCTION RAILWAY COMPANY. Exch. of Pleas. May 13, 1841.—A declaration in case against a common carrier for refusing to carry goods, averred that the plaintiff “was ready and willing and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage, and conveyance of the said parcel:”—Held, on special demurrer, that the averment was sufficient, and that it was not necessary to aver an actual tender of money for the carriage.

[S. C. 2 Railw. Cas. 592; 9 Dowl. P. C. 766; 10 L. J. Ex. 342; 5 Jur. 731.

See further, 10 M. & W. 399.]

Case. The declaration stated, that whereas the defendants, before and at the time hereinafter mentioned, to wit, on the 24th November, 1840, were common carriers of goods and chattels for hire, from Birmingham, in the county of Warwick, to Manchester, in the county of Lancaster, and from Manchester aforesaid to Birmingham aforesaid, and thereupon heretofore, to wit, on the said 24th November, 1840, the plaintiffs caused to be tendered to the defendants, they being such common carriers as aforesaid, to wit, at a certain place in Birmingham aforesaid, being the place by them then used in the way of their said business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed as such common carriers as aforesaid, a certain parcel of goods of the plaintiffs, to wit, a hamper containing divers goods then of great value, to wit, of the value of £100; and then requested the defendants to receive, and to carry and convey the same from Birmingham aforesaid to Manchester aforesaid; and the defendants then had ample convenience for receiving and carrying and conveying the same according to the said requirement of the plaintiffs in that behalf; and the plaintiffs were then ready and willing, and then offered to pay to the defendants, such sum of money as the defendants were legally entitled to receive for the receipt and carriage and conveyance of the said parcel, and all other charges whatsoever which the defendants were then authorized or in anywise entitled to make or receive for the receipt, carriage, and conveyance of the said parcel from Birmingham aforesaid to Manchester aforesaid, to wit, the sum of £2; and the defendants then had notice of the premises: yet the defendants, not regarding their duty as such common carriers as aforesaid, but con-[373]-triving and wrongfully and unjustly intending to injure the plaintiffs, though they did receive as aforesaid, and carry and convey, the goods of divers other persons on that occasion from Birmingham aforesaid to Manchester aforesaid, did not nor would, at the said time when they were so requested as aforesaid, or at any time afterwards, receive the said parcel, or carry or convey the same from Birmingham aforesaid to Manchester aforesaid, but wholly neglected and refused so to do, though they might and could, and ought as such carriers to have received and carried and conveyed the same as aforesaid; whereby the plaintiffs were then forced and obliged to carry and convey the said parcel from Birmingham aforesaid to Manchester aforesaid, with great labour, cost, and inconvenience, and were put to great expense, &c., in and about the carriage and conveyance of the said parcel, &c., and were and are otherwise greatly annoyed, injured, inconvenienced, and damaged.

Special demurrer, assigning for cause, that the declaration did not aver a tender to the defendants of the money which they were entitled to receive for the carriage of the goods. Joinder in demurrer.

The case was argued on the 11th of May, by

Cowling, in support of the demurrer. The question in this case is, whether, in a declaration in case against common carriers for refusing to convey the plaintiffs' goods, it is necessary to aver a tender of the sum of money which the defendants are legally entitled to charge for the carriage? It is submitted that it is; and that the averment in this declaration, that "the plaintiffs were ready and willing, and offered to pay," is insufficient. The case would be different, if the declaration disclosed any special circumstances which amounted to a dispensation with the tender, or shewed that it was impossible to make one. The general rule is, that no [374] man is bound to deal or traffic with another; but in the case of carriers and innkeepers the law is different. It compels them, from motives of policy, to deal with all persons who may come to them; but they are not bound to deal on credit, but are allowed by law to exact the price of their labour, or of the provisions they supply, as a condition precedent. [Parke, B. Can it be necessary to tender the amount of the carriage, as a condition precedent to the performance of the carrier's contract? By his contract, he is to convey the goods safely to their journey's end; and if they are lost on the road, he would not be entitled to anything for the carriage.] The authorities are in favour of the principle contended for. In *Pinchon's case* (9 Rep. 87 (i)), it is said, that "a victualler or hostler is not compellable to deliver victuals till he be paid for them in hand," citing 10 H. 7, 8 a., and 39 H. 6, 19 a. So, in *Hawkins's Pleas of the Crown*, Book I., c. 32, s. 2, it is said, "if one who keeps a common inn refuse either to receive a traveller as a guest in his house, or to find him victuals or lodgings, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the King." In *Jackson v. Rogers* (2 Show. 327. See also 1 Wms. Saund. 312, n. 2), which was an action on the case against a common carrier for refusing to carry goods, Jefferies, C. J., held, "that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road, who refuses to shoe my horse, being tendered satisfaction for the same." In *Story on Bailments*, c. 8, s. 508, it is stated to be "one of the duties of a common carrier to receive and carry all goods offered for transportation, upon receiving a suitable hire. This is the result of his public employment as a carrier; and, by the custom of the realm, if he will not carry goods for a reasonable compensation, [375] upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is reasonable ground for the refusal." With respect to the lien which a carrier has on the goods intrusted to him, he is in no better situation than an ordinary tradesman; he has only a particular, and not a general lien. The value of the goods may not be an adequate compensation, and he may know the bailor to be in insolvent circumstances. In *Rushforth v. Hadfield* (7 East, 224; 3 Smith, 221), it was held that a carrier has no general lien, but only for the carriage of the particular goods. Parke, B. How is a party to tender the sum for the carriage, when he does not know the amount?] He must tender a reasonable sum.

Martin, in support of the declaration. The averment, that the plaintiffs were ready and willing and offered to pay such sum as the defendants were legally entitled to receive, is sufficient, without averring an actual tender. A person who delivers goods to a carrier cannot be expected to know the precise amount of the carriage; and if he offers to pay what the carrier is entitled to charge, he does all that the law requires of him. The authority quoted for the position in *Story on Bailments* is *Bacon's Abr., Carriers* (B.); but there the word "offered" is made use of, and it is evident that the word "tender" is not used in its strict sense, either in the notes to *Williams's Saunders*, or in *Hawkins*, but as synonymous with "offer." It is clear from the context, in all these authorities, that a strict legal tender was not contemplated. The words tender and offer are used in several instances as meaning the same thing. A strictly legal tender is only necessary, and indeed can only be made, where there is a pre-existing debt, the amount of which may be ascertained with precision by the party tendering it. No precedent of a declaration against a carrier for refusing to carry goods is to be found in the books; but in *Chitty on Pleading* (6th Edit. vol. 2, p. 468). [376] a form of declaration is given against an innkeeper for refusing to entertain a guest,

and there the averment is, "that the plaintiff was then ready and willing, and offered to pay the defendant a reasonable sum of money for such lodging." In *Rawson v. Johnson* (1 East, 203), which was an action for the non-delivery of malt, which the defendant had undertaken to deliver on request, at a certain price, it was held sufficient for the plaintiffs in the declaration to aver such request, and that they were ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring any actual tender of the price; and in that case Lord Kenyon said, "Under this averment the plaintiffs must have proved that they were prepared to tender and pay the money, if the defendant had been ready to receive it, and to have delivered the goods; but it cannot be necessary, in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down, in order to take it up again. It would be repugnant to common sense to require it." There, it is true, the duty was voluntarily imposed, whereas in the case of carriers it is imposed by law; but in both cases the principle is the same. [Parke, B. In this case the receipt of the goods, and the payment for the carriage, would be contemporaneous acts.] The plaintiffs were not bound to pay the money until the goods were received, and the price of the carriage named; and they need not aver more than they are bound to prove. In *Wilks v. Atkinson* (6 Taunt. 11; 1 Marsh. 412), which was an action for not delivering oil according to agreement, after demand made, the declaration averred, "that the plaintiff, on &c., requested the defendant to deliver it; but that though the plaintiff was always ready and willing to accept it, and pay for the same on the terms agreed upon, [377] yet the defendant would not deliver it," &c. Gibbs, C. J., said, "that the delivery of the oil and the payment for it were to be concomitant acts; and that it was not necessary for the plaintiff to prove that he had offered the money to the defendant, till the defendant was ready to perform his part of the contract by delivering the oil." *Levy v. Lord Herbert* (7 Taunt. 314; 1 Moore, 56), and *Waterhouse v. Skinner* (2 Bos. & Pul. 447), are authorities to the same effect. But it may well be questioned whether carriers are entitled to be paid in advance for the carriage of goods. The law casts upon them the duty of carrying the goods, and they must rely upon their lien as a security for the payment for the carriage.

Cowling replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. (After stating the pleadings, he continued):—It was admitted on the argument in this case, that the defendants, in their capacity of common carriers, are bound to carry all goods presented to them for the purpose, but it was contended that that is only on being paid in ready money: and the simple question is, whether, in order to support an action against them for refusing to carry, on the offer of a reasonable sum, it is necessary that the plaintiffs should have made what the law terms a strict tender, in the form required by law. Now the Court think that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it, in which case the tender stands in the place of payment, and is in fact a payment, so far as it is in the power of the party tendering to make it one, but which remains incomplete only [378] because the party to whom the money is offered refuses to accept it. Such a tender we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods. The case of *Rawson v. Johnson*, and the other cases cited by Mr. Martin, clearly shew, that whenever a duty is cast on a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty. Here the acts to be done by the plaintiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs, until the carrier receives the goods, which he is bound to carry. Our judgment, therefore, must be for the plaintiffs; but as there are some other questions pending between the parties, which they are desirous of having decided in the present action, the defendants may have until the first day in next term to apply at chambers for leave to amend, on payment of costs.

ALDERSON, B. In cases of this nature, it is enough if the party be ready and willing to deal for ready money, and notify that readiness and willingness to the other side.

Judgment for the plaintiffs.

[379] SHARP v. KEY. Exch. of Pleas. May 11, 1841.—Where rent became due after the delivery of a writ of elegit to the sheriff, but before the inquisition was taken thereon :—Held, that the execution creditor was not entitled to the rent.

[S. C. 9 Dowl. P. C. 770 ; 10 L. J. Ex. 304.]

Covenant on an indenture of lease, by lessor against assignee of lessee, for a quarter's rent due the 29th of September, 1840.

The defendant pleaded that, before the rent became due, one W. Sage, in the Court of Exchequer, recovered a judgment against the plaintiff for a certain debt and damages ; that the debt and damages remaining unsatisfied, W. Sage, before the said rent became in arrear, for obtaining satisfaction, sued out a writ of elegit, and delivered it to the sheriff of Middlesex, indorsed to levy 27l. 16s. ; that W. Sage then gave notice to the defendant to pay all future sums of the rent to accrue and become due to him, W. Sage : by virtue of which writ of elegit, afterwards, a certain inquisition was had and taken at the sheriff's office, to wit, on the 16th of October, 1840, and by adjournment on the 23rd day of October, 1840, by which inquisition it was found that the plaintiff, on the 3rd day of July, 1838, was seised in his demesne as of fee of and in certain premises, &c. ; that those premises, with their appurtenances, the sheriff caused to be delivered to W. Sage, to hold until the debt and interest should be levied ; that the said premises are the same as in the indenture in the declaration mentioned, and that the said judgment was in full force, and the debt and damages unpaid, at the time when the rent aforesaid became due, and at the time of the commencement of this suit ; and the said W. Sage, by means of the premises, thereby then became and was entitled to demand of and from the defendant the said rent, and therefore, before the commencement of this suit, demanded and claimed the same, &c. Verification.

Special demurrer, assigning for causes, that the delivery of the premises under the writ and inquisition are a symbolical and not an actual delivery, and it does not appear in the [380] plea that W. Sage evicted or ejected the defendant, without which he was not of right entitled to receive the rents ; nor is it stated that the defendant, before the rent accrued due, attorned to W. Sage ; that it does not appear that the rent was due after the taking of the inquisition, or after the delivery of the premises to W. Sage ; that it does not appear what the nature of the plaintiff's estate was, or whether the same was capable of being extended under an elegit ; and that it is not averred that the defendant paid the rent to W. Sage.

Cresswell, in support of the demurrer, was stopped by the Court.

Bramwell, in support of the plea. The pleadings shew that the writ of elegit was delivered to the sheriff before the rent became due, although the inquisition was not taken until after. The question is, whether the inquisition had relation back to the time of the delivery of the writ to the sheriff, so as to entitle the execution creditor to the rent. Taking it to be realty, it would be bound from the time of the judgment ; taking it to be personalty, from the time of the delivery of the writ to the sheriff. It is clear that the rent is a part of the reversion. [Parke, B. The rent in arrear is no part of the reversion ; it is a mere chose in action. Is there any authority to shew that the execution creditor is entitled to it ?] There is no express authority.

Per Curiam. Judgment for the plaintiff.

End of Easter Term.

[381] REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER, AND EXCHEQUER CHAMBER, TRINITY TERM, 4 VICTORIE.

SMITH v. ROYSTON. Exch. of Pleas. May 22, 1841.—On a plea of liberum tenementum to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to that part of the close

on which the trespass was committed, and is not bound to prove a title to the whole close.

[S. C. 1 Dowl. (N. S.) 124; 10 L. J. Ex. 437.]

Trespass for breaking and entering a close of the plaintiff, called the Buck Leap, in the county of Derby, and erecting a building thereon, and keeping and continuing the same so erected thereon, &c. Plea, that the close in which &c., was and is the close, soil, and freehold of the defendant. Issue thereon.

At the trial before Lord Abinger, C. B., at the last assizes for the county of Derby, it appeared that the Buck Leap was a slip of land, about twelve feet in width, lying outside the hedge of the plaintiff's land, and not divided by any fence from a field of the defendant's which immediately adjoined it. The plaintiff proved acts of ownership exercised by him over the Buck Leap, to the extent of about four feet from his hedge. The building erected by the defendant was not within that limit, but was just within the distance of twelve feet from the plaintiff's hedge: and the defendant proved acts of ownership on that part of the land upon which the building was [382] erected. The Lord Chief Baron, in summing up, told the jury that the defendant was not bound, in support of his plea of soil and freehold, to prove that the whole of the Buck Leap was his property, but that he was entitled to a verdict if he proved that that portion of it in which the alleged trespass was committed was his. The jury having found a verdict for the defendant,

Balguy, in Easter Term, obtained a rule nisi for a new trial, on the ground of misdirection. In the same term,

Whitehurst and Gale shewed cause. The question in the cause, upon this issue, was, whether the identical spot on which the building was erected was or was not the soil and freehold of the defendant, and he was not bound to prove that the whole of the close named in the declaration belonged to him; he was entitled to succeed if he shewed himself entitled to that part of it on which the trespass was committed; and it is immaterial whether the surrounding land, called the Buck Leap, was the plaintiff's or not. The leading case on this subject is that of *Cocker v. Crompton* (1 B. & Cr. 489; 2 D. & R. 719), which decided that where a plaintiff in trespass names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not bound to new assign, but may recover on proof of a trespass in any close of his bearing the name given in the declaration, although the defendant have also a close in the same parish known by the same name. Take the converse of that case—suppose the plaintiff had two Buck Leaps in this parish, and proved a trespass in the close in question; could he have defeated the defendant by proving his title to the other? And the question is the same, whether there be two closes of the same name, divided by visible fences, or an open field divided only by [383] an ideal line. The question is, whose is the spot where the trespass was committed? that is, “the close in which, &c.” If the plaintiff denies that the place justified is that wherein the trespass was committed, he should new assign. [Alderson, B. The whole question is, whether the plea necessarily means that the defendant had a right to the whole Buck Leap. According to your argument, your case is that the defendant never did break and enter the plaintiff's close called the Buck Leap at all.] The defendant could plead no other plea than this, admitting the plaintiff's possession. That of which the plaintiff is in rightful, and that of which he is in wrongful possession, goes by the common name of Buck Leap. The plea of not guilty would only have put in issue the breaking and entering a close of the same name with that in the declaration: it would not have denied the plaintiff's possession. [Lord Abinger, C. B. And you would say, that if you had pleaded not possessed, it might as well be argued that that applied to the whole, as your present plea.] Yes. [Alderson, B. Suppose the plaintiff had described the close by abutments: is not the name, with the evidence, equivalent to abutments? Do not you undertake to prove that the whole is yours, the description of which by name you accept, it being hereafter to be proved what is its extent?] Where it is described by abutments, it has no attribute common to anything beyond the metes and bounds; but even then, if the place of the trespass could be ascertained, it is submitted that the defendant would not be bound to prove the whole to be his soil and freehold: and the same holds where it is described by name: *Cooke v. Jackson* (9 D. & R. 495). In *Tapley v. Wainwright* (5 B. & Adol. 395; 2 Nev. & M. 697), it was alleged in the declaration that “the

said closes in which &c.," for twenty years and more, had been separated from the residue of a waste, and enjoyed in severalty; and it was held that this allegation [384] was divisible, and was satisfied by proof that any part of the closes, in which the trespasses were committed, had been so inclosed for that period. If that be the rule of construction applied by the Court to the declaration, the defendant also must so understand it; and therefore, when the defendant pleaded liberum tenementum, he must have assumed the plaintiff to apply the name Buck Leap only to the part on which the trespass is committed. Where the close is set out by abutments, and a plea of leave and license pleaded, if there were any excess of the license, by going on a different part, the plaintiff must new assign, otherwise the defendant would succeed by proof of a license over a single acre: *Ditcham v. Bond* (3 Camp. 524). The case of *Hawke v. Bacon* (2 Taunt. 156) must be taken to have been overruled by *Tapley v. Wainwright*, and *Richards v. Peake* (2 B. & Cr. 918; 4 D. & R. 572). In the latter case Abbott, C. J., says—"The words, the closes in which, &c., in the declaration mentioned, confine that allegation to the spot where the trespass was committed; then it becomes a question of fact whether the trespass was committed in that part of Burgey Cleave Garden which had been inclosed and enjoyed in severalty." *Stevens v. Whistler* (11 East, 51) is to the same effect. And in *Bassett v. Mitchell* (2 B. & Adol. 99), where the justification was, that the close in which &c., was part of an allotment of six acres, and it appeared that the close, which was set out by abutments, was not all within the allotment, but the part wherein the trespass occurred was, it was held that the justification was made out. That case is expressly in point for the defendant.

Balguy and N. R. Clarke, contra. If the defendant chose to plead liberum tenementum, having in reality a title to part only of the close described by name in the declaration, [385] he ought in his plea to have set out by metes and bounds the part claimed by him, and to have alleged that to be the place in which the supposed trespass was committed. Not having done so, he must be taken to assert a title to the whole of the close named in the declaration. The case of *Tapley v. Wainwright* is no authority for the defendant: it only proceeded upon the established rule, that the plaintiff may prove a trespass in any part of the close mentioned in the declaration. In *Bassett v. Mitchell*, the question was different from the present. If this had been the case of two closes both called the Buck Leap, the case of *Cocker v. Crompton* is a distinct authority that the defendant must have set out his close by metes and bounds; and the same rule must equally apply where each party is entitled to a part of one close bearing the same name. If upon this evidence the defendant is entitled to succeed, this injustice will follow, that the record will hereafter be evidence of the defendant's title to the whole of the close called the Buck Leap.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. This was an application made by Mr. Balguy for a new trial, in a case tried before Lord Abinger, at the last assizes for the county of Warwick, and which was argued in the course of the last term before Lord Abinger, my Brother Rolfe, and myself. It was an action of trespass for breaking and entering the close of the plaintiff, called the Buck Leap, and building thereon. The only plea of the defendant upon the record was that the close in which &c., was the soil and freehold of the defendant. Upon this plea issue was joined. It must be taken as a fact for the purposes of the present motion, that the close called the Buck Leap was a strip of ground comprising a breadth of about twelve feet, and lying outside the [386] hedge of the plaintiff, and undivided from the defendant's adjoining field. It must also be admitted, that the plaintiff gave some evidence, upon which the opinion of the jury might have been taken, of acts of ownership extending to about four feet in width measured from the defendant's hedge; but that the building erected by the defendant, the subject of the action of trespass, was not within that limit, although clearly within the distance of the twelve feet from the hedge.

The misdirection complained of by the plaintiff's counsel is, that the learned Judge was wrong in telling the jury, that upon these facts they ought to find for the defendant upon this issue. And that question is in substance, whether, upon the issue that the close in which &c., was the soil and freehold of the defendant, the defendant undertakes to prove the whole of the close called the Buck Leap to be his property, or only that part or portion of it upon which the trespass complained of had been

committed. And upon full consideration, we think that the latter is the true view of the pleadings, and consequently that the direction was correct in point of law.

There seems to us to be no distinction in the cases where the declaration describes the close in which &c., by metes and bounds, or by name only. In both cases, it must be taken to mean a complaint that the defendant committed a trespass upon a piece of land in the lawful possession of the plaintiff, described in the one case as being part of a close having certain metes and bounds, and in the other case, as part of a close named A. The metes and bounds in the one case, and the name in the other, serve only to define to the defendant what close it is, for the trespassing on a part of which the plaintiff brings his suit. When therefore the defendant, following the declaration, asserts in his plea that the close in which &c. is his soil and freehold, we think his plea means that the part of the close so described in the declaration, on which he [387] admits that he has done the acts complained of, was his soil and freehold. By this plea, therefore, he undertakes to prove two propositions—first, that some part of the described close belongs to him; and secondly, that it is on this part of the close that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed.

This view of the pleadings seems to us to be consistent with all the authorities cited in the argument. For the plaintiff we were referred principally to the case of *Cocker v. Crompton*. There, both plaintiff and defendant had each a close called the Fold Yard. The defendant had pleaded to a declaration for breaking and entering the plaintiff's close called the Fold Yard, that the close in which &c. was his soil and freehold. There it appeared that the trespass committed was in the plaintiff's Fold Yard; and the Court held that the plaintiff was right, and that where a close is described by name or by abutments, there can be no new assignment. But there the defendant failed to prove the second proposition raised by the plea, viz. that the act complained of was committed in that close, or in that part of the close, which belonged to him. Here, on the contrary, the plaintiff and the defendant are, for the purposes of this argument, supposed each to have a portion of the close called the Buck Leap, and the acts complained of were done in that part belonging to the defendant. This case, therefore, falls expressly within the authority of *Richards v. Peake*, where the Court held the words "the close in which &c.," to amount to a divisible allegation, and to be satisfied by proof that the defence stated was applicable to that part of the close in which the supposed trespasses were committed. The same rule was also laid down in *Bassett v. Mitchell*, and in *Tupley v. Wainwright*, which authorities seem to be conclusive on the subject.

It was urged, that the effect of the finding upon this plea [388] in future will be to conclude the right of the soil of the Buck Leap as belonging to the defendant. But this is not so. If the rule we have laid down, as being the true rule deducible from the authorities, be correct, the only effect of this record, if given hereafter in evidence between the parties to it, or those claiming under them, will be to shew conclusively that some part of the Buck Leap belongs to the defendant; and further, if the party giving the record in evidence can shew where the trespass in the declaration was actually committed, the record will be conclusive that such part of the Buck Leap belonged to the defendant. But the record will prove no more than this, and a proof to this extent is only in full conformity with principle and justice.

On the whole, we are of opinion that this rule must be discharged.

Rule discharged.

RUTTER v. CHAPMAN. Exch. of Pleas. May 24, 1841.—In an action by the coroner of the county of Lancaster for disturbance in his office, the plea set forth a charter granted by the Crown to the borough of Manchester, pursuant to the stat. 1 Vict. c. 78, s. 49, and the issue in the cause was, whether the petition for such charter was the petition of the inhabitant householders of the borough, and whether the charter was accepted by them. The defendant had witnesses in attendance at the trial, to prove the genuineness of the signatures to the original charter, which was lodged at the Privy Council office:—Held, that the charter was a document which the defendant ought to give a notice to admit and inspect, within the rule of H. T. 4 Will. 4, s. 20, and that, not having done so, he was not entitled to the costs of the witnesses above mentioned. That rule extends

to every document which a party proposes to adduce in evidence, and is not confined to documents in his custody or control.

[S. C. 1 Dowl. (N. S.) 118 ; 10 L. J. Ex. 495 ; 5 Jur. 610.]

At the trial of this cause, (which was an action by the plaintiff for disturbance in his office of coroner for the county of Lancaster, brought to try the validity of the charter granted by the Crown to the borough of Manchester (see ante, p. 1), the defendant had in attendance a number of witnesses (who, however, in consequence of the course the [389] cause took, were not actually called), to prove the signatures of the petitioners in favour of the charter. The petition had been lodged at the Privy Council Office, pursuant to the stat. 1 Vict. c. 78, s. 49. No notice had been given by the defendant, under the rule of H. T. 4 Will. 4, s. 20, to admit and inspect the petition. The Master having, on taxation, allowed the defendant the costs of the above witnesses,

Cresswell, in Easter Term, obtained a rule to shew cause why the taxation should not be reviewed, and the costs of those witnesses disallowed : against which

The Attorney-General and Crompton now shewed cause. This is not a case falling within the operation of the rule of H. T. 4 Will 4. That rule provides, that "either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, or to the like effect, of his intention to adduce in evidence certain written or printed documents ; and unless the adverse party shall consent, by indorsement on such notice within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a judge why he should not consent to such admission, or in case of refusal be subject to pay the costs of proof ; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge, &c., certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause." And it is afterwards provided, that "no costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as [390] aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons, that he does not think it reasonable to require it." Then the form of notice referred to in the rule is as follows:—"Take notice, that the plaintiff [or defendant] in this cause, proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his attorney or agent, at on , between the hours of , and that the defendant [or plaintiff] will be required to admit, that such of the said documents as are herein specified to be originals, were respectively written, signed, or executed, as they purport respectively to have been," &c. &c. First, even if this petition had been a document in the possession or within the control of the defendant, it is not such a document as is intended by this rule. The rule applies to documents which are, as such, either genuine or spurious ; but the question in this case was not whether this petition was to be recorded as genuine, or rejected as spurious, but to what extent it was the petition of the inhabitant householders of the borough. The rule applies only to cases in which there can be an indorsement by the Judge that the document was proved to his satisfaction. [Alderson, B. Is not each signature a written document?] Not within the meaning of this rule. The mere proof of the signatures would be insufficient ; it was necessary further to shew that the subscribers were in fact inhabitant householders within the borough. It is clear the defendant could not have given notice in this case to inspect and admit a copy : the original itself must have been produced. What would be "the admission specified" in this case?—That all were genuine signatures of inhabitant householders. The rule looks to a case where, in proving the document, you prove the whole of it, and does not apply to such a case as this, which involves the proof of an extrinsic fact.

[391] But secondly, the rule can only reasonably be applied to documents which are in the possession or within the control of the party giving the notice, and of which, therefore, he is able to give the other party an inspection. It can only apply to cases in which the form of notice subjoined to the rule, or one to the like effect, can

be given. [Alderson, B. There is nothing in the terms of the rule so to limit its operation: the difficulty of access to the document may, indeed, be an answer to the application when before the Judge. Parke, B. If the rule were to be so restricted, parties would always evade it by setting up a lien in some third person.] Why should the party be called upon to admit that of which an inspection cannot be afforded him? The rule assumes that he will have an opportunity of admitting it on inspection, without an application to a Judge. The notice in this case would clearly have been absurd and unavailing. [Alderson, B. When you ask to admit a copy, that equally involves the power of seeing that it is a copy, that is, of seeing the original. The meaning of the rule was, that every person should have an opportunity of making an admission of documentary evidence, and so saving expense. We ought rather to enlarge than restrict it.] Can it be said that the rule applies to every document in every body's hands, whether hostile or otherwise? [Parke, B. To every document you mean to produce in evidence, and which you must therefore have the means of getting at.] It appears strange to say you shall give notice to inspect a document, when you know the other party cannot inspect it.

Cresswell (Cowling with him) *contra*. This case is clearly within both the words and the spirit of the rule. It is first objected, that this is not such a document as the rule applies to: but that objection is founded upon a fallacy. The petition is the joint and several petition of all who signed it, and therefore, as to each signature, it is a question as [392] to the admission of a written document. In every case it is necessary to prove something beyond the mere document itself. In the case of a bond, for example, it is necessary to prove not only the handwriting, but also the identity of the obligor. [Alderson, B. It must always be a compound question. Parke, B. Both are costs of proving the document—i.e., of proving that it is the petition of the parties whose document it professes to be, that is to say, of the inhabitant householders.] He was then stopped by the Court.

PARKE, B. I am of opinion that this rule must be made absolute. We are called upon in this case to construe one of our general rules. It is said that we ought to limit it to cases in which the document is within the power or possession of the party who seeks to adduce it in evidence. That, however, is a qualification of the rule, which, unless we could see clearly that it was within the contemplation of its framers—which we do not—we certainly ought not to annex to it. Nothing of the kind is expressed in the rule itself, or necessarily to be implied from the terms of it. The practice established by this rule, of giving each of the parties to a cause an opportunity, before the trial, of preventing by timely admissions the expense of proving documents proposed to be given in evidence by the adverse party, is one of a most salutary nature. And the fact of the document not being in the possession or power of the party who seeks to adduce it in evidence, works no hardship upon his adversary; because, in order to obviate any mischief or hardship arising from the difficulty of access to it, the Judge has always the power to say that the document is not one which the party ought reasonably to be called upon to admit: and the result would then be, that the costs of proving it would be costs in the cause. In such a case as the present, the Judge would take into his consideration whether the document was of such a nature [393] that access to it might be obtained—as in the actual case, whether the Privy Council would have allowed an inspection of it; if there existed a positive restriction against inspecting it at all, of course he would make no order. In a case where the document is in the possession of a hostile party who refuses to produce it, so that the party giving notice to admit cannot have full knowledge of its contents, he may give a special notice; although that is not likely to be a case of frequent occurrence, because a party is not likely to adduce in evidence a document which he has not previously seen, and of the nature of which he is ignorant. It is to be observed, that the rule does not say imperatively that the notice is in all cases to follow the form there given, but that it shall be in that form, “or to the like effect;” shewing the intention of the framers of the rule, that some latitude was to be allowed where circumstances rendered a deviation from the form necessary. But there is no such limitation in the rule itself as has been contended for, and it is most beneficial to construe it generally, in order to the general diminution of expense. The rule to review the taxation must therefore be absolute.

ALDERSON, B. I am of the same opinion. I think we ought to construe the rule liberally, and not to restrain it. The difficulty suggested in this case is provided for

by the discretion given to the Judge, when the summons is heard before him. Here it would have been a reasonable term to impose upon the party requiring the admission, that, as he had obtained an inspection of the document for himself, he should obtain it for the other party.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion, although I had at first some doubt on the subject. But for this rule, the defendant would clearly have been entitled to these costs; [394] the question is, does this rule entitle him to them? It is said, that these witnesses are not adduced merely to prove the fact of the signatures to the petition, but also the identity of the parties signing, and that therefore these are not the costs of proving a written document, within the meaning of the rule; but that is a circumstance which enters into the composition of all proof of this nature; and upon consideration, I think the costs to which the rule applies must mean the costs of proving the document so as to identify it in the cause. Then, secondly, is the rule limited by the fact of the document being out of the custody of the party giving the notice? I think not. He may give a notice to admit, and, if necessary, insert a special clause, stating his inability, for such and such reasons, to give an inspection of the document; a course fully authorized by the terms of the rule, that notice is to be given according to the annexed form, or "to the like effect," as far as the nature of the case admits. If the admission be refused, and the matter comes before the Judge on summons, it will then be for him to exercise his discretion upon all the facts of the case, and to make or refuse an order, as he shall deem most reasonable. Upon the whole, therefore, I concur in all respects with the rest of the Court.

Rule absolute.

[395] FOSTER v. POINTER. Exch. of Pleas. May 25, 1841.—In an action for libel, the Judge has power to certify, under the 3 & 4 Vict. c. 24, s. 2, that the grievance for which the action was brought was wilful and malicious.—The words of the statute, "wilful and malicious," import personal malice and ill will to the plaintiff, as contradistinguished from the malice in law which is essential to sustain an action for libel.

[S. C. 1 Dowl. (N. S.) 28; 10 L. J. Ex. 454; 5 Jur. 440.]

This was an action for a libel, in which, at the trial before Gurney, B., at the last Berkshire Assizes, the jury found a verdict for the plaintiff, damages one farthing. The learned Judge thereupon certified, under the stat 3 & 4 Vict. c. 24, that the libel was wilful and malicious; and the Master, on taxation, allowed the plaintiff his full costs.

In Easter Term, Ludlow, Serjt., obtained a rule to shew cause why the Master should not review his taxation, or why the certificate should not be set aside or withdrawn, contending that the learned Judge had no power under the statute to certify in an action for libel. On the 24th of May,

Erle and Gray shewed cause. This rule was obtained on the ground, that the stat. 3 & 4 Vict. c. 24 does not apply to cases in which it appears on the record that the act complained of was malicious; and therefore that, as malice is a necessary ingredient in every libellous publication, in order to make it the subject of an action, the certificate is in such case inoperative. If, however, in all cases where it appears by the record that the act is wilful and malicious, the plaintiff is by law entitled to his costs, the consequence would rather follow that the certificate is merely unnecessary, than that it is inoperative:—as where a battery is admitted on the record. But, in truth, the words of the statute are clear and unequivocal, and the intention of it was to take away costs in all actions of trespass or on the case, unless the Judge in his discretion should think fit to certify for costs. The argument for the defendant goes to interpolate words in the act, as if the exception were, "unless the Judge, &c. shall certify, in all actions of trespass or upon the case, in which it shall not appear by the record that the act of which the plaintiff complains was [396] wilful and malicious, &c." [Alderson, B. How does it appear by the record that the libel is wilful? The defendant's argument must be that the certificate has no operation, because upon the record the act complained of appears to be malicious; but how does it appear to be wilful?] It might in the same manner have been contended, that a

certificate would never be necessary to deprive the plaintiff of costs under the stat. 43 Eliz. c. 6, because it must always appear on the record that the damages are under 40s. The plain meaning of the legislature was, that the plaintiff should never have costs, unless the Judge, by his certificate, shewed his opinion that it was not a frivolous complaint, but founded on a real grievance. The power of certifying is co-extensive with the actions described therein—viz., all actions of trespass or on the case, where the damages are under 40s. The legislature never meant to adopt the strict technical meaning of the word malicious, as applied to legal malice. [Alderson, B. The meaning of the term malicious publication, in the declaration, is, an unauthorized publication, without lawful excuse, of that which is injurious to the plaintiff's character: but in the certificate the word has reference to personal malice—a real intention to injure the plaintiff.]

Ludlow, Serjt., *contra*. The reasonable construction of this statute, as well upon the words of it as by analogy to the other statutes on this subject, is, to confine the operation of the certificate to something ultra that for which the action on the face of it appears to be brought; i.e. to the fact, either that it was really brought to try a right, or that the grievance complained of was not only a damage, but a wilful and malicious one. The result of the cases decided under the 22 & 23 Car. 2, c. 9, s. 136, (which is equally general in its terms as the present) is, that wherever there is a legal ingredient material or necessary to the maintenance of the action, [397] as to that the Judge had no power to certify. [The learned Serjeant referred to the cases of *Hughes v. Hughes* (2 C. M. & R. 663), *Smith v. Edwards* (4 Dowl. P. C. 621), *Dunnage v. Kemble* (3 Bing. N. C. 538; 4 Scott, 365), and *Jones v. Thomas* (11 Ad. & Ell. 193; 3 P. & D. 91).] Now malice is a necessary ingredient in every actionable libel; and if it be an inference that because a libel is false, it must also be taken to be malicious, that term must have the same meaning here. And as every publication includes an act of the will, a libellous publication must also be wilful. Whichsoever is necessary to entitle the plaintiff to recover, whether malice in law or in fact, the power of certifying must have reference to something beyond that. Such is clearly the case as to the other branch of the clause, which empowers the Judge to certify that the action was really brought to try a right beyond the mere right to recover damages. It has been held that the Judge cannot certify in an action for negligence: *Marriott v. Stanley* (1 Man. & G. 853; 1 Scott, N. R. 392). The act is to be generally applied, and the action is to be assumed, where the damages are so small, to be a frivolous one, unless in certain cases. But even if it does not appear on the record that the act was wilful, yet if it does that it was malicious, the certificate cannot have any operation, because it must be operative both as to the malice and the wilfulness. The defendant, however, contends, that the power of certifying is confined to something beyond the mere maintenance of the action, whereas this is in substance merely a certificate of that which was necessary in order to entitle the plaintiff to a verdict. He cited also *Shuttleworth v. Cocker* (1 Man. & G. 829; 2 Scott, N. R. 47).

Cur. adv. vult.

The judgment of the Court was now delivered by

[398] ALDERSON, B. The question in this case was, whether my Brother Gurney had power, in an action for libel, to certify, under the statute 3 & 4 Vict. c. 24, s. 2, that the grievance complained of was wilful and malicious. We deferred our judgment yesterday, in order that we might have an opportunity of more fully considering the provisions of the act of Parliament. On consideration, we are of opinion that the learned Judge had full jurisdiction to grant the certificate. There is no conflict, as was contended in argument, between the words of the certificate and those of the declaration; both may well stand together: and we must follow in this case the rule which has been so often laid down as to the interpretation of acts of Parliament, that where the literal construction of the words used by the legislature induces no absurdity or contradiction, that construction ought to be adopted. Here the words of the act are, that where the plaintiff shall recover by the verdict of a jury less damages than 40s., he shall not be entitled to recover costs, unless the Judge or other presiding officer shall certify, &c., that the action was brought to try a right, or "that the trespass or grievance for which the action was brought, was wilful and malicious." Now, why should we hold, that because the declaration in this case contains an averment that the injury was malicious, the Judge has no power to give a certificate confirmatory of that fact? If the certificate were contradictory in terms to the

declaration, the argument would be more reasonable: although, even then, there might be no real discrepancy between them, because the word "malicious," as used in a declaration for libel, does not necessarily imply personal malice in the defendant. Wherever a party publishes calumnious matter, affecting the character of another, that constitutes malice in law, sufficient to justify an averment of malice in the declaration; but in order to justify the Judge in certifying under this statute that the act complained of was malicious, he must be satisfied, as [399] it seems to me, that the conduct of the defendant arose from personal malice—from a real design to injure the plaintiff, and that it was in fact a wilful and malicious grievance; so that the certificate of malice does not necessarily mean malice in the same sense as it is used in the declaration. This rule must therefore be discharged, and, as the moving of it was altogether an experiment, with costs.

Rule discharged, with costs.

DAVIS v. SMYTH. Exch. of Pleas. May 26, 1841.—In Jan. 1837, a carriage was sold and delivered by the plaintiff to the defendant. In April following, the defendant wrote to the plaintiff as follows:—"The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself," &c. :—Held, that this was some evidence to go to the jury of an agreement to pay for the goods by a bill or note, and therefore that the jury might give interest on the price as part of the damages.

[S. C. 10 L. J. Ex. 473.]

Debt for goods sold and delivered, work and labour, and on an account stated. Plea, *nunquam indebitatus*. At the trial before Lord Abinger, C. B., at the London sittings after Easter Term, it appeared that the plaintiff, who was a coachmaker, in January, 1837, supplied a carriage to the defendant, which was delivered at Brussels. On the 5th of April following, he received from the defendant the following letter, which was read in evidence:—

"Sir,—The document you have sent me appears to me completely in the nature of a bill, and of course, I presume, payable to you or order, is good in the market—just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself, as an acknowledgment of the debt in the first place, and appointing the time of payment in the next.—I am, Sir, yours, &c.

"Bruxelles, April 5.

"W. SMYTH."

Nothing was proved to have been said at the time of the contract about payment, and no demand for interest had ever been made: but in the particulars of demand the plaintiff claimed the price of the carriage, and also interest [400] from the 21st July, 1839. The Lord Chief Baron, in summing up, left it to the jury to say, upon the evidence to be derived from the above letter, whether there was an agreement by the defendant at the time of the contract, to give a bill or promissory note for the price of the carriage, in which case his Lordship thought the plaintiff was entitled to recover interest. The jury found a verdict for the whole demand, including the interest, and the Lord Chief Baron thereupon gave the defendant leave to move to reduce the verdict by the amount of the interest, if the Court should think the plaintiff could not recover it.

Rowe now moved accordingly. The plaintiff has no right to recover interest. There is no count for interest; and no demand having been made of it, he clearly cannot claim it under the stat. 3 & 4 Will. 4, c. 42, s. 28. His whole case, therefore, in this respect stands upon the letter of the 5th April. But that furnishes no inference whatever, beyond mere conjecture, that there was originally a contract to pay by bill or note.

LORD ABINGER, C. B. I think there was some evidence to go to the jury of an agreement by the defendant to pay interest in consideration of forbearance. The only uncertain matter was as to the time of payment of the note. The jury may have thought that the word "wished" in the defendant's letter, referred to some conversation con-

taining such a promise: and I cannot say they were not justified in coming to such a conclusion.

PARKE, B. *Marshall v. Poole* (13 East, 98) is an authority, that if at the time of the original contract the defendant agreed to pay by bill or note, interest is recoverable as part of the price. I think there was some evidence for the jury of such an agreement, and that is enough.

ALDERSON, B., concurred.

Rule discharged.

[401] HILLS, Administrator of Limmer, Deceased, v. HILLS. Exch. of Pleas. May 26, 1841.—A gift may be good as a *donatio mortis causâ*, although it be coupled with a trust that the donee shall provide the funeral of the donor.

[S. C. 10 L. J. Ex. 440; 5 Jur. 1185. Discussed, *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 817.]

Assumpsit for money had and received to the use of the plaintiff as administrator. Plea, non assumpsit. At the trial before Rolfe, B., at the Middlesex sittings after last term, the facts appeared to be as follow:—

The plaintiff's intestate, Mrs. Limmer, when in her last illness, and on the day of her death, went to bed, and sending for the landlady of the house where she lodged, told her that "she felt much worse, and she wished her brother James (the defendant) to bury her; that she wished him to have all she had, and he would bury her comfortably." At that time her pocket-book, containing a sum of about £80 in cash and notes, was lying on the bed. She said her pocket was very dirty, upon which a clean one was brought, and the pocket-book was put into it, and placed upon the pillow. She then fell asleep for a short time, and on awaking asked for the pocket-book, took out a half-sovereign, and having paid 10d. for some household expense, put the change into the pocket-book, and replaced it on the pillow. Shortly afterwards the defendant came to see her, and she then, in the presence of the landlady, and a few minutes before her death, put the pocket-book into his hands. It was to recover the amount of the money contained therein that this action was brought. For the defendant, two points were made: first, that this was an absolute gift *inter vivos*, which could not be questioned by the administrator; or secondly, that it was good as a *donatio mortis causâ*. The learned Judge thought that it could not be deemed to amount to a gift *inter vivos*; and as to the latter question, he left it to the jury to say whether it was intended as an absolute gift to the defendant after the death of the intestate, or whether she intended to retain a control on the property during her life: and the jury finding in the affirmative of the former branch of the [402] proposition, the verdict, under his lordship's direction, was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him for £75.

Kelly now moved accordingly. The facts in this case negatived the legal inference of a *donatio mortis causâ*. Here the deceased had resumed the possession of the money after expressing her wish that the defendant should have it, and before the ultimate delivery of it to him, and had paid a debt of her own out of it. [Rolfe, B. I thought it was for the jury to say whether there was an absolute parting with the possession, subject only to the contingency of her recovering: if so, I thought it a good *donatio mortis causâ*.] There must be a delivery, and a continuing possession in the donee; if the subject-matter of the gift be resumed before death, that will prevent it from operating as a *donatio mortis causâ*; *Bunn v. Markham* (7 Taunt. 223). The first delivery, therefore, did not operate as such. And it was not left to the jury whether the ultimate delivery to the defendant could of itself, under the circumstances, amount to a *donatio mortis causâ*.

But, further, the condition annexed to the gift, viz. that of providing a funeral for the deceased, prevented it from being a good *donatio mortis causâ*. It is, in truth, only a gift after payment of the expenses of the funeral. The only condition which enters into the definition of a *donatio mortis causâ*, either by the civil law or the law of England, is the condition of the sick person's recovery. If it were otherwise, a

direction to pay debts and legacies, making the party a residuary legatee, may equally be construed into a *donatio mortis causâ*: and the necessity for a written will may be evaded altogether under that form. Supposing the gift in this case good, how is the condition to be enforced? No evidence was given that the defend-[403]-ant had performed the funeral. Would not the administrator nevertheless be liable for the expenses of it? How can the point be raised, whether the title of the donee is perfect by the performance of such a condition? [Parke, B., referred to *Blount v. Barrow* (4 Bro. Ch. C. 72).]

LORD ABINGER, C. B. I think no rule ought to be granted. The facts upon which the question depends were for the jury, and their finding has determined the point. If indeed in law there could be no *donatio mortis causâ* coupled with a condition, the defendant could not succeed: but upon the authorities, that appears not to be so; property may be given by way of *donatio mortis causâ*, although the gift be made for a special purpose, and coupled with a trust.

PARKE, B. The only question for us to determine is, whether what is otherwise a *donatio mortis causâ*, as found by the jury, is less so because coupled with a condition that the donee shall pay the expenses of the funeral. That circumstances afforded a strong argument to the jury as to the construction to be put upon the expressions used by the deceased, and that a mere nuncupative will was meant, of which the defendant was to be the executor. But the jury have excluded that argument, by finding that there was a delivery which was intended to transfer the property in the money, subject to the contingency of the donor's recovering, and coupled with the condition of payment of the funeral expenses by the defendant: and the only question now is, whether that condition makes it void. It is not, indeed, properly a condition, because otherwise the property would not vest until performance of it, but a trust, upon which the *donatio mortis causâ* was made. And the authority to which I have already referred, of *Blount v. Barrow*, goes the length of deciding that it is no objection to the gift that it is made for a special purpose. [404] There India bonds were given by the deceased to the party, subject to the condition of his carrying on a Chancery suit, and the gift was nevertheless held to be a good *donatio mortis causâ*. I cannot distinguish that case from the present. It follows, therefore, that a gift made for a special purpose, and coupled with a trust, may be good as a *donatio mortis causâ*: although I agree that upon this particular trust a very strong argument arose that the deceased did not intend to make a *donatio mortis causâ*, but as it were to make the defendant her executor under a nuncupative will.

ALDERSON, B. I am of the same opinion. The case of *Blount v. Barrow* decides, that a *donatio mortis causâ* may be made for a particular purpose; that the party may deliver the subject matter of the gift so as to pass the property to the donee, in contemplation of death, although he is to use it for a particular purpose, or out of it to make particular payments, and to keep the residue for himself. That case is entirely in point.

ROLFE, B. I am of the same opinion. I told the jury that a *donatio mortis causâ* was always to be viewed with suspicion: but if it be allowed at all, I cannot see how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference that with it he is to pay for a particular thing. If a man on his death-bed gives another 1000*l.*, is it any addition to the evils attending this mode of bestowing property that he attaches a condition to it—as, for instance, that he stipulates that his brother shall receive an outfit to India? The case of *Blount v. Barrow* is expressly in point, and disposes of the question; and I have no doubt that other cases to the same effect might be found.

Rule refused.

[405] GALE v. WILLIAMSON, BART. Exch. of Pleas. May 26, 1841.—Where a father, by deed, assigned to his son “in consideration of natural love and affection,” his dwelling-house and all his personal estate:—Held, in an action by the son against the sheriff, for levying on goods, part of such estate, under a *fi. fa.* against the father, that it was competent to the plaintiff to prove that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife and children; and that, the jury having found that it was a part

of the same transaction, and that the assignment was *bonâ fide*, it was not void against creditors under the stat. 13 Eliz. c. 5.

[S. C. 10 L. J. Ex. 446. Referred to, *In re Holland: Gregg v. Holland*, [1902] 2 Ch. 360.]

Trespass against the sheriff of the county of Durham, for breaking and entering the plaintiff's dwelling-house, and seizing and carrying away his goods.

Pleas, first, not guilty: secondly, that the dwelling-house in the declaration mentioned was not the dwelling-house of the plaintiff: thirdly, that the goods were not the goods of the plaintiff: and, fourthly, a justification under a writ of *fieri facias* against the goods of Matthew Gale, the elder; that divers goods belonging to the said Matthew Gale the elder were, at the said time when &c., in the said dwelling-house in the declaration mentioned, and that the defendant, as such sheriff, peaceably and quietly entered the same, in order to levy thereon, &c. The plaintiff joined issue on the three first pleas, and as to the last, admitted the suing out of the writ, the indorsement thereon, and the delivery of it to the defendant, and as to the residue of the plea, replied *de injuriâ*: on which also issue was joined.

At the trial before Rolfe, B., at the last Durham Assizes, the following facts appeared in evidence:—Matthew Gale the elder, the father of the plaintiff, who was possessed of a leasehold interest in the house in question, assigned the same, by indenture dated the 11th of January, 1840, to the plaintiff. The indenture, after reciting that the said M. Gale the elder was in a weak state of health, and was desirous of committing the charge of his wife and younger family, and also of his business, dwelling-house, stock in trade, &c., to Matthew Gale the younger, (the plaintiff), witnessed, that “for and in consideration of the natural love and affection which he the said Matthew Gale the elder hath and beareth, as well to the said Matthew Gale the younger, as to his said wife and younger children, and to the end that he may henceforth have his mind diverted [406] from the cares of business, and be at liberty to pursue health wheresoever it may please him,” he assigned to the plaintiff the dwelling-house, &c., in question: And the indenture further witnessed, that “for the consideration aforesaid, he assigned to the plaintiff his stock in trade, shop-goods, and household furniture.” The plaintiff gave in evidence a bond, of even date with this deed, whereby he was bound in the penal sum of 500*l.* to support his father's wife during her life, and his other children until they respectively arrived at the age of eighteen. A writ of *fi. fa.* had been sued out against the father, but whether it issued before or after the execution of the deed of assignment, did not distinctly appear. On the 14th of August, the sheriff's officer entered the plaintiff's house under this writ, and took the goods therein, which was the trespass complained of. It was contended for the defendant, that the plaintiff ought to be nonsuited, for that the deed of assignment was void against creditors under the stat. 13 Eliz. c. 5, being voluntarily, and made without any other consideration than natural love and affection: and that the bond could not be used to shew the existence of a different consideration than that expressed in the deed itself. The learned Judge declined to nonsuit, and in summing up, stated to the jury, that it did not necessarily follow that a deed was void, because it was made in consideration only of natural love and affection: that in the present case, it appeared that the plaintiff had executed a bond, whereby he charged himself with the maintenance of his father's wife and family; and that if the jury thought the bond was executed at the same time with the assignment, and was a part of the same transaction, a valuable consideration had been given by the plaintiff for the assignment to him of the house and goods. He directed them also to take into their consideration, whether they thought there was in fact no intention of really conveying the house and goods to the plaintiff, but a secret under-[407]-standing that no property in them was to pass; in which case the deed would be void independently of the statute. The jury found a verdict for the plaintiff, damages 48*l.*; and the learned Judge reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the deed of assignment was void under the stat. 13 Eliz. c. 5. In Easter Term,

Knowles moved accordingly, and obtained a rule to shew cause why a nonsuit should not be entered, or why there should not be a new trial, on the ground of misdirection.

Addison now shewed cause. This deed was not void merely because it was

executed in consideration of natural love and affection; and the jury have expressly found that the transaction was free from fraud, and that there was a valuable consideration given in the execution of the bond by the plaintiff. But it will be said, that consideration ought to have appeared on the face of the deed. That, however, is not necessary; it may be shewn by other evidence. On that principle it was held, in *Trevitt v. Aggas* (Willes, 107), that one deed may amount to a defeazance, and be set forth as such in pleading, without any express words of relation to the former deed. The statute 13 Eliz. c. 5, does not require that the consideration should appear on the face of the deed: and there was no evidence in this case that it was made to defeat or delay creditors. It is competent to the party to shew by evidence another or additional consideration to that stated in a deed. The cases are collected in *Phillipps on Evidence*, where the rule is thus laid down (vol. 2, p. 761 (8th edit.)):—“It is an established rule, that a party may aver another consideration, which is consistent with the consideration expressed; but no averment can be made contrary to, or inconsistent with, that expressed in the deed. [408] Thus, if a deed of bargain and sale is expressed generally to be made ‘for divers good considerations,’ it may be averred that the bargainee gave money or other valuable consideration.” Here it was perfectly consistent with the consideration of natural love and affection, that the son should also bind himself to maintain his mother and her children. [Alderson, B. The rule is thus laid down by Lord Hardwicke, in *Peacock v. Monk* (1 Ves. sen. 128): “Where any consideration is mentioned, as of love and affection only, if it is not also said and for other considerations, you cannot enter into proof of any other: the reason is, because it would be contrary to the deed: for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other.”] He held it to be otherwise where there is no consideration at all in the deed: yet where is the difference in principle between the two cases, that where no consideration is stated, the party shall be allowed to prove one, and where one consideration is stated, he shall be allowed to prove an additional one? [Lord Abinger. The bond was not offered in evidence so much to shew a different consideration, as to rebut the inference that this was a voluntary deed, intended to defeat or delay creditors.]

Knowles, *contra*. The objection was, that there was no proof of any assignment, this being a fraudulent one, and made for no legal consideration. [Lord Abinger, C. B. It is not an illegal consideration, unless the deed be made with intent to delay creditors.] It must necessarily have that effect; and it is not competent to the party to give evidence aliunde of the consideration. It is said that this was evidence, not of the consideration, but of the bona fides of the transaction, so as to withdraw it from the operation of the statute. But the circumstance that fraud [409] is alleged makes no difference as to the application of the rule of law, that a party cannot be admitted to contradict the consideration stated in his deed. In *Rex v. Inhabitants of Cheddle* (3 B. & Adol. 833), a different consideration was allowed to be shewn in evidence, but there the party invalidating the deed was the parish, which was no party to the instrument; and the Court intimated in the strongest terms that the parties to the deed would be estopped by it from saying that the consideration was other than that stated in it. The rule is correctly laid down by Lord Hardwicke in *Peacock v. Monk*.

LORD ABINGER, C. B. I think this rule must be discharged. A deed made in consideration only of natural love and affection is not necessarily void, although it may be made so by evidence. But if no fraud can be shewn, and if a consideration be in fact given, the deed is good. And that consideration may be proved aliunde. Suppose the attorney who drew the deed had stated, that his clerk had omitted, in the deed of assignment, to mention the execution of the bond as the consideration for the assignment; such evidence would surely have been admissible. The evidence is used to explain away fraud; and even in the case of a deed, fraud may be proved or disproved aliunde. A deed cannot be altered as between the parties to it, but the rule is different as between third parties. In this case, therefore, it was competent for the plaintiff to give evidence of a valuable consideration, so as to disprove the existence of fraud; and that being so, it became a question for the jury, and there is no ground for disturbing their verdict.

ALDERSON, B. I am of the same opinion. In the case of *Coppock v. Bower* (4 M. & W. 361), this Court held that an illegal [410] agreement was admissible in evidence

without being stamped, when used for the collateral purpose of shewing that it was illegal. So here, the deed was used for a collateral purpose, and therefore admits of evidence to shew the real nature of the transaction. The rule of law is, that a deed made merely in consideration of natural love and affection, *prima facie* imports fraud; that alone shews that it is not conclusively, but only presumptively, fraudulent. It follows, therefore, that evidence may be adduced to shew that no fraud was in fact intended. This is not a case in which the parties to a deed are contesting some right arising out of the deed; the question is, whether there was in the transaction in question an intent to defeat or delay creditors. Under such circumstances, surely it is reasonable that the party should be allowed to shew, by a bond of even date with the assignment to which the fraudulent purposes is ascribed, that it was made, not voluntarily with intent to delay creditors, but in truth as a consideration for the support of his father's family. I think, therefore, that the learned Judge was right in receiving the bond in evidence. Whether it was in fact executed at the same time with the assignment, was a question for the jury: it was also for them to say whether the consideration of the bond, being different from that which appeared on the deed of assignment, was or was not the true one. They have by their verdict found that a valuable consideration was given, and I see no ground for disturbing that finding.

ROLFE, B. It is a mistake to suppose that the statute makes void, as against creditors, all voluntary deeds. All that it says is, that a practice of making covinous and fraudulent deeds had prevailed, and therefore, that all feoffments, gifts, &c., of any lands or goods and chattels, as against the persons whose actions, debts, &c., by such covinous and fraudulent devices and practices shall be disturbed, hindered, delayed, or de-[411]-frauded, shall be void. The Courts, in construing the statute, have held it to include deeds made without consideration, as being *prima facie* fraudulent, because necessarily tending to delay creditors. But the question in each case is, whether the deed is fraudulent or not; and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction; not to contradict the consideration stated in the deed, but to take it out of the operation of the statute.

Rule discharged.

BEECHING v. WESTBROOK. Exch. of Pleas. May 26 & 29, 1841.—In an action for board and lodging supplied to an illegitimate child of the defendant, letters of the defendant, containing promises to remit money to the plaintiff, and making excuses for not having done so, were held not to require an agreement stamp as being “evidence of a contract,” within the meaning of those words in the Stamp Act, 55 Geo. 3, c. 184, Sched. Part 1, tit. Agreement.

[S. C. 1 Dowl. (N. S.) 18; 10 L. J. Ex. 464. Applied, *Fancourt v. Thorne*, 1846, 9 Q. B. 312; *Knight v. Barber*, 1846, 16 M. & W. 66. Referred to, *Clay v. Crofts*, 1851, 20 L. J. Ex. 361.]

Debt for meat, drink, lodging, &c., provided by the plaintiff for divers persons at the defendant's request, and upon an account stated. Plea, *nunquam indebitatus*. At the trial before Parke, B., at the last Sussex Assizes, it appeared that the action was brought to recover the sum of 21l. 18s., for board and lodging supplied by the plaintiff to an illegitimate child of the defendant, who, after paying a weekly sum of 3s. for several years towards the maintenance of the child, had discontinued payment. The plaintiff tendered in evidence four letters of the defendant's, all of them containing promises to remit money to the plaintiff, and making different excuses for not having done so. It was objected for the defendant, that these letters were not admissible for want of a stamp; for that they were “evidence of a contract,” within the meaning of the Stamp Act, 55 Geo. 3, c. 184, Sched. Part 1, tit. “Agreement.” The learned Baron overruled the objection, and admitted the letters in evidence; and, in summing up, directed the jury that they should find for the plaintiff, if from the contents of the letters, and the other [412] evidence in the cause, they were satisfied that the defendant had entered into a contract to pay 3s. a-week towards the support of the child. The jury having found a verdict for the plaintiff, damages 21l. 18s.,

Shee, Serjt., in Easter Term, obtained a rule nisi for a new trial, on the ground that the evidence had been improperly admitted.

Platt and Espinasse now (May 26) appeared to shew cause, and referred to

Wheldon v. Matthews (2 Chit. Rep. 399); but no counsel being present to support the rule—

LORD ABINGER, C. B., said—I think this rule must be discharged, and that the letters in question did not require a stamp. There is a great difference between a memorandum of agreement, on which an action may be maintained, and a document which merely amounts to an acknowledgment of the debt, and upon which the law will imply a promise to pay. That is the ground upon which an I.O.U. is admitted in evidence without a stamp, as being a mere acknowledgement of an antecedent debt, and not in itself containing the contract between the parties.

PARKE, B. I am of the same opinion. It is quite clear that the tax is imposed, not upon every document which is produced in evidence to prove an agreement, but upon “a memorandum or minute of an agreement;” that is, upon the document which the parties themselves have put down as the terms of their agreement. That is the substance of what is said by the Court of Common Pleas, in the cases of *Lucas v. Beach* (1 Man. & G. 417; 1 Scott, N. R. 350) and *Faughton v. Brine* (1 Man. & G. 559; 1 Scott, N. R. 258), which are [413] quite in point; and the same opinion was expressed by this Court in the course of the discussion in *The Mayor of Ludlow v. Charlton* (6 M. & W. 815).

ALDERSON, B. The act of Parliament meant to put an agreement, and a memorandum or minute of an agreement, on the same footing. The agreement must be such as to bind both parties, and so also, therefore, the memorandum or minute of agreement, to come within the act, must be an instrument binding on both parties.

ROLFE, B., concurred.

The rule was therefore ordered to be discharged; but afterwards, on the application of Shee, Serjt., the Court allowed the case to stand over for argument.

Shee, Serjt., was accordingly heard on a subsequent day (May 29) in support of the rule; and contended that the letters in question fell within that clause of the Stamp Act which imposes a stamp on written instruments “where the matter thereof shall be of the value of 20l. or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument:” That these letters were clearly “evidence of a contract,” for they were expressly left to the jury as materials whence they were to infer a contract between these parties; and that the statute expressly included other instruments than those which contained in themselves the binding obligation upon the parties. He referred to *Emmerson v. Heelis* (2 Taunt. 38), *Roots v. Lord Dormer* (4 B. & Adol. 77), *Watkins v. Hewlett* (1 Brod. & B. 1), and *Mayor of Ludlow v. Charlton*.

PARKE, B. I still retain the opinion which I before expressed, that these letters did not require a stamp. A [414] stamp is not imposed by the act upon every document which refers to, and so furnishes evidence to prove, an agreement; it is required only on documents in which the parties put down the terms by which they intend to be mutually bound. This was admitted to be the law in the case of *Lucas v. Beach*. This question is put upon the right ground by Erskine, J., in *Faughton v. Brine*. He says—“It does not appear to me that the act requires that every document which may be given in evidence, to shew the existence of an agreement, shall be stamped, but only such agreements as would be evidence against both the contracting parties.” Maule, J., says in the same case:—“The subsequent words, ‘whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument,’ are, I conceive, used to exclude the excuse, that the agreement, of which some memorandum is given in evidence, need not have been made in writing; which would, in every case not within the Statute of Frauds, enable a party to give in evidence a written contract without its being stamped.”

There is certainly some ambiguity in the latter part of the clause, arising, probably, from the desire of the legislature to give the clause as extensive an operation as they could, in order to prevent evasions of the act. But I am clearly of opinion that a written instrument, to come within the clause, must have been made with the intention of containing in itself the terms of an agreement between the parties. The rule must therefore be discharged.

ALDERSON, B. I quite agree in thinking that no stamp was necessary in this case. It cannot be contended that letters of the defendant, the contents of which tend to shew the existence of an antecedent contract with the plaintiff, therefore require a stamp; if it were so, it would hardly be possible to put in any letters without stamping

them. Those letters only require a stamp, which are writ-[415]-ten, if I may so express myself, while the agreement is being made; but no stamp is necessary upon letters which are written after the agreement has been made.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. Suppose a letter in these words:—"I addressed a note to you some time ago, containing the terms of our contract, and properly stamped:" according to the argument of my brother Shee, such a letter would be "evidence of a contract," and could not be read to the jury without a stamp.

Rule discharged.

ELLIS v. TAYLOR AND OTHERS. Exch. of Pleas. May 28, 1841.—A tender of rent and costs of distress, after impounding, is too late, and no action lies for selling the distress notwithstanding such tender.—Quere, whether such action be maintainable on allegation and proof of malice.

[S. C. 10 L. J. Ex. 462. Overruled, *Johnson v. Upham*, 1859, 2 El. & El. 250.]

Case for wrongfully and injuriously selling goods distrained by the defendant for rent due to him from the plaintiff, after a tender of the rent and expenses. Plea, not guilty (by statute). At the trial before Rolfe, B., at the last assizes at Liverpool, it appeared that, after the distress, the goods remained impounded upon the plaintiff's premises at his request; and after such impounding, but before the sale of the goods, the plaintiff tendered to the bailiff the amount of the rent and costs of the distress, which was refused. It was contended for the defendant, that the tender, after impounding, was too late, and did not entitle the plaintiff to recover. The learned Judge reserved the point, and the plaintiff had a verdict for £36, leave being given to the defendant to move to enter a nonsuit.

In Easter Term, Cresswell moved accordingly, and cited *The Six Carpenters' case* (8 Rep. 147, a.), and *Thomas v. Harries* (1 Man. & Gr. 695; 1 Scott, N. R. 524). [416] [Parke, B. At common law, undoubtedly, a tender made after impounding is too late; but the question is, whether, upon the equity of the statute 2 W. & M. stat. 1, c. 5, s. 2, an action is not maintainable for selling goods seized under a distress, where a tender of the rent and expenses is made before the sale, although after the impounding. It is laid down in Mr. Chitty's *Precedents in Pleading*, vol. ii. p. 723 (5th edit.) that in a distress for rent, upon the equity of this statute, a sale of the distress after tender of the rent and costs would be illegal, and that in such case trespass is the proper remedy: and certainly the precedents are constantly in this form. The object of the distress is only to realize the rent.] A rule having been granted,

Murphy now shewed cause. The doctrine that a tender of the rent and costs, after impounding, is too late, rests upon dicta, which, (with the exception of that of Lord Coke, in *The Six Carpenters' case*,) apply only to the case of a distress for trespass damage feasant. Those dicta applied to the then existing state of the law, when the distress was taken off the premises to the public pound; and rest upon the principle, that, inasmuch as the goods were then in the custody of the law, that custody could not be changed by the interference of the party, but only by the intervention of some legal remedy. But when, by the stat. 2 W. & M. st. 1, c. 5, s. 2, the goods were allowed to be impounded on the premises of the tenant, the same reason no longer applied. In that case the landlord suffers no inconvenience, but has the means of obtaining the rent, which is the sole object of the distress, and of reimbursing himself his costs: and it appears monstrous to say that the landlord should be allowed to sell the goods, after the full benefit which he can receive by a sale has been tendered to him, and that the tenant should necessarily be put to the circuitous remedy of a replevin. The forms of [417] precedents, and the statement of the law by Mr. Chitty, favour this view of the case. The case is analogous to that of an imprisonment of the person, in which case payment or tender of the debt and costs, although after the defendant is in custody on a ca. sa., is held a sufficient ground to entitle him to his discharge: *Crozier v. Pilling* (4 B. & Cr. 26; 6 D. & R. 129). So also, where the tenant has neglected to replevy within the five days, and there has been an appraisal, he may yet replevy before sale of the goods: *Jacob v. King* (5 Taunt. 451). The dictum in *Firth v. Purvis* (5 T. R. 432), that a tender is too late after impounding, is

extra-judicial. The cases of *Thomas v. Harries* and *Ladd v. Thomas* (4 P. & D. 9) are undoubtedly authorities against the plaintiff; but in the former case Maule, J., dissented from the opinion of the other Judges; and all the cases cited in *Ladd v. Thomas* were cases of distress damage feasant. The question is, whether the Court will not review the dicta upon which all the later authorities appear to rest, and which, in the present state of the law, are no longer applicable (see per Best, C. J., in *Broune v. Powell*, 4 Bing. 230).

Cresswell (Baines and Martin with him) contra. There is nothing in the stat. 2 W. & M. st. 1, c. 5, or in any subsequent statute, to alter the rule of the common law as to the effect of the impounding of a distress. The law is thus laid down by Lord Coke, in *The Six Carpenters' case* (8 Rep. 146). "Note, reader, this difference, that tender upon the land, before the distress, makes the distress tortious: tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined." That statement of the law, and the reason given for it, equally apply [418] to distresses of all kinds, whether for rent or for damage feasant. Now it is conceded that the law still remains the same as to goods distrained damage feasant. [He was here stopped by the Court.]

LORD ABINGER, C. B. It appears that there are two modern decisions on the point in favour of the defendant, and it cannot be expected that we shall overrule them. If the case were prosecuted in such a form as to bring them under the consideration of a superior court, there might be some reason for entertaining the question; but until those cases are rescinded, we must be bound by their authority. There certainly appears to be considerable weight in the argument as to the hardship on the tenant by the present state of the law; but the same argument has been submitted to and weighed by former judges. If, indeed, the case stated that the goods had been maliciously sold by the landlord after a tender, I should have hesitated whether to consider the cases which have been referred to as binding authorities upon us. [Murphy suggested that, after verdict, the words "wrongfully and injuriously" would have the same meaning as "maliciously"; and that in *Smith v. Goodwin* (4 B. & Adol. 413), that meaning appeared to have been assigned to the word "vexatiously."] No; the words "wrongfully and injuriously" mean no more than contrary to law, whereby there is a wrong and an injury: the word "vexatiously" implies actual malice. I do not mean to say that a landlord may not be liable if he maliciously persevere in a sale, notwithstanding a tender of the rent and expenses, though made after impounding; but that must be upon an allegation and proof of malice. Upon that point, however, I give no positive opinion. At present the rule must be absolute to enter a nonsuit.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[419] ABBEY v. PETCH. Exch. of Pleas. May 28, 1841.—Where a farm tenant is under covenant not to carry off the premises the hay and straw made on the farm, the landlord, who has seized the hay and straw under a distress, may sell it subject to a condition that the purchaser shall consume it on the premises.

[S. C. 10 L. J. Ex. 455. Held overruled, *Hawkins v. Walrond*, 1876, 1 C. P. D. 282.]

Case for an excessive distress. The third count of the declaration stated, that the plaintiff was tenant to the defendant of a farm at a certain rent, of which a certain sum of money, to wit, &c., was due; and that the defendant, wrongfully and maliciously contriving to injure the plaintiff, took and distrained certain crops, goods and chattels of the plaintiff of great value, &c., and thereby took a great and unreasonable distress for the said rent, and wrongfully and injuriously sold the same for much less than the best price that might have been obtained for the same, had the same been sold in a due and proper manner, and under due and proper conditions of sale, &c. Plea, not guilty.

At the trial before Maule, J., at the last assizes for Yorkshire, it appeared that the defendant, after having distrained the hay and straw on the premises of the plaintiff, who held a farm under him, sold them, subject to a condition that the purchaser should

consume them on the premises; the consequence of which was, that they produced less than they would if the sale had been absolute. By the terms of this lease, the plaintiff was bound not to carry off the hay and straw grown on the farm. It was contended for the plaintiff, that the selling of the goods, subject to the above restriction, was a wrongful act, and that the plaintiff was entitled to recover, under the third count, the difference between the price actually obtained, and that which might have been obtained if no such condition had been annexed to the sale. The learned judge, however, was of opinion that no cause of action had been proved, and under his direction a verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him on the third count.

Alexander, in Easter Term, obtained a rule accordingly; against which

[420] Cresswell and W. H. Watson now shewed cause, and contended, that the third count was not proved; for that as the plaintiff, by the terms of his tenancy, was precluded from carrying away the straw and hay off the premises, the landlord had a right to sell them under the distress subject to the like restriction, and to impose upon the purchaser the condition that they should be consumed upon the premises.

Addison, *contra*. The defendant had no right to restrict the sale under the distress according to the terms of the tenancy, but ought to have sold the property absolutely. But for the stat. 56 Geo. 3, c. 50, which enables the sheriff to sell a tenant's property subject to such a restriction, he must have sold it absolutely; but the 3rd section of that statute empowers him to sell the produce of the farm subject to a condition that the purchaser shall expend it on the land. But the landlord, selling under a distress, has no such right. It is true the plaintiff in the present case was under a covenant not to carry the hay and straw off the farm; but he had an absolute property in them, although he would have been liable to the landlord for removing them contrary to the covenant: and the sale of them ought, therefore, to have been absolute and unconditional.

LORD ABINGER, C. B. This rule must be discharged. The only question is, whether the landlord, having distrained for rent, was bound to sell the hay and straw to be consumed off the premises, in a case in which, according to the terms of his covenant, the tenant had no beneficial interest in them. I do not think he was. As the question comes to be decided by us for the first time, we may decide it upon the general principle, that the tenant cannot be in a better situation, by means of a distress, than he would be while paying his rent faithfully. When the [421] landlord, therefore, sells under a distress, he should sell no more than the tenant could himself dispose of.

ALDERSON, B. The plaintiff complains that he has sustained damage by his landlord having sold his goods in an undue and improper manner. But it is clear that he could not himself have disposed of the goods on any other terms than those on which the landlord has sold them: how then can he complain of any damage?

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. It seems to me that the statute which has been referred to, the 56 Geo. 3, c. 50, throws some light upon this point: for the 3rd section provides, that on an execution against the tenant, the sheriff may dispose of the produce of the land to any person who shall agree in writing to expend it on the land, according to the custom of the country, where no covenant or written agreement shall be shewn, otherwise according to such covenant or written agreement; and the 6th section enacts, that the landlord shall not distrain for rent on any such produce which shall have been severed from the soil, and sold subject to such agreement.

Rule discharged.

MUSCHAMP v. THE LANCASTER AND PRESTON JUNCTION RAILWAY COMPANY. Exch. of Pleas. May 28, 1841.—A parcel was delivered, at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union line, and that afterwards with another, and

so on into Derbyshire. The parcel having been lost after it was forwarded from Preston:—Held, that the Lancaster and Preston Railway Company were liable for its loss.

[S. C. 2 Rail. Cas. 607; 10 L. J. Ex. 460; 5 Jur. 656. Applied, *Mytton v. Midland Railway*, 1859, 4 H. & N. 615; *Bristol and Exeter Railway v. Collins*, 1859, 7 H. L. C. 194. Referred to, *Shepherd v. Bristol and Exeter Railway*, 1868, L. R. 3 Ex. 193.]

Case. The declaration stated, that, after the passing of a certain act of Parliament, intituled "An Act for [422] making and maintaining a Railway from the Town of Lancaster to the Town of Preston, in the County Palatine of Lancaster," the defendants were the proprietors of a certain railway, to wit, &c., and of certain engines and carriages used thereon; and the plaintiff, on &c., caused to be offered and delivered to the defendants, to wit, as common carriers, and the defendants received as such carriers, a certain box, and divers goods and chattels contained therein, of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendants, from Lancaster aforesaid, upon the said railway, and upon other railways, and to be caused by the defendants to be left at a certain other place, to wit, at a certain place called the Wheatsheaf, Bartlow, near Bakewell, Derbyshire, for the plaintiff, for certain reward to be therefore paid by the plaintiff to the defendants: yet the defendants, contriving, &c., did not nor would convey the said box, &c., upon their said railway, or upon other railways, or cause the same to be left at the said Wheatsheaf, &c., for the plaintiff; but through the negligence, carelessness, &c., of the defendants, the said box, goods, and chattels were wholly lost to the plaintiff.

Pleas, first, not guilty; secondly, that the plaintiff did not cause to be delivered to the defendants, nor did the defendants accept and receive, the said box, &c., for the purpose and in the manner and form as the plaintiff hath in his said declaration alleged:—on which issues were joined.

At the trial before Rolfe, B., at the last assizes at Liverpool, the following facts appeared in evidence:—The defendants are the proprietors of the Lancaster and Preston Junction Railway, and carry on business on their line between Lancaster and Preston, as common carriers. At Preston the line joins the North Union Railway, which afterwards unites with the Liverpool and Manchester Railway at Parkside, and that with the Grand Junction Rail-[423]-way. The plaintiff, a stonemason living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff, "to be left at the Wheatsheaf, Bartlow, near Bakewell, Derbyshire," (a place about eight miles wide of the Birmingham and Derby Junction Railway), and requested the clerk at the station to book it. In answer to her inquiries, he told her that the box would go in two or three days; and on her asking whether it would go sooner if the carriage were paid in advance, he inquired whether any one was going with it; on her answering in the negative, and that the person for whom it was intended would be ready at the other end to receive it, he said the carriage had better be paid for by that person on the receipt of it. It appeared that the box arrived safely at Preston, but was lost after it was dispatched from thence by the North Union Railway. Upon these facts, the learned Judge stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed: and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. The jury found a verdict for the plaintiff, damages 16l. 1s.

In Easter term, Cresswell obtained a rule nisi for a new trial, on the ground of misdirection.

Martin now shewed cause, and contended that there was no misdirection; that there was abundant evidence for the jury of an undertaking by the defendants, through their agent, to carry the box and its contents to the place of its ultimate destination; that if the carriage had been paid in [424] advance, according to the offer made by the plaintiff's mother, the sum demanded would clearly have been the carriage for the whole distance; and that to suppose as many different contracts as

there were carriers on a continuous line of railway, would be against all principle and convenience. The Court then called on

Cresswell, Baines, and Burrell, in support of the rule. This is not the case of a conveyance travelling throughout a continuous line, like a coach, for instance, which professes to run from London to York: in such a case parties are not bound to look out for the particular proprietors interested in the different parts of the line. But there it is held out to the public as one line: this is the case of a company known as the Lancaster and Preston Junction Railway, and holding themselves out to the world as the proprietors of and carriers upon that distinct line of railway only. To hold them liable for the loss of a parcel beyond the limits of their own line would therefore be very unjust. Suppose the case of a known coach from London to Stamford, and a party delivers to the book-keeper a parcel directed to York, does that prove a contract to carry it to York? [Lord Abinger, C. B. What would be the undertaking of the carrier in that case?] To carry to Stamford, and forward thence to York. Parties must be assumed to contract in reference to the known mode in which the carrier carries on his business. Suppose it had been alleged in this case that the defendants were common carriers from Lancaster to Derby, and that had been traversed; would evidence of the kind given on the part of the plaintiff have proved that they were? If the defendants are held liable in this case, it would follow, that a carrier who professed on his part to carry parcels one stage only from London, would be liable for the loss of a parcel at any place between London and the Land's End: or the owners of a steam-vessel plying between Liverpool and [425] Belfast, by receiving a box directed to an inland town in Ireland, would be responsible for its safe delivery at that place. If it be so, the same principle must hold as to imputed negligence to persons, as to goods. Now, suppose a passenger booked at Lancaster for London, and injured on the North Union Railway: could the proprietors of the Lancaster and Preston line be held responsible? The true construction of the defendants' contract is, that they engage to carry the goods safely as far as Preston—i.e. as far as they hold themselves out, and are empowered by their act of Parliament to trade, as carriers—and then to put them in a course of carriage onward, by transferring them to another carrier, so as to give the owner, in the event of their loss, a right of action against the new bailees. *Garside v. Trent and Mersey Navigation Company* (4 T. R. 581). [Lord Abinger, C. B. The defendants refuse to receive the money for the carriage at the time: does not that shew that they treat the carriers forward as their agents, from whom they are to get their remuneration?] A contrary inference rather arises—that they could not tell what the whole amount of the carriage would be, and therefore declined to receive it. If this be in law a contract to carry the whole distance, it must be so also, although the other party be fully cognizant of the terms on which the defendants carry on their business. [Lord Abinger, C. B. Do you say the successive carriers are agents of the original customer?] Yes, if the successive companies be known to him. [Rolfe, B. How is he to discover on which line the goods were lost?] In *Upston v. Shark* (2 Car. & P. 598), the name of the defendant was over the door of a booking-house for coaches and waggons in Piccadilly, with the words, "Conveyances to all parts of the world," followed by a list of places, amongst which was Windsor: yet it was held, that proof of the booking at that office of a box directed to Windsor, which did not reach its destination [426]-ation, was not sufficient to make the defendant responsible for its loss. So, in *Gilbart v. Dale* (5 Ad. & Ell. 543; 1 Nev. & P. 22), which was an action brought for negligence in the loss of goods, against the proprietor of a general booking-office for the transmission of parcels by coach, it was held insufficient to prove that the goods never reached their destination. Coleridge, J., there says, "Suppose goods were left with a carrier, to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?" The same hardship which is recited in the preamble to the Carriers' Act, 1 Will. 4, c. 68, from the great increase of the responsibility and risk of common carriers, will occur again, if a carrier is to be held liable under such circumstances as these.

LORD ABINGER, C. B. The simple question in this case is, whether the learned Judge misdirected the jury, in telling them that, if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they

accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel, that the defendants contract to do something more with the parcel than merely to carry it to Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carrier a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, is it not for the jury to say what is the contract, and how much more was undertaken to be done by them? Now, it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable; such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion, that the persons who were to carry the goods from Preston to their final destination, were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against them. But the question is, why should the jury infer one of these contracts rather than the other? which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum, rather supports the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners inter se as to the carriage-money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine what the contract was on the evidence before them. With respect to the case referred to, of the booking-office in London, it only goes to shew that when persons take charge of parcels at such an office, they merely make themselves agents to book for the stage-coaches. You go to the office and book a parcel: the effect of this is to make the booker your agent, instead of going to the coach-office yourself; and so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the carriage of the goods. In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, *prima facie*, must be made, of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as

conclusive evidence of the contract sued on by the plaintiff; it is only *prima facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward.

GURNEY, B. I think there was no misdirection in this case, and that the jury might fairly infer that the contract was such as was stated by the learned Judge. If the goods were to be carried only in the narrow sense contended for by the defendants, then, if the place of their destination were but three miles beyond Preston, and they were lost on the other side of the railway terminus, the defendants are not to be liable, but the plaintiff is to find out somebody or other who is to be liable in respect of the carriage for those three miles.

ROLFE, B. I am of the same opinion, and think the construction we are putting on the agreement is not only consistent with law, but is the only one consistent with common sense and the convenience of mankind. What I told the jury was only this, that if a party brings a parcel to a railway station, which in this respect is just the same as a coach-office, knowing at the time that the company only carry to a particular place, and if the railway company receive and book it to another place to which it is directed, *prima facie* they undertake to carry it to that other place. That was my view at the trial, and nothing has occurred to alter [430] my opinion. As to the case which has been put, of a passenger injured on the line of railway beyond that where he was originally booked, I suppose it is put as a *reductio ad absurdum*; but I do not see the absurdity. If I book my place at Euston Square, and pay to be carried to York, and am injured by the negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York. But at all events, in the case of a parcel, any other construction would open the door to incalculable inconveniences. You book a parcel, and on its being lost, you are told that the carrier is responsible only for one portion of the line of road. What would be the answer of the owner of the goods?—"I know that I booked the parcel at the Golden Cross for Liverpool, and my contract with the carrier was to take it to Liverpool." All convenience is one way, and there is no authority the other way.

Rule discharged.

[431] ROBERT JONES v. THOMAS JONES. Exch. of Pleas. June 3, 1841.—A cargo of 80 quarters of wheat was shipped in London, on the 6th of December, 1839, on board a vessel bound to Barmouth and Tremadoc, and by the bill of lading, was to be delivered at the port of Barmouth and Tremadoc to L. T., or to his assigns, on his paying freight, &c. The cargo was paid for by L. T. partly in cash, partly by his acceptance at two months. On the 28th January, 1840, L. T. by deed assigned all his estate and effects to the plaintiff and A. B., in trust for the benefit of themselves and his other creditors. L. T. was at that time insolvent, to the plaintiff's knowledge. The bill of lading was indorsed by L. T. to the plaintiff as follows (the indorsement being without date):—"I do hereby order that Captain J. do deliver the possession of the within-mentioned quantity of wheat to Mr. R. J. [the plaintiff], being one of my assignees, to be disposed of as he may think proper." On the 4th February, the vessel arrived at Barmouth with the wheat on board, and the plaintiff there went on board and took samples, and sold 70 of the 80 quarters, for which he paid the freight, and they were delivered to the purchasers: and he directed the master to take forward the remaining 10 quarters to Tremadoc. On the 9th February, L. T.'s acceptance became due and was dishonoured, and on the 10th the shippers gave notice to the captain, at Barmouth, not to deliver the wheat, but to hold it to their use. On the 23rd, the vessel arrived at Tremadoc, where the plaintiff demanded the remaining 10 quarters, tendering the freight, but the master refused to deliver it.—Held, that under these circumstances, (even supposing the plaintiff to be in the same situation as L. T.) the right of stoppage in transitu was determined, as to the whole of the cargo, by the acts done by the plaintiff at Barmouth.—*Semble*,

that if the composition deed contained a release to L. T., the plaintiff was an indorsee for value of the bill of lading, and no right of stoppage in transitu therefore existed as against him.

[S. C. 10 L. J. Ex. 481. Discussed, *Tanner v. Scovell*, 1845, 14 M. & W. 28. Distinguished, *Ex parte Coquer*: *In re McLaren*, 1879, 11 Ch. D. 68.]

Case. The declaration stated, that before and at the time of receiving on board the goods and merchandise thereafter mentioned, the defendant was the owner and master of a certain ship or vessel called the "Orion," then lying at anchor in the River Thames, and bound for Barmouth; and that certain persons trading under the name and firm of North & Co. had, to wit, on the 1st day of December, 1839, at the request of the defendant, caused to be shipped on board the said vessel divers goods and merchandise, to wit, 160 sacks of wheat, to be safely and securely carried in and on board the said ship or vessel from London to Barmouth aforesaid, to be delivered (the act of God, the Queen's enemies, &c. &c., being excepted) unto Lewis Thomas, or his assigns, for certain freight in that behalf: And the defendant then, to wit, on the day and year aforesaid, received the said wheat on board the said ship or vessel on the terms and for the purpose aforesaid, and did safely and securely carry the same on board thereof to Barmouth aforesaid, and there, to wit, at Barmouth aforesaid, delivered a great part, to wit, 140 sacks thereof, to the plaintiff, then being the assign of the said Lewis Thomas, and having full right and authority to receive the [432] same wheat, and every part thereof, from the defendant; and afterwards, and whilst the said vessel was lying at Barmouth, with the residue of the said wheat, to wit, 20 sacks thereof, still on board, and whilst the defendant was owner and master of the said ship or vessel, and the plaintiff was and continued to be such assign, and so authorized and entitled as aforesaid, to wit, on the 30th day of January, 1840, the defendant, by the consent and with the privity of the plaintiff, sailed with the said residue of the said wheat on board the said vessel, from Barmouth aforesaid, and took and carried the same to a certain other port, to wit, Portmadoc, to be there, to wit, at Portmadoc aforesaid, delivered to the plaintiff. And the plaintiff says, that although afterwards, to wit, on the day and year last aforesaid, the said vessel arrived at Portmadoc aforesaid, with the said residue of the said wheat on board thereof, and it was the duty of the defendant to deliver the same to the plaintiff; and although the plaintiff, after the arrival of the said vessel, was at all times ready and willing to receive the said residue of the said wheat, and to pay the freight for the same due and payable thereupon, on delivery, of all which premises the defendant afterwards, to wit, on &c., had notice, and was then requested by the plaintiff to deliver the said residue of the said wheat to him, yet the defendant did not regard his duty in that behalf, and would not nor did then, or at any other time, deliver the said residue of the said wheat, or any part thereof, to the plaintiff, but wholly neglected and refused, and still doth neglect and refuse, to deliver the same or any part thereof to the plaintiff. There was also a count in trover.

First plea: That just before the persons in the said first count mentioned, to wit, North & Co., shipped the said wheat as in that count mentioned, to wit, on &c., the said North & Co. were owners of the said wheat; and being such owners, and believing the said Lewis Thomas to be [433] then solvent, then bargained with and agreed to sell to the said Lewis Thomas, at certain credit then agreed upon between them; and the said Lewis Thomas, then holding himself out to the said North & Co. as solvent, and then representing himself to be a person of credit in trade, and fit to be trusted with the said wheat on sale thereof to him by the said North & Co. on credit, bargained with and agreed to buy of the said North & Co., the said wheat, at the said credit then agreed upon and fixed between them, and at for a certain price or sum in that behalf then agreed between them, to wit, the sum of 259l. 6s. 7d.; and the said North & Co., then believing the said Lewis Thomas to be solvent, and a person fit to be trusted with the said wheat on sale thereof to him at trust and credit, upon and by virtue of the said bargain above mentioned, then shipped the said wheat as in the said first count in that behalf mentioned, to be carried and conveyed as in the said first count also mentioned: of which said several premises the plaintiff then, and before the delivery of any part of the said wheat to the said plaintiff, had notice; and the defendant in fact saith, that after the said wheat was put on board the said vessel as

in the said first count mentioned, to be so carried and conveyed, and after the said delivery of the said 140 sacks to the plaintiff, and before the delivery of the said 20 sacks thereof in the said first count mentioned, and before the payment of the said price or sum of 259l. 6s. 7d., so agreed upon as the price of the said wheat to be paid by the said Lewis Thomas as aforesaid to them the said North & Co., to wit, on the said day and year aforesaid, they the said North & Co. then first learnt, as the fact was, that the said Lewis Thomas, at the time of the said bargain, and giving trust and credit to the said Lewis Thomas, and of shipping the same on board the said vessel as aforesaid, was insolvent, and that the plaintiff at that time, and before the delivery of any part of the said wheat to the said plaintiff, as in the first count [434] mentioned, well knew that the said Lewis Thomas was insolvent: and that the plaintiff, at the time of the indorsement of the said bill of lading to the plaintiff by the said Lewis Thomas, and at the time of his so becoming assign of the said bill of lading and of the said wheat, and at the time of the delivery of the said part of the said wheat to the plaintiff, as in the said first count mentioned, well knew that the said Lewis Thomas was then insolvent, and had not the pecuniary or other means of paying the said North & Co. for the same; nevertheless the plaintiff, well knowing the premises aforesaid, and without giving or paying any legal or valid consideration for the assignment or indorsement of the said bill of lading to him, and in fraud of the said North & Co., and of their right of stoppage in transitu, and without paying the said North & Co. for the said wheat, caused and procured the said part of the said wheat, under the pretence of his so being the assign thereof, as in the said first count mentioned, to be so delivered to him the plaintiff; and the said North & Co. after the delivery of the said part of the said wheat to the plaintiff as aforesaid, and before the delivery of the said 20 sacks, residue of the said wheat, as in the said first count mentioned, and before the expiring of the said credit to the said Lewis Thomas, to wit, on the said 30th of January, gave notice to the defendant not to deliver the said twenty sacks to the said Lewis Thomas or his assigns, and then stopped the same in transitu on board the said vessel, to be so conveyed and carried as aforesaid, and before the delivery of the same to the plaintiff, on account of and for the insolvency of the said Lewis Thomas, and then so stated and declared the same to the defendant, as such owner and master as aforesaid; and thereupon then the defendant, at the instance of the said North & Co. and by their command, and before the delivery of the said twenty sacks to the defendant, and while the same were in transitu, and before the expiration of the said credit to the said Lewis [435] Thomas, to wit, on the said 30th day of January, stopped the same, and refused to deliver the said twenty sacks to the plaintiff, the same being then stopped in transitu by the said North & Co. on account of and by reason of the said Lewis Thomas's insolvency, and the price of the said twenty sacks then not being paid to the said North & Co.; as he the defendant lawfully might for the cause aforesaid, and which is the said refusal to deliver the said twenty sacks, in the said first count mentioned and therein complained of. Verification.

Second plea, to the first count, that although the said persons trading under the name and firm of North & Co., had caused to be shipped on board the said vessel the said sacks of wheat in that count mentioned; yet the defendant says, that the said sacks of wheat were so shipped on board the said vessel, to be safely and securely carried in and on board the said ship or vessel from London aforesaid, to Barmouth aforesaid and a certain place, to wit, Tremadoc, and there, at Barmouth and Tremadoc aforesaid, to be delivered (the act of God, the Queen's enemies, &c. &c., being excepted), unto Lewis Thomas or his assigns, for certain freight in that behalf: without this, that the said sacks of wheat were shipped on board the said vessel to be carried to Barmouth only, and there delivered, in manner and form as in the said first count in that behalf mentioned; concluding to the country.

Third plea, to the second count—that the plaintiff was not lawfully possessed as of his own property of the said twenty sacks of wheat, *modo et formâ*.

Replication to the first plea, *de injuriâ*; to the second and third pleas, joinder in issue.

At the trial before Williams, J., at the last Merionethshire Assizes, the following facts appeared:

On the 6th of December, 1839, Messrs. North & Co. of London, sold on credit to Lewis Thomas, of Carnarvon, 80 quarters (160 sacks) of wheat, and delivered an

invoice of [436] the goods, the amount of which (295l. 7s. 3d.) was settled on that day with the said Lewis Thomas as follows:—

| | £ | s. | d. |
|--|-------------|----------|----------|
| Cash | 23 | 3 | 0 |
| Bill on a stranger (which was paid at maturity) | 76 | 17 | 0 |
| Bill of exchange dated 6th December, 1839, drawn by North & Co. on and accepted by Lewis Thomas, at two months' date, due 9th February, 1840 | 195 | 7 | 3 |
| | <u>£295</u> | <u>7</u> | <u>3</u> |

On the 30th of December, the wheat was shipped by North & Co., on board the ship "Orion," of which the defendant was master, and he then signed a bill of lading, in which the vessel was described as being bound for Barmouth and Tremadoc, and whereby the wheat was to be delivered "at the aforesaid port of Barmouth and Tremadoc, &c. to Lewis Thomas, or to his or their assigns, on his paying freight for the said goods," &c.(a) Upon it was the following indorsement, without date:—"I, Lewis Thomas, do hereby order and direct that Captain Jones do deliver the possession of the within-mentioned quantity of wheat to Mr. Robert Jones [the plaintiff], being one of my assignees, to be disposed of as he may think proper." It was proved that by the deed dated 28th of January, 1840, Lewis Thomas assigned over all his estate and effects to the plaintiff and one David Williams, in trust for the benefit of themselves and his other creditors. Lewis Thomas was at that time in insolvent circumstances, of which the plaintiff was aware.

On the 4th of February, 1840, the "Orion" arrived at Barmouth, and the plaintiff there went on board of her, and [437] produced the bill of lading, indorsed as above mentioned, saying that he came to take samples of the wheat. He accordingly, on that and the following day, took samples, by which he sold 70 out of the 80 quarters, for which he paid the freight, and they were landed and delivered to the purchaser. The plaintiff then directed the defendant to take forward the remaining 10 quarters to Portmadoc, which is the nearest port to Tremadoc. On the 9th of February, Lewis Thomas's bill for 195l. 7s. 3d. became due, and was dishonoured; and on same day North & Co. sent notice to the defendant not to deliver the grain to the purchaser, who had dishonoured his acceptance, but to hold it to their order. This notice was received by the defendant at Barmouth on the 10th of February. On the 23rd, the "Orion" arrived at Portmadoc, and the plaintiff there demanded of the defendant the remaining 10 quarters of wheat, and tendered the freight for the same: and the defendant refusing to deliver them, this action was brought.

It was contended for the defendant, that under the circumstances, the indorsement of the bill of lading to the plaintiff by Lewis Thomas was fraudulent and without consideration; that the plaintiff, therefore, was in the same condition as Lewis Thomas; that as against him the right of stoppage in transitu was in existence at the time when the notice to stop was given by North & Co. to the defendant, and that the first plea was therefore proved. The learned Judge expressed his opinion, that the right of stoppage in transitu was determined by the part delivery to the plaintiff at Barmouth:—and it was then agreed, that a verdict should be entered for the plaintiff, subject to the opinion of the Court upon the facts of the case, the verdict to be entered upon the several issues as the Court should think fit.

In Easter Term, Welsby accordingly obtained a rule to [438] shew cause why the verdict should not be entered for the defendant, against which

Jervis and Townsend now shewed cause. By the arrangement made at the trial, the Court are to be in the position of a jury, and to decide whether, under the circumstances, the transitus was determined. The first question is, whether the indorsement

(a) This was produced by the defendant: the copy of the bill of lading produced by the plaintiff in the course of his case, (which bore no indorsement,) described the vessel as being bound for Barmouth only, and made the wheat deliverable "at the aforesaid port of Barmouth." No explanation was given of this discrepancy, but it was stated that the two bills of lading had been exchanged between the plaintiff and defendant at Barmouth.

of the bill of lading to the plaintiff was without consideration or not. It will be contended for the defendant, that there was no consideration for the transfer, because it was made to the plaintiff as one of the assignees of Lewis Thomas, for the general benefit of his creditors. But the plaintiff was himself a creditor, and his being a party to the deed was itself a sufficient consideration for the assignment to him. He takes the bill of lading under the assignment, as part of the effects of the debtor, for a special purpose. [Parke, B. Then the question is, whether that is the kind of value which is sufficient to defeat the right of stoppage as against the indorsee. Alderson, B. If the deed contained a release to Lewis Thomas, it probably would be.] Any *bonâ fide* value is sufficient: and the plaintiff would be entitled to his proportion rateably with the other creditors.

Secondly, the right of stoppage in transitu was determined, even as against the original consignee, by the part delivery at Barmouth. The bill of lading is, in effect, in the alternative—to deliver the goods at Barmouth or Tremadoc: giving the consignee an option, either of having the cargo carried forward to Tremadoc, or of receiving and dealing with it at Barmouth. Then has not that option been exercised? The exchanging of the bills of lading at Barmouth is strong to shew that the voyage was then considered complete. The taking of the samples alone, with the intention to take possession of the cargo, would be a sufficient delivery, and here it is manifest that such was the plaintiff's intention. *Foster v. Frampton* (6 B. & Cr. 107; 9 D. & R. 108) is in point. There the vendee of several hogsheds of sugar, on receiving from the carrier notice of their arrival, went and took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse till he should receive further directions, and before they were removed he became bankrupt. It was held that the transitus was determined: and Bayley, J., says, "Where a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end. Now here the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples, and directed the carrier to keep the goods in his warehouse until he received further directions." And Littledale, J., says, "The taking of samples was a complete act of ownership." [Parke, B. That is, under the circumstances of that case. In *Dixon v. Yates* (5 B. & Adol. 313; 2 Nev. & M. 177), a similar act of the vendee was held not to have that effect.] It is in every case a question of intention. In the present case, it is clear that the plaintiff's object was to sell the whole of the corn at Barmouth, and that the samples were taken with that view. But supposing that to be an equivocal act, the part delivery to the plaintiff, under the circumstances, was equivalent to a taking possession of the whole cargo. He thereby exercised his option of taking possession at Barmouth. And the sending on the remainder of the cargo to Portmadoc does not alter the case. That is a fresh destination given by the plaintiffs to the goods, although not under a new contract. They cited *Wright v. Lawes* (4 Esp. 82), *Slubey v. Heyward* (2 H. Bl. 204), *Dixon v. Baldwin* (5 East, 175), *Hanson v. Meyer* (6 East, 614), and *Tucker v. Humphrey* (4 Bing. 516; 1 M. & P. 378, n.).

Welsby and Higgins, contra. The first plea was proved in substance. In order to establish a defence under it, the defendant had to prove two propositions: first, that the plaintiff was such an assignee of the bill of lading as that he stood in the same situation as Thomas, the original consignee; and secondly, that as against Thomas the transitus was not determined at the time of the stoppage. Now it is clear that the plaintiff knew, at the time of the indorsement of the bill of lading, and of the delivery of the goods to him, that they were sold on credit and not paid for, and that Lewis Thomas was insolvent. Those circumstances alone are treated by Lord Ellenborough, in *Cuning v. Brown* (9 East, 506), as being sufficient to invalidate the assignment of the bill of lading. But it also appears that it was without consideration. The indorsement was made to the plaintiff only in his character of trustee under the deed of assignment for the benefit of creditors, and was made, as appears from the terms of it, subsequently to the execution of that deed. The assignment of a bill of lading, to be valid, ought to be such as to vest in the assignee

the property in the goods for his own benefit. There might be a good consideration for the plaintiff's executing the deed, but there was none for the transfer to him of the bill of lading.

Secondly, the right of stoppage was not gone as against the original consignee, in respect to that part of the cargo which is the subject of this action. This bill of lading is peculiar in this respect, that it makes the goods deliverable at Barmouth and Tremadoc, thereby giving the consignee the option of having the whole of the cargo, or any part of it, delivered at either of those places. The vessel first [441] arrives at Barmouth, and there the plaintiff makes a contract for the sale of a part of the cargo, and that part is delivered accordingly; and it is material to observe, that the plaintiff there pays the freight for that part only. With respect to the remaining twenty sacks, the voyage originally contemplated continued until the arrival of the vessel at Portmadoc; they were carried there under the original contract; and accordingly, the plaintiff tendered the freight for them at Portmadoc. It is not a fresh destination given to the goods by the order of the consignee, but a carriage of them according to the original contract. With respect to the taking of samples, no doubt if that had been done with the intention of taking possession of the whole of the cargo, the transitus would have been determined thereby; but here it was done solely with a view to the sale of so much as the plaintiff might be able to dispose of at Barmouth, leaving the remainder to proceed to the end of the voyage. *Foster v. Frampton* is quite distinguishable: there the vendee had made the warehouse of the carrier his own, and the decision proceeded mainly on that ground: see also *James v. Griffin* (1 M. & W. 20). They cited also *Vertue v. Jewell* (4 Camp. 31). With respect to the count in trover, if the indorsement was without value, and the transitus was not determined, the plaintiff has clearly no title to recover on that count.

PARKE, B. There is no doubt in this case, with respect to the law; the question is entirely one of fact. The only question is, whether the Court think that the conclusion of the learned Judge at the trial, upon the evidence, was wrong. The Court do not think that conclusion wrong; on the contrary, the opinion expressed by the learned Judge is the same we should have formed. I forbear to give any decided opinion, whether the plaintiff was entitled to the goods as indorsee for value of the bill of lading. If [442] the deed of assignment contained a release to Lewis Thomas, I should think he would be; and it was decided by Lord Ellenborough, in the case of *Cuning v. Brown*, that a notice of non-payment of the acceptance would be no sufficient notice to deprive him of his right as a bona fide indorsee. It is not necessary, however, to decide this point; besides that it is left in uncertainty when the bill of lading was actually indorsed. Supposing, therefore, that the plaintiff was not an indorsee for value, the other question then arises, upon the facts of the case, quo animo he did the acts proved to have been done by him at Barmouth. There is no doubt as to the true construction of the bill, namely, that its effect was to reserve the whole cargo for the same port, of Tremadoc, unless the consignee took the actual dominion of the goods before they arrived at the journey's end according to the original destination. The question therefore is, whether the plaintiff did or did not take the possession and dominion of the whole of the goods at Barmouth. The taking of samples is an equivocal act: it might be that he took them in order to ascertain whether he could dispose of any part of the goods there, without intending thereby to take actual possession. Again, the actual delivery of the 140 sacks is not sufficient; it is no more than a delivery of 140 sacks to a purchaser of 140, and not done with a view to take possession of the whole. But let us look to the indorsement on the bill of lading. It is in these terms:—"I, Lewis Thomas, do hereby order and direct, that Captain Jones do deliver the possession of the within mentioned quantity of wheat to Mr. Robert Jones, being one of my assignees, to be disposed of as he may think proper." It seems to have been worded with the view of enabling the plaintiff to take possession of the whole of the cargo as soon as he could, i.e. at Barmouth. The very purpose for which he took the transfer, namely, as an assignee for the benefit of creditors, would require that he should obtain possession of [443] the whole, for the purpose of distribution among the creditors, on the first opportunity. These circumstances shew, that the entry on board at Barmouth, and taking of samples, was with the intent of taking possession of the whole. This rule must therefore be discharged.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

WYLD v. PICKFORD AND ANOTHER. Exch. of Pleas. June 10, 1841.—A carrier is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that be not paid, it is competent to him to limit his liability by special contract. And therefore, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a mis-delivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.—In case against carriers, the first count stated a delivery to the defendants, at their request, of a case containing certain maps, to be carried, &c., and alleged a receipt thereof by the defendants, whereby it became their duty to take due and proper care thereof; but that they did not take due and proper care of them, whereby the goods were lost. The second count was in trover. Plea to the first count, that at the time of the delivery of the case and its contents, the defendants were common carriers for hire, and then gave notice to the plaintiff, who then had notice and knowledge, that the defendants would not be responsible for the loss of, or damage done to, certain goods and chattels, delivered to them for the purpose of carriage, and, amongst others, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of delivery; that the said case was the package in which the said maps were contained; that they received the case and maps to be carried as aforesaid, upon the terms and conditions of the said notice, and upon no other terms whatsoever, of which the plaintiff at the time of the delivery had notice, and that the maps were not at the time of the delivery insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been by a mis-delivery, through mistake and inadvertence. On special demurrer to both pleas:—Held, first, that the action being founded on a breach of duty ex contractu, the allegation in the pleas of a special contract, was sufficient; and that as the defendants accepted the goods only on the terms of the notice, a special averment of the plaintiff's consent was unnecessary. Secondly, that the third plea was not an argumentative traverse of the facts in the declaration, from which the breach of duty was implied. Thirdly, that, as the declaration might apply to any kind of negligence, it was not necessary to allege in the third plea, that the loss was occasioned by such negligence as the defendants were not responsible for; and that if the defendants had committed negligence for which they were liable notwithstanding their notice, the plaintiff should have new assigned it. Fourthly, that the case was not separable from the maps. Fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not shew that the inadvertence was such as was protected by the notice.

[S. C. 10 L. J. Ex. 382. Explained, *Butt v. Great Western Railway*, 1851, 11 C. B. 150. Applied, *The Glendarroch*, [1894] P. 237. Discussed, *Hinton v. Dibbin*, 1842, 2 Q. B. 661; *Treadwin v. Great Eastern Railway*, 1868, L. R. 3 C. P. 312; *Great Western Railway v. Blower*, 1872, L. R. 7 C. P. 663; *Manchester, Sheffield, and Lincolnshire Railway v. Brown*, 1883, 8 A. C. 709; *Price v. Union Lighterage Company*, [1903] 1 K. B. 750. Referred to, *Shaw v. Great Western Railway Company*, [1894] 1 Q. B. 373.]

Case. The first count of the declaration stated, that theretofore, to wit, on &c., the plaintiff, at the request of [444] the defendants, caused to be delivered to the defendants certain goods and chattels, to wit, one case containing divers, to wit, 1000 maps of the plaintiff, of great value, to wit, of the value of 200l., to be by the defendants carried and conveyed from a certain place, to wit, London, to a certain other place, to wit, the town of Athlone, in the kingdom of Ireland, and there, to wit, at Athlone aforesaid, to be delivered by the defendants for the plaintiff, for certain

reward to the defendants in that behalf; and the defendants then had and received the said goods and chattels for the purpose aforesaid; and thereupon it then became and was the duty of the defendants, whilst they so had the said goods and chattels, to take due and proper care thereof: yet the defendants, not regarding their duty in that behalf, did not nor would, whilst they so had the said goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on &c., the said goods and chattels became and were greatly injured, and wholly lost to the plaintiffs. There was also a count in trover.

Pleas, first, not guilty. Secondly, to the first count, that the plaintiff did not cause to be delivered to the defendants the said goods and chattels of him the plaintiff to be carried and conveyed by the defendants, nor did the defendants have and receive the same, *modo et formâ*. Thirdly, to the first count, that before and at the time of the delivery to the defendants by the plaintiff of the said case and its contents, as in the said first count mentioned, they the defendants were, and still are, common carriers of goods for hire: and that at the time of the delivery to them the defendants of the said case containing the said maps, as in the said first count mentioned, they the defendants then gave notice to the plaintiff, and the plaintiff then had notice and knowledge, that the defendants would not be responsible for the loss of or damage done to certain goods and chattels delivered to them for the purpose of carriage [445] or conveyance, and, amongst others, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of delivery to the defendants: and the defendants further say, that the said case was the package in which the said maps were contained; and that they accepted and received from the plaintiff the said case with the said maps, the contents thereof as aforesaid, to be carried and conveyed as aforesaid, subject to and under and upon the terms and conditions of the said notice, and upon no other terms whatsoever: whereof the plaintiff, at the time of the delivery thereof by him to the defendants as aforesaid, had knowledge and notice. And the defendants further say, that the said maps were not, at the time of the delivery thereof to them the defendants as aforesaid, insured according to their value, or paid for. Verification.

The defendants pleaded, fourthly, to the second count, that the plaintiff was not lawfully possessed as of his own property of the said goods and chattels in that count mentioned, *modo et formâ*. Fifthly, to the second count, that they the defendants, before and at the time of the committing of the said alleged grievance in that count mentioned, were common carriers of goods for hire, and that the said case and maps therein mentioned was a package containing the said maps, which were delivered by the plaintiff to the defendants for the purpose of carriage and conveyance by them as such common carriers as aforesaid, and for no other purpose whatsoever. [The plea then stated the notice, the receipt of the case and maps on the terms of the notice, with the plaintiff's knowledge, and without its being insured or paid for, as in the third plea, and then continued as follows:] And the defendants further say, that the said conversion of the said case and maps in the said second count mentioned, was and is the loss of the said case and maps therein also mentioned, by a mis-[446]-delivery thereof through mistake and inadvertence, and not otherwise howsoever. Verification.

The plaintiff joined issue on the first, second, and fourth pleas, and to the third and fifth demurred specially, and the defendants joined in demurrer.

The causes of demurrer to the third plea were as follow:—That the said plea does not shew that the said case and maps were of the value of £10 or upwards: that it does not sufficiently state any special contract respecting the carriage of the same, whereby the liability of the defendants was in anywise restricted; that the statement that the plaintiff had knowledge and notice of the matters in the plea stated, is not a sufficient, but at best but a round-about and argumentative statement of such a special contract; and even supposing the said plea sufficiently to state a special contract, or other facts limiting the responsibility of the defendants as carriers, it is bad for argumentativeness, in this, that it merely amounts to an argumentative traverse of the averments in the first count of the defendants' duty, and their breach thereof: that the said plea does not shew that the notice to the plaintiff therein mentioned was any thing more than a public notice; that it does not state any defence as to the said case, inasmuch as it does not shew that the said case was not

insured or paid for pursuant to the said notice, or that it was valueless; and that it is consistent with the said plea, that some, although not all, of the said maps were insured and paid for pursuant to the said notice: that the said plea, being bad as to part of the cause of action to which it is pleaded, is bad altogether; and that it does not sufficiently shew that the defendants were not guilty of negligence in respect of the carrying and taking care of the said case and maps.

The causes of demurrer to the fifth plea were:—That it does not sufficiently admit a conversion, but is an argumentative denial of a conversion, and amounts to the general issue, and ought to have been so pleaded; and the [447] statement therein that the conversion complained of was a loss by mis-delivery through mistake and inadvertence, is repugnant and contradictory: that the terms mentioned therein, namely, that the defendants would not be responsible for loss of or damage to certain goods and chattels delivered to them for the purpose of carriage or conveyance, &c., are not sufficient to include the case of a conversion of goods delivered for the purpose of carriage and conveyance in manner and form as complained of in the declaration: that the said plea is double, in this, that it attempts to excuse the conversion complained of by reason of the alleged knowledge of and notice to the plaintiff, and the non-insurance of and non-payment for the said case and maps, and also argumentatively traverses the conversion complained of: that the said plea does not state any defence as to the said case, &c., &c.; that it is consistent with the said plea that some, although not all, of the said maps, were insured and paid for pursuant to the said notice: that the said plea, being bad as to part of the causes of action to which it is pleaded, is bad altogether: that the said plea does not shew that the said case and maps were of the value of £10 and upwards, or that the plaintiff was asked to declare the value of the said maps, or refused to declare the same; and that the said plea does not sufficiently state any special contract respecting the carriage of the same, whereby the liability of the defendant was in any way restricted; and that the statement, that the plaintiff had knowledge and notice of the matters, in the said plea in that behalf stated, is not a sufficient, but is at best but a round-about and argumentative statement of such special contract, &c., &c.

The case was argued at the sittings after Easter Term (May 11 and 13) by

Willes, in support of the demurrers. First, the notice stated in these pleas furnishes no defence to the action, [448] under the circumstances of this case. A notice of this kind can operate as a defence for a carrier, only in one of two ways:—either on the ground that, after receiving such a notice, it becomes the duty of the owner of the goods to inform the carrier of their nature and value, and that the concealment of them is a fraud upon the carrier; or as a limitation, by special contract, of the general common law liability of the carrier. Now in this case, the defence of fraud by improper concealment is not pleaded: the only question, therefore, that can arise upon this part of the case, is as to the effect of the notice itself upon the liability of the defendants as common carriers. But even assuming that a common carrier may limit his responsibility by a special contract, these pleas do not contain any sufficient statement of such special contract. There is, indeed, an averment of notice to the plaintiff, but that is of itself insufficient; it ought to have been followed by some statement shewing an acceptance by the plaintiff of the terms contained in the notice, whereby he is bound. Again, the pleas ought directly to have averred a contract; at present they contain only an indirect and argumentative traverse of the averments in the declaration of the defendants' duty. But even supposing these objections removed, the pleas do not amount to a defence. It is clear that such a notice as this, even if accepted by the owner of the goods, does not operate to exempt the carrier from all responsibility, but only from liability in respect of loss or injury arising from mere accident or inadvertence, leaving them still liable for all damage or loss occasioned by a want of due and proper care of the goods. The pleas ought therefore to have shewn distinctly, that the negligence complained of was of a nature for which the defendants were not responsible, by reason of their special contract with the plaintiffs. The principle laid down in the authorities on this subject is, that even if it be competent to a carrier to exempt himself, by a special acceptance of a [449] notice of this kind, from his common law liability, the exemption will not extend to losses arising from his own personal default, but only to losses from accident or chance:—per Lord Ellenborough, C. J., in *Lyon v. Mells* (5 East, 428). So, in *Bodenham v. Bennett* (4 Price, 31), where a bank parcel sent by a stage coach

was lost, and it appeared that on the arrival of the coach at its destination, the coachman was in liquor, and the book-keeper (who saw the entry of the parcel in the way-bill), supposing that the coachman had the parcel about him, as was the custom, did not ask him for it, or look for it in the coach: it was held that this was a loss arising from gross negligence, and that the coach-proprietors were liable, notwithstanding they had put up the usual notice to restrict their liability. A common carrier has, in truth, two distinct liabilities; the one for losses by mistake or inadvertence (to which he is subject in his character of an insurer), the other for losses by personal default or negligence: from the latter of these such a notice does not exempt him, although it may from the former: *Garnett v. Willan* (5 B. & Ald. 53), *Sleat v. Fagg* (id. 342). These authorities are equally applicable to the fifth plea, which is pleaded to the count in trover: because a mis-delivery by mistake is a conversion, for which trover will lie: *Youl v. Harbottle* (Peake's N. P. C. 49), *Devereux v. Barclay* (2 B. & Ald. 702), *Syeds v. Hay* (4 T. R. 260). *Ellis v. Turner* (8 T. R. 531) is a strong authority for the plaintiff. There the master of one of the vessels plying on the navigation between A. & C. took on board goods of the plaintiff to be carried from A. to B., an intermediate place between A. & C., and there delivered. The vessel passed by B. without delivering the goods there, and afterwards sunk without any want of care in the master. It was held that the owner of the vessel was liable for the loss, although the owners of [450] the vessels on the navigation had given public notice that they would not be answerable for losses in any case, except when occasioned by want of care in the master, nor even then beyond £10 per cent., unless extra freight were paid according to the value of the goods. *Beck v. Evans* (16 East, 244), *Riley v. Horne* (5 Bing. 217; 2 M. & P. 331), and *Smith v. Horne* (8 Taunt. 144; 2 Moore, 18), are authorities which all go to establish the same distinction. In Story on Bailments, 365, the rule is laid down in conformity with these authorities. The pleas, therefore, furnish no answer to either of the counts of the declaration.

But at all events, the defendants are liable for the loss of the case, if not for that of the maps also: inasmuch as they seek, by means of their notice, to relieve themselves from liability as to both, but the pleas do not aver that the case was not insured and paid for.

Martin, for the defendants. These pleas furnish a good defence to the action. They admit the truth of the averments in the declaration, but shew also that no responsibility attaches to the defendants in respect thereof, by reason of the notice given by them to the plaintiff. That is a defence which, since the new rules, cannot be gone into under the general issue, but must be pleaded specially: *Syms v. Chaplin* (5 Ad. & Ell. 634; 1 N. & P. 129). Then the important question is as to the effect of the notice in point of law. It is put on the other side, that it can operate only in the nature of a special contract to carry on the terms of it; but that is not so: its only effect is as a limitation of the common law liability of the carrier. If the carrier makes no demand of the kind, his common law liability attaches in its full extent; but if he chooses to insist on a condition precedent being performed by the other party,—which the law enables him to annex,—he discharges himself, in case of the non-performance of such condition, of his common law liability in respect of [451] the carriage of the particular goods, and remains liable only for gross negligence. By his knowledge of the notice, the customer takes upon himself the risk of loss or injury from other causes. [Parke, B. It is very difficult to reconcile the notice, so construing it, with the carrier's obligation to carry.] That obligation does not arise until the offer has been made him of a reasonable compensation; and the meaning of the notice is, that the bailor is to make such compensation in proportion to the risk incurred. The carrier in effect says—"I am ready to incur my common law liability as to your goods, upon the condition of your paying me a reasonable sum in proportion to the extent of my risk." No doubt it cannot exempt him from the consequences of gross negligence, and it is fully admitted that it would be a complete answer to these pleas to reply that the goods were lost by gross negligence; but if it were a contract on the terms of the notice, that could not be so, because it could only be pleaded as co-extensive with the notice: it must be a contract on the terms of the notice, or none at all. The cases which have been referred to are therefore, in truth, authorities for the defendant. In the case of *Batson v. Donovan* (4 B. & Ald. 21), not a word is said in the judgments of the several Judges, as to any implication of a contract from such a notice. If such were its true construction, it would seem that the party ought

to declare upon the contract: but this is an action on the case, in which the defendant is charged on his common law liability as a carrier, and he has a right to defend himself by means of this notice, which he had a right to give, and by which his common law liability is qualified as to these goods. [Parke, B. If the condition mentioned in the notice is not performed, but the goods are nevertheless received to be carried, the parties then stand in a new relation: either the common law liability still attaches, the con-[452]-dition precedent being waived, or, as it would seem, a special contract arises to carry with a limited liability. No doubt the notice operates as a limitation of liability, but the question is, in what way; simpliciter, or as the foundation of a special contract?] It is submitted, simpliciter: if not, there has been a misdirection in all the cases at *Nisi Prius*, in which the only fact left to the jury has been whether such a notice was given to the plaintiff or not, and no question has ever been left as to any contract to be inferred from the notice. In *Gibbon v. Paynton* (4 Burr. 2298), Aston, J., says, "The true principle of a carrier's being answerable is the reward; and a higher price ought in conscience to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value." If, therefore, valuable goods are sent to be carried, without any offer to pay the insurance to which the carrier is in conscience entitled, no obligation to receive them arises, and it is fully competent to the carrier to make such conditions of receiving them as are contained in this notice. In *Harris v. Packwood* (3 Taunt. 264), it was held that a party who does not pay the insurance according to the terms of the notice, cannot recover any part of the goods if they are lost. So, in *Marsh v. Horne* (5 B. & C. 322; S. D. & R. 223), where the defendant had given notice that he would not be responsible for goods above the value of 5l., unless paid for accordingly, he was held not to be liable for the loss of a parcel above that value (even though he knew its actual value), unless the price of the carriage was paid when the parcel was received. This is, therefore, a limitation of the defendants' responsibility at common law, on which they had a right to insist, and not a matter of contract; and the pleas sufficiently shew the existence of such limitation in the particular case. It is said that they ought to have negatived gross negligence, or such negligence as the sup-[453]-posed special agreement did not apply to. Now the declaration is general and ambiguous in its terms: it may apply either to a case of contract, or to a delivery to the defendants as common carriers. The pleas, taken together with the declaration, shew that the latter is the true state of the case, and it is sufficient that they shew such facts as exempt the defendants, as such, from liability for some species of loss; if there was gross negligence, it was for the plaintiff to reply that fact.

Then as to the distinction taken between the case and the maps. The averment is of the delivery of a case with maps, the latter being the real article of value, and the former merely an accessory. The meaning of the notice and of the act of Parliament is, that the additional sum is to be paid on the maps in the package, not on the package containing them. If the carrier has discharged himself of responsibility as to the principal, so has he also as to the mere adjunct. But even if the notice is to be strictly construed, the defendants are within the terms of it. The notice is, that they will not be liable for (inter alia) "maps in packages," unless insured and paid for according to their value. Here the package has not been insured and paid for at all; therefore, the article delivered to be carried has not been insured and paid for according to its value.

Lastly, as to the objection to the fifth plea, pleaded to the count in trover: The question on that plea is, whether a conversion is admitted. On this point the case of *Youl v. Harbottle* is conclusive. There are many instances of mis-delivery to which the notice would apply; as a delivery to a wrong person of the same name in the same house, the parcel being directed generally. That, according to *Youl v. Harbottle*, would be a conversion, but it would be one to which the notice would be an answer. In *Birkett v. Willan* (2 B. & Ald. 356), a delivery to a stranger, who professed to come from the person to whom the parcel was directed, but did [454] not, was held to be such negligence as to prevent the notice from being a protection: but in *Bulson v. Donovan*, Bayley, J., distinguishes that as being a case of misfeasance, being a wrongful delivery to a person who had no colour for receiving. Upon the whole, therefore, it is submitted that both the pleas are well pleaded, and constitute a good answer to the declaration.

Willes, in reply. The argument on the other side is, that this notice operates,

not as a special contract, but as an act done by the carrier, not amounting to a contract, whereby he relieves himself of part of his common law liability, except on certain terms. But there is in fact no distinction between these two modes of construing the notice. The ground taken for the defendant is altogether anomalous. How can the party on one side, by his own act, free himself of a liability which the law casts upon him? It is said the payment of the insurance is a condition precedent:—so it is, but it is a condition precedent which is parcel of a contract. Then it is said, what is this contract, and how is it to be pleaded? The contract is this—the carrier agrees, in consideration that the owner of the goods will be content with his carrying without insuring them, that he will carry at the ordinary rate, and waive any additional recompence. It is a contract whereby each party agrees to waive a certain portion of his rights at common law; and might be so pleaded. Mr. Justice Story says (*Story on Bailments*, s. 551, p. 352): “In respect to special contracts, they may be divided into two classes; first, such as are express, secondly, such as are implied. The latter class is the most frequent in cases of carriage of goods on land. It sometimes arises from the particular dealing between the parties, either generally, or in the given case; sometimes from the general course of trade or business; and [455] sometimes, and most usually, from the public advertisements and notices given by carriers, stating the terms and limits of their responsibility.” And again: (*ibid.* s. 557, p. 356) “The notice in all cases, where it is brought home to the parties, is, in the absence of all contravening circumstances, deemed proof of the contract actually subsisting between them; and of course it varies, pro tanto, the general liabilities of the common law in respect to common carriers. . . . It is, then, to be construed like every other contract, and so far as its exemptions extend, they convert the general law into a qualified responsibility.” But further, this being the case of carriage partly by water and partly by land, the Carriers’ Act, 1 Will. 4, c. 18, ss. 4 & 6, is applicable as to the latter part of the journey, and as to that part it was competent to the defendants to avail themselves of the benefit of the act, and they must be taken to have done so; they are therefore bound by its terms. Now the 6th section says expressly, that nothing in the act shall extend or be construed to annul or affect any special contract between parties for the conveyance of goods. Either, therefore, there is a special contract, or the 4th section of the act renders the notice a nullity.

Secondly, there is no defence as to the case. The notice refers merely to maps in packages. But it is said that the declaration is for one entire chattel, and that the case is only an accessory to the maps, which are the principal. But that maxim does not apply to a thing which is not necessarily incident to the principal. Here the maps and the case are perfectly distinct chattels. But further, it does not appear that the notice has reference to entire chattels: the words are generally—“maps in packages.” Either the notice includes the case or it does not: if not, there is clearly no defence as to the case; if it does, the plea ought to have stated that the case was not insured [456] and paid for, as well as the maps. But the defendants rely on the allegation that the case was the package: that, however, is an immaterial averment, which the plaintiff could not have traversed: *Newhall v. Barnard* (Yelv. 225). The defendants ought to have pleaded payment of money into Court as to the case.

Next, as to the plea to the count in trover. There are two distinctions with respect to notices of this kind:—first between the carrier’s liability as an insurer, and as an ordinary bailee for hire; he frees himself by notice from the former, but not from the latter:—secondly, there is another distinction between acts done by him in the course of his duty in forwarding the goods, and acts done out of the course of his duty. Such is a mis-delivery of the goods. In *Garnett v. Willan*, Holroyd, J., puts it as a renunciation of his character of a carrier, as contradistinguished from a mere negligent discharge of his duty in that character. So, Mr. Justice Story says (*Story on Bailments*, s. 570, p. 365), “It is clear that such notices will not exempt the carrier from any losses by the malfeasance, misfeasance, or gross negligence of himself or his servants. If, therefore, he or they convert the goods to a wrong use; if he or they make a wrong delivery to a person not entitled to them; or if he or they are guilty of gross negligence in the carriage or care of them, the loss must be borne by the carrier, notwithstanding his notice.” [Alderson, B. You could not in common parlance say you have lost or damaged an article, when you knew you have delivered it to A. B.] And such a distinction is very reasonable: because the risk in the course of conveyance is necessarily much greater, than after the goods have arrived at the

place when they are to be delivered. A conversion, therefore, by mis-delivery, is not within the terms of the notice.

Lastly, it is objected that the first count is ambiguous. [457] It is in the form adopted in the case of *Pozzi v. Shipton* (8 Ad. & Ell. 973; 1 P. & D. 4), except that here the declaration states a delivery on request, the absence of which allegation Patteson, J., there considered as affording some inference that the action was not founded on contract. But here also the count charges the defendants as ordinary bailees for hire, not as common carriers, and imputes to them a breach of duty in not taking such proper care of the goods as any bailee for reward is bound to take: and to this charge the plea offers no defence; it only sets up a special contract, exempting the defendants from responsibility for such loss or damage as they would be bound to protect the goods against as insurers, (which the declaration does not cast upon them), admitting a breach of their duty as ordinary bailees for hire.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. [Having stated the pleadings and the grounds of demurrer, his Lordship continued:—] Several objections were made to the pleas in this case.

The first, which was applicable to both the 3rd and 5th pleas, was, that the defence arising from the notice in this case could be rested only on one of two grounds: either that of fraudulent concealment of the value of the goods, (to be implied from the fact of delivery without mention of the value, after such a notice, according to the opinion of the majority of the Judges in *Batson v. Donovan*), or of a limitation of the responsibility of a common carrier, by special acceptance, or contract: that fraud was not pleaded at all; and the special acceptance, or contract, not properly alleged, but that the plea contained an argumentative statement, or only evidence of a contract, to carry with it a responsibility less extensive than that which the law imposes on common carriers.

[458] We agree that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract; which limitation it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder. It seems to us, however, that in the present case there is a sufficient allegation in both the pleas of such a special contract. In an action on the case for breach of a duty arising ex contractu, upon a bailment, or otherwise, it is not necessary to state the contract with the same forms as in an action of assumpsit. The usual mode is to aver, as is done here, that the goods were delivered by the plaintiff to the defendant, and had and received by the defendant, to be kept, or carried, or dealt with in a particular way. In this plea there is an averment, after the allegation of the notice, and knowledge thereof by the plaintiff at the time of the delivery of the goods to the defendants, that they accepted and received the goods from the plaintiff, to be carried and conveyed, subject to and under and upon the terms and conditions of the notice, and upon no other terms, whereof the plaintiff then had knowledge and notice. It is objected, that there is no express averment that the plaintiff consented to those terms; but assuming that he did not, the defendant did not accept the goods on any other, and the plaintiff is in this difficulty, that he cannot enforce the defendants' obligation as common carriers, with all the obligations of that character, because he was not ready to pay the price of carriage beforehand, and if he sue as on a bailment to the defendants on special [459] terms, it must be a bailment on these terms on which alone the defendants have agreed to accept the goods.

Another objection was, that the third plea amounted to an argumentative traverse of the averment in the declaration of the defendant's duty. This objection is not well founded, because, in the first place, the allegation of duty is not a traversable matter, but an inference of law from the delivery and receipt of the goods for the purpose of carriage: and if by the special demurrer it is meant to object, that the facts in the declaration from which the duty is inferred, are argumentatively traversed, the answer is, that the allegations in the plea are not inconsistent with a delivery, and with a receipt for the purpose of being carried, which is all that the declaration avers.

A third objection was, that the plea ought to have gone on to allege, that the loss was not occasioned by such negligence as the defendants were responsible for, notwithstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz., that such negligence should have been replied, or, more properly speaking, newly assigned. Under this declaration, the plaintiff might recover for any species of loss by neglect: and, according to the decision of the Court of Queen's Bench, in the case of *Pozzi v. Shipton*, for any species of loss for which a common carrier would be responsible; and the present case cannot be satisfactorily distinguished from that, the only difference being, that here the goods are stated to have been delivered at the defendant's request, the absence of which words in that case afforded, as Mr. Justice Patteson observed, some inference that the action was not founded on contract, but no more: and in *Brotherton v. Wood* (3 Brod. & B. 54), the second count of the declaration stated the plaintiff to be a passenger at the special instance and request of the defendant, and yet the judgment against eight out of ten defendants was supported, on the ground of the action not [460] being founded on contract, but on a duty arising out of the custom of the realm. The declaration, therefore, being general, and the plea being a good answer to some species of loss, the defendant has a right to suppose that the plaintiff complains of that species of loss which the plea answers, and the plaintiff is put to correct the generality of his declaration by a new assignment.

What circumstance may make the defendants responsible after such a notice, whether ordinary negligence, or gross negligence, or wilful misfeasance, is a question which need not have been determined on the demurrer to the third plea. But on that to the fifth it is necessary, for if any conversion by non-delivery, or a negligent conversion, would be a misfeasance for which the defendants would be liable notwithstanding the notice, the plea would be bad; if a mere inadvertent conversion, it would not.

Upon reviewing the cases on this subject, the decisions and dicta will not be found altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In *Bodenham v. Bennett* (4 Price, 34), Mr. Baron Wood considers that these notices were introduced for the purpose of protecting carriers from extraordinary events, and not meant to exempt them from due and ordinary care. On the other hand, in some cases it has been said that the carrier is not by his notice protected from the consequences of misfeasance, Lord Ellenborough, in *Beck v. Evans* (16 East, 247); and that the true construction of the words "lost or damaged," in such a notice, is, that the carrier is protected from the consequences of negligence or misconduct in the carriage of goods, but not if he divests himself wholly of the charge committed to his care, and of the character of carrier. Bayley and Holroyd, Js., in *Garnett v. Willan* (5 B. & Ald. 57, 60). In many other cases it is said, he is still responsible for "gross negligence:" but in some of them that term has been defined in such a way as [461] to mean ordinary negligence, (Story on Bailments, section 11), that is, the want of such care as a prudent man would take of his own property. Best, J., in *Batson v. Donovan* (4 B. & Ald. 30), and Dallas, C. J., in *Duff v. Doddl* (3 Brod. & B. 182). The weight of authority seems to be in favour of the doctrine, that in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence—gross negligence, in the sense in which it has been understood in the last-mentioned cases; and that the effect of a notice, in the form stated in the plea, is, that the carrier will not, unless he is paid a premium, be responsible for all events, (other than the act of God and the Queen's enemies), by which loss or damage to the owner may arise, against which events he is by common law a sort of insurer; but still he undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage: and after such a notice, it may be that the burthen of proof of damage or loss by the want of such care would lie on the plaintiff. But a mis-delivery of a parcel, although it is a conversion, according to the doctrine in *Youl v. Harbottle* (Peake, N. P. C. 49), because it is the giving the dominion over the goods to another, is not necessarily a proof of want of ordinary care, still less of gross negligence, if that word is to be understood as meaning a greater want of care; it

may have been an act done by a careful person, who has been deceived by an artifice calculated to circumvent the most careful person. In *Birkett v. Willan* (2 B. & Ald. 356), a mis-delivery took place under such circumstances as that the jury found, with the concurrence of Lord Tenterden, that it was protected by a similar notice, though the Court [462] thought fit to direct a new trial, from an impression that there had been gross negligence. But there is a difficulty in supporting this plea, on the construction which we think we ought to put upon the terms of the notice on which the goods were received, for the plea admits a conversion by inadvertent delivery; and does not excuse that, since the carrier is not by such notice made irresponsible for every mistake or inadvertent delivery, but only for such as were made without negligence, whether gross or ordinary, and a delivery may be even grossly negligent which is inadvertent. And this is not a case for a new assignment, for the plea shews that the defendants know for what the plaintiff is proceeding, viz. the mis-delivery, but does not give an answer to that.

Our judgment, therefore, must be for the plaintiff on the demurrer to the fifth plea, and for the defendants on that to the third plea. The other objection, as to the distinction between the case and its contents, was, we think, satisfactorily answered. One is in truth accessory to the other, and if not, then, as the plaintiff has not paid insurance for both, as he would have done if he had paid for the package and not for the maps, the defendants are protected by the notice. The defendants may, if they please, amend the fifth plea on the usual terms.

Judgment accordingly.

[463] WHITMORE AND OTHERS, Assignees of J. S. Viret and T. R. Kitching, Bankrupts, v. ROBERTSON. (a) Exch. of Pleas. 1841.—Where an execution by fieri facias on a judgment on a warrant of attorney (not given by way of fraudulent preference) was executed by seizure, after a secret act of bankruptcy, but not completed by sale of the goods seized before the issuing of the fiat, which was subsequent to the passing of the 2 & 3 Viet. c. 29:—Held, that the execution creditor was not entitled to the benefit of it, as against the assignees of the bankrupt; the stat. 2 & 3 Viet. c. 29, not having had the effect of rendering valid such executions, so as to entitle the execution plaintiff to the benefit of them as against the assignees, nor repealed the 108th sect. of 6 Geo. 4, c. 16.

[S. C. 1 Dowl. (N. S.) 135; 5 Jur. 1088.]

Trover for certain goods and chattels, of which the plaintiffs, after the bankruptcy, were lawfully possessed as of their own property as assignees.

Plea. That at the time of the recovery of judgment by the defendant as thereafter mentioned, the said goods and chattels in the declaration mentioned were the property and in the possession of the said J. S. Viret and T. R. Kitching, before they became bankrupts: that before the date and issuing of the fiat against the said J. S. Viret and T. R. Kitching, under which the said plaintiffs were appointed assignees as in the said declaration mentioned, and whilst the said J. S. Viret and T. R. Kitching were so possessed, as of their own property, of the said goods and chattels, the said J. S. Viret and T. R. Kitching were justly and truly indebted to the defendant in a large sum of money, to wit, the sum of £2500 and upwards, and that afterwards and whilst the said J. S. Viret and T. R. Kitching were so indebted as aforesaid, and after the making and passing of a certain act of Parliament, made and passed in the second and third years of the reign of our Lady the now Queen, "For the better Protection of Parties dealing with Persons liable to the Bankrupt Laws," and before the date and issuing of the said fiat, to wit, on the 24th of July, 1840, in the Court of our Lady the Queen before the Queen herself, at Westminster, in the county of Middlesex, the defendant, by the consideration and judgment of the said Court, recovered against the said J. S. V. and T. R. K. as well a certain debt of £5000, as also 3l. 10s. for his damages, [setting forth the [464] judgment]. And the defendant further says, that the said judgment being in full force, and the said debt and damages remaining unpaid and unsatisfied,

(a) The judgment in this case was not delivered until Michaelmas Term, but the Reporters have thought it right to publish it thus early, on account of its great importance.

afterwards, and after the making and passing of the said act of Parliament, and before the date and issuing of the said fiat, and before he had any notice of any act of bankruptcy by the said J. S. V. and T. R. K., or either of them, committed, and before the said time when &c. in the said declaration mentioned, to wit, on the said 24th day of July, 1840, he the said defendant, for the obtaining satisfaction thereof, sued out and prosecuted out of the said Court of our said Lady the Queen, before the Queen herself, at Westminster aforesaid, a certain writ of our Lady the Queen, called a fieri facias, directed to the sheriffs of London, [setting forth the fieri facias for the debt, damages and interest], which said writ afterwards, and before the delivery thereof to the said sheriffs as hereinafter mentioned, was indorsed with a direction to the said sheriffs to levy 2510l. 6s. 5d., with interest on 2509l. 6s. 5d., part thereof at the rate and from that date last aforesaid, together with sheriffs' poundage and all legal charges, and which said writ so indorsed was afterwards, and before the return thereof, and before the date and issuing of the said fiat, and before the defendant had any notice of any act of bankruptcy by the said J. S. V. and T. R. K., or either of them committed, to wit, on the day and year last aforesaid, delivered to Wm. Evans, Esq. and John Wheelton, Esq., who then and from thence until and at the time of the execution thereof as hereafter mentioned, were sheriffs of London, to be by them executed in due form of law, by virtue of which said writ the said W. E. and J. W., as such sheriffs, did afterwards and after the passing of the said act of Parliament, and before the date and issuing of the said fiat, and before the defendant or the said sheriffs had any notice of any act of bankruptcy by the said J. S. V. and T. R. K., or either of them committed, to wit, on the said 24th day of July, 1840, seize and take in execution [465] the goods and chattels in the declaration mentioned, the said goods and chattels then being in the actual possession of the said J. S. V. and T. R. K., for the purpose of satisfying the debt, damages, and interest aforesaid. And the defendant further says, that after the said sheriffs had so seized and taken in execution the said goods and chattels in the said declaration mentioned, and whilst the debt, damages, and interest, so recovered by the said defendant as aforesaid, remained wholly unpaid and unsatisfied, to wit, on the 22nd day of August, A.D. 1840, by a certain deed-poll then made by the said W. E. and J. W. as such sheriffs under their hands and seals (profert) the said W. E. and J. W., as such sheriffs, for and in consideration of the sum of £1646 to them by the defendant paid, did bargain, sell, assign, and set over to the said defendant, his executors, administrators, and assigns, all the said goods and chattels in the declaration mentioned, and so by them, the said sheriffs, seized and taken in execution as aforesaid, To have and to hold the said goods and chattels unto the said defendant, his executors, administrators, and assigns, as his and their own proper goods and chattels absolutely for ever. And the defendant further says, that he did afterwards, and before the commencement of this suit, to wit, on the 23rd day of August in the year aforesaid, sell the said goods and chattels, in the said declaration mentioned, to one William Broome, as it was lawful for him to do for the cause aforesaid, which is the said supposed conversion in the said declaration mentioned. And the defendant further says, that the said execution against the said goods and chattels of the said J. S. V. and T. R. K., was really and bonâ fide executed and levied before the date and issuing of the said fiat, and that at the time of executing and levying thereof, the defendant had not notice of any act of bankruptcy committed by the said J. S. V. and T. R. K., or either of them, prior to the executing and levying thereof: and that the said judgment was not founded on any warrant of attorney or cognovit given by the said J. S. V. [466] and T. R. K., or either of them, to the defendant, by way of fraudulent preference to the said defendant. And the defendant further says, that the possession of the plaintiffs, in the said declaration mentioned, of the said goods and chattels therein mentioned, was a possession by relation to the said act of bankruptcy committed by the said J. S. V. and T. R. K., before the defendant had any notice thereof, and not otherwise. Wherefore the defendant did at the said time when &c. in the declaration mentioned, convert and dispose of the said goods and chattels to his own use, as it was lawful for him to do for the cause aforesaid.

Verification.

Replication. That before the said judgment in the plea mentioned was recovered against the said J. S. V. and T. R. K., by the defendant, to wit, on the 8th day of July, A.D. 1840, the said J. S. V. and T. R. K., respectively signed, sealed, delivered, and executed a certain warrant of attorney, directed and addressed to one William

Brodrick and one William Bell, described as attornies of Her Majesty's Court of Queen's Bench at Westminster, jointly and severally, or to any other attorney of the same Court, and thereby desired and authorized them, the said attornies above named, or any one of them, or any other attorney of the Court of Queen's Bench aforesaid, to appear for them the said T. R. K. and J. S. V., in the said Court, and then and there to receive a declaration for them in an action of debt, at the suit of Robert Henderson Robertson, the now defendant, for the sum of £5000, for money advanced to and paid for the said T. R. K. and J. S. V., and thereupon to confess the same action, or else to suffer a judgment by nil dicit or otherwise to pass against them in the same action, and to be thereupon forthwith entered up against them of record of the said Court, for the said sum of £5000, besides costs of suit, as by the said warrant of attorney remaining affiled in the said Court of Queen's Bench at Westminster, will appear. And the plaintiffs say, that the said judgment in [467] the said plea mentioned was afterwards, to wit, on the 24th day of July, A.D. 1840, suffered, and was by the now defendant obtained and entered up by nil dicit upon and in pursuance of the said warrant of attorney, and was not a judgment on a *cognovit actionem* signed after declaration filed or delivered, nor a judgment in any action commenced adversely, and the said writ in the said plea mentioned was issued upon the said judgment so suffered, obtained, and entered on as aforesaid. And the plaintiffs say, that before executing or levying of the said writ of *fieri facias* in the same plea mentioned, and before obtaining and entering up of the said judgment, to wit, on the 1st day of July, A.D. 1840, the said J. S. V. and T. R. K. committed an act of bankruptcy, within the true meaning and intent of the statutes in force concerning bankrupts. And the plaintiffs further say, that afterwards, and within and much less than two calendar months of levying or executing of the said execution, to wit, on the 1st day of August, 1840, before execution by the said sheriffs of the said assignment in the said plea mentioned, a fiat in bankruptcy (dated within the said space of two calendar months, to wit, dated the day and year last aforesaid) was issued against the said J. S. V. and T. R. K., whereupon they were duly declared and adjudged to be bankrupts; as by the said fiat duly filed and entered of record in the Court of Bankruptcy, and by adjudication that the said J. S. V. and T. R. K. had become bankrupt, now also remaining of record in the said last-mentioned Court, fully appears, and under which said fiat the plaintiffs were appointed assignees as aforesaid. And the plaintiffs say, that after the said J. S. V. and T. R. K. had become bankrupts as aforesaid, and after the issuing of the said fiat, and before the execution by the said sheriffs of the said deed poll in the said plea mentioned, and before the sale by the defendant to the said William Broome of the said goods and chattels in the said plea also mentioned, to wit, [468] on the 1st day of August, 1840, the defendant had notice of the said bankruptcy, and of the issuing of the said fiat: and thus the plaintiffs say, that they the plaintiffs, at the said time in the declaration in that behalf mentioned, were possessed of the said goods and chattels in the declaration mentioned, as of the property of the plaintiffs as such assignees as aforesaid, in manner and form as is in the declaration alleged, and that the defendant did convert and dispose of the same to his own use, in manner and form as in the said declaration alleged. Verification.

General demurrer, and joinder in demurrer.

The following were the points marked for argument:—

One of the matters of law intended to be argued is, that the defendant having levied his execution before the date and issuing of the fiat, and before he had any notice of an act of bankruptcy committed by the bankrupts, or either of them, was entitled to the goods and chattels in the declaration mentioned, as against the plaintiffs.

The plaintiffs will contend, that the circumstances appearing on the pleadings do not justify the seizure, and sale, and subsequent conversion by the defendant admitted on the 3rd plea: that if the seizure was protected by the 2 & 3 Vict. c. 29, or otherwise, yet that the fiat, which issued before the sale of the goods, operated as a statutory supersedeas to the execution, which was founded on a judgment on a warrant of attorney, which was invalid by reason of the 6 Geo. 4, c. 16, s. 108: that the defendant had then no longer a right to avail himself of such execution to the prejudice of other fair creditors of the bankrupts.

Bayley, in support of the demurrer. The question in this case is, whether so much of the 108th section of the Bankrupt Act (6 Geo. 4, c. 16) as is not re-enacted by the stat. 2 & 3 Vict. c. 29, is not repealed by it. [Erle. The plaintiffs contend

that the 108th section is not affected by the latter statute, except where they directly conflict. [469] Parke, B. Surely that statute repeals all those enactments, as to cases where warrants of attorney are given, except in cases of fraudulent preference? By the 81st section of 6 Geo. 4, c. 16, it is enacted, "that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed." Under that section, executions under judgments, however obtained, if executed more than two months before the issuing of the commission, are protected. Then comes the 108th section, which enacts, "that no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt, before the bankruptcy: Provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." That provision is not confined to any period of time. At one time it was contended, that a judgment by nil dicit might be superseded at any period of time; but that question was set at rest, and the contrary was determined, by *Godson v. Sanctuary* (4 B. & Ad. 255; 1 Nev. & M. 52). [Parke, B. Under the 6 Geo. 4, c. 16, s. 108, if the goods were [470] actually sold before the bankruptcy took place, then the execution was protected. Then the stat. 1 Will. 4, c. 7, s. 7, took away the operation of the proviso in the 108th section of the Bankrupt Act, as to judgments in actions commenced adversely; and then came the last stat. 2 & 3 Vict. c. 29, which, it seems to me, has taken away all distinction.] He was then stopped by the Court.

Erle, contrâ. These statutes have been treated as if they were in *pari materiâ*; but they are for totally different purposes. If it were to be so held, the effect of the stat. 2 & 3 Vict. c. 29 would be to enable every fraudulent creditor to take away the bankrupt's goods by obtaining a fraudulent preference. The purposes of the two sections, the 81st and 108th, are totally different; they are remedies against distinct evils. The language of the Judges, in *Godson v. Sanctuary*, to the effect that the proviso in the 108th section and the 81st section are to be construed together, was founded in mistake, and cannot be supported. Formerly, all contracts with persons who might happen to have dealings with any person who afterwards became bankrupt, in the intermediate time between an act of bankruptcy and the fiat, were void by relation back to the act of bankruptcy. That was found to occasion great injustice, and the 81st section was passed to remedy that evil in some degree, by limiting the period of such relation to two months; that is the only evil intended to be affected by it; and it is only such transactions as by relation to a prior act of bankruptcy would have been invalid, that are within its operation. The words "shall be valid, notwithstanding any prior act of bankruptcy," in that section, ought to be read, "shall be as valid as they would have been in case no prior act of bankruptcy had taken place." The 2 & 3 Vict. c. 29, is merely in furtherance of that enactment. It was never intended to operate as a repeal of the 108th section; that is clear from the preamble, reciting the 82nd [471] section only. The stat. 2 & 3 Vict. c. 29, does not give an absolute unqualified validity; it renders the execution valid notwithstanding the act of bankruptcy; but it does not cure any objection to it upon other grounds. The 108th section was passed *alio intuitu*. The object of the Bankrupt Act was to obtain a rateable distribution amongst the creditors, and that of the 108th section was to prevent persons having latent securities from enforcing them in cases of bankruptcy. It comes in the nature of a proviso upon an exception, but it may be read as an express and absolute enactment. Latent securities were the objects against which that enactment was aimed, and it had no relation to the time of the fiat. [Parke, B. It means, if an act of bankruptcy does not intervene before the execution is complete by sale. Alderson, B. Is there no limitation as to time, then?] The limitation is, so long as the goods remain in the hands of the sheriff. The act is confined to

creditors having security. *Wymer v. Kemble* (6 B. & Cr. 479; 9 D. & R. 511). As far as the validity of an execution is affected by a prior act of bankruptcy, the 81st section applies, but the 108th section has no reference to a prior act of bankruptcy. The enactments in the Insolvent Debtors' Act are in pari materia, and in those cases where the goods are in the hands of the sheriff at the time of the imprisonment, he is bound to hand them over to the assignees: and if he does not, there is no doubt the assignees may maintain an action. The only authority to the contrary is *Godson v. Sanctuary*, and there Parke, J., in the course of the argument, throws out an observation favourable to the view now contended for. He says—"Does not the proviso in section 108 prevent the plaintiff from receiving more than a rateable part of his debt?" For these reasons, it is submitted that the plaintiffs are entitled to recover.

Bayley, in reply. The clear words of the enacting clause, [472] in the act of the 2 & 3 Viet. c. 29, are not to be so limited as has been contended for. It is said, that the preamble of that statute recites only the 82nd section, and therefore that its operation is to be limited to that section, or, at all events, only to extend its provisions to the 81st. But there are many cases where it has been held, that the construction of an act is not to be limited by its title or preamble. In Bacon's Abr. Statute (1. 2), it is said, "It is in general true, that the preamble of a statute is a key to open the minds of the makers, as to the mischiefs which are intended to be remedied by the statute. But this rule must not be carried so far as to restrain the general words of an enacting clause by the particular words of the preamble; and the preamble of a statute is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute." In *Doe dem. Bywater v. Brandling* (7 B. & Cr. 660), Lord Tenterden says, "In construing acts of Parliament, we are to look not only at the language of the preamble of any particular clause, but at the language of the whole act; and if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act, we can collect from the more large and extensive expression used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause." And in *Copeman v. Gullant* (1 P. Wms. 320), Lord Hardwicke says, "I can by no means allow of the notion, that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good [473] which the words would otherwise and of themselves import; which (with some heat, his Lordship said), was a ridiculous notion."

In passing the stat. 1 Will. 4, c. 7, the legislature felt that the 108th section had been too stringent, and therefore relaxed it. The 7th section, after reciting the 6 Geo. 4, c. 16, s. 108, says, "that by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem, with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished:" and then enacts, that no judgment signed or execution issued on a cognovit signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, in any action commenced adversely, should be deemed to be within the 108th section. That clause, however, has been held to extend only to cognovits, and not to warrants of attorney: *Crossfield v. Stanley* (4 B. & Adol. 87; 1 Nev. & M. 668). The legislature, in passing the stat. 2 & 3 Viet. c. 29, had the 108th section in view, and intended still further to relax it. They intended to protect all executions levied before the fiat, unless they were obtained by way of fraudulent preference. The only proviso in the act 2 & 3 Viet. c. 29, is that relating to fraudulent preference, and that proviso is a sufficient answer to the objection as to the too great facility of obtaining executions from persons in embarrassed circumstances.

Cur. adv. vult.

The judgment of the Court was delivered in Michaelmas Term by

PARKE, B. The question raised by the pleadings in this case, is one of considerable importance. It is this—whether the late statute 2 & 3 Viet. c. 29, in the case of fiats [474] subsequent to it, has the effect of rendering valid the execution of a fieri facias, on a judgment on a warrant of attorney, so as to entitle the plaintiff to the benefit of it against the assignees, such execution having been executed by seizure after a secret act of bankruptcy, but not completed by the sale of the effects seized,

before the issuing of the fiat: and the warrant of attorney not having been given by way of fraudulent preference. The question depends upon the true construction of the act. It is intituled, "For the better Protection of Parties dealing with Persons liable to the Bankrupt Laws," and after reciting one section, the 82nd, of 6 Geo. 4, c. 16, and one, the 12th, of the 2 Vict. c. 11, and also the expediency of giving further protection to persons dealing with bankrupts before the fiat, proceeds to enact, "That all contracts, dealings, and transactions by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt, by way of such fraudulent preference." According to the ordinary meaning of the language [475] used in this enactment, it is clear, that all executions, whether on judgments on warrants of attorney and confessions or not, are rendered valid to some extent, if bonâ fide executed or levied (and seizure would be a sufficient execution) before the date of the fiat, provided the plaintiff has no notice of the prior act of bankruptcy; it seems also clear, that these executions are not made valid for all purposes, so as to entitle the respective plaintiffs, at all events, to the benefit of them, but only so far as they would be defeated by an act of bankruptcy prior to the execution, that is, the seizure; for all that is done is to make them valid, "notwithstanding a prior act of bankruptcy." They are, therefore, placed in the same situation as if no such prior act of bankruptcy had occurred, and in the case of executions other than on a warrant of attorney or cognovit, without adverse suit, the effect of this enactment would be to entitle the plaintiff to the fruits of them, for he could be deprived of them only by reason of such act of bankruptcy. But an execution on such warrant of attorney or cognovit stands on a different footing, and would have been defeated, not only by a prior act of bankruptcy, but by one intervening between the seizure and the sale, by virtue of 6 Geo. 4, c. 16, s. 108; the construction put upon that section by several cases having been, that if the plaintiff was a creditor of the bankrupt at the time of the act of bankruptcy, he had no priority, and he was such creditor of the bankrupt, until, by the actual sale of the goods, the sheriff became liable to him for the proceeds of the sale; and the established distinction, before the recent act, between executions on a judgment on a verdict, and on a judgment on a warrant of attorney, or by confession, was, that the plaintiff acquired a title against the assignees by seizure only in the former case: in the latter by seizure and sale before the act of bankruptcy. So far, then, as an execution on a warrant of attorney would have been invalidated by an act of bankruptcy before the [476] seizure, the statute affords a protection; but as the fiat itself issued in this case before a sale, the execution thereby absolutely became inoperative, and for that the statute appears to us to have provided no remedy. The effect of this provision seems to me, in the case of bonâ fide contracts, and dealings, and executions, to do away with the relation to the act of bankruptcy, and substitute the issuing of the fiat for the act of bankruptcy, as the time at which the right of the assignees is to accrue. This, we think, is the fair construction of the words of this enactment; and it is some confirmation of this view of the case, that there is not only no express repeal of the latter part of the 108th section of the 6 Geo. 4, but not any recital of it as a provision which is to be qualified or altered by the act. The concluding proviso, that nothing in the act should be deemed to give validity to executions on warrants of attorney or cognovits, by way of fraudulent preference, does not warrant the inference, that the legislature meant to render valid all executions on such instruments, when not given by way of fraudulent preference; that enactment, introduced perhaps from superabundant and unnecessary caution, would have an operation, by depriving of the benefit of the act all executions on warrants of attorney or cognovits fraudulently given, even though the execution may have

been complete by sale as well as seizure, before the date of the fiat. We are of opinion, therefore, though we have entertained considerable doubt on the question, that the execution in this case was defeated by the fiat. There is another point of view in which the subject may be considered, but which leads to the same result. It may be, that the term "executed or levied," in the statute of Victoria, may be taken in conjunction with the 6 Geo. 4, c. 16, s. 108, to have different meanings, as applied to one description of execution or the other; it may mean, with respect to execution on judgment after a verdict, an execution by seizure only: with regard to those on judgments [477] on warrants of attorney, an execution by seizure and sale. If this be the construction of the clause in question, the assignees are still entitled, for this execution was not executed by seizure and sale, before the issuing of the fiat. We are of opinion, therefore, that the assignees are entitled, and our judgment must be for the plaintiff.

Judgment for the plaintiffs.

JACKSON, (Assignee of the Sheriff of Warwick,) v. HANSON AND OTHERS. Exch. of Pleas. May 22, 1841.—The condition in a replevin bond, for prosecuting the suit with effect, means the prosecuting it to a not unsuccessful termination. In a declaration in an action on a replevin bond, the breach assigned was, that the defendant did not appear at the next County Court, and then and there prosecute his suit with effect:—Held, that the breach was not well assigned, it being consistent therewith that the suit might have been begun at the next County Court, and be still pending.—Sembles, that the words "then and there," usually inserted in the conditions of replevin bonds, are not proper.

[S. C. 1 Dowl. (N. S.) 69; 10 L. J. Ex. 396.]

Debt on a replevin bond. The declaration stated, that theretofore, to wit, on the 1st June, 1840, the plaintiff distrained the goods and chattels of the defendant, John Hanson, for a certain sum, then due to the said plaintiff for rent: and the said goods and chattels being so distrained, the said defendant John Hanson, afterwards, and within the space of five days then next ensuing, to wit, on the 3rd day of June, 1840, made his plaint to Dempster Heming, Esq., then being sheriff for the county of Warwick, out of the County Court of the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said defendant John Hanson, by the plaintiff, and then and there prayed the said sheriff that the said goods and chattels might be forthwith replevied, and delivered to the said defendant John Hanson; thereupon the said Dempster Heming, Esq., so being sheriff of the said county of Warwick, according to the form of the statute in such case made and provided, did take from the said defendant John Hanson, and from the said other defendants, George Marshall and Samuel White, as two responsible sureties, a [478] bond in double the value of the said goods and chattels so distrained as aforesaid, (the value of the said goods and chattels having been, on that occasion, first ascertained by the oath of a credible witness, duly sworn, according to the form of the statute in such case made and provided). And the said defendant John Hanson, and the said defendants George Marshall and Samuel White, on the said 3rd day of June, 1840, by their certain writing obligatory sealed, &c., (profert), did jointly and severally acknowledge themselves to be held and firmly bound to the said Dempster Heming, Esq., so being sheriff of the said county of Warwick, in the sum of 28l., above demanded, to be paid to the said sheriff, with a condition thereunder written, that if the said defendant, John Hanson, should appear at the then next County Court to be holden at Warwick, in and for the county of Warwick, and then and there should prosecute his suit with effect against the said plaintiff, Joseph Jackson, for the taking and withholding of the said goods and chattels (mentioned in an inventory unto the said condition annexed, being the said goods and chattels first above mentioned), and should make return thereof, if return thereof should be adjudged by law, and the said sheriff, his heirs, executors, administrators, and assigns, should acquit, discharge, and save harmless, against our Sovereign Lady the Queen, and the said plaintiff, Joseph Jackson, of, from, and against, all and every thing and things concerning the premises: then the said obligation was to be void, or otherwise to be and remain in full force and virtue: and thereupon the said sheriff, to wit, afterwards, on the said 3rd day of June, 1840,

at the prayer of the said defendant John Hanson, replevied, and made deliverance of the said goods and chattels to the said John Hanson, according to the duty of his said office. And although afterwards, to wit, on the 24th day of June, 1840, the County Court of the said sheriff of the said county of Warwick, was duly holden at Warwick afore-[479]-said, in and for the said county, before Edward Hyde Clarke, William Thompson, Charles Lamb, and Theophilus Taylor, suitors of the said Court, the same being the next County Court of the said county of Warwick, after the making of the said writing obligatory as aforesaid; yet the defendant John Hanson did not appear at the said County Court so holden next after the making of the said writing obligatory as aforesaid, and then and there prosecute his said action with effect against the said plaintiff, according to the form and effect of the said condition, but wholly omitted and neglected so to do, whereby the said writing obligatory became forfeited to the said Dempster Heming, Esq., so being sheriff of the said county of Warwick as aforesaid; and the same being so forfeited, the said sheriff afterwards, and before the commencement of this suit, to wit, on the 19th day of August, 1840, to wit, at the request and costs of the said plaintiff, by an indorsement on the said writing obligatory, duly assigned the said writing obligatory to the said plaintiff, according to the form of the statute in such case made and provided, as by the same assignment indorsed on the same writing obligatory as aforesaid, and to the said Court of our Lady the Queen before the said barons now here shewn, the date whereof is the day and year last aforesaid, may fully appear. By means whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, as assignee of the said Dempster Heming, Esq., so being sheriff of the said county of Warwick as aforesaid, to demand from the defendants the said sum of 28l.; yet the defendants, though often required so to do, have not, nor hath any of them, as yet paid the said sum of 28l. or any part thereof, to the said Dempster Heming, before the said assignment, or to the said Dempster Heming, or the plaintiff assignee as aforesaid, or either of them, since the said assignment, but have hitherto wholly neglected and refused so to do, and still do neglect and [480] refuse to pay the same, or any part thereof, to the said plaintiff as assignee as aforesaid.

Special demurrer, assigning for causes, that it does not appear by the declaration, nor by the breach assigned therein, that the said John Hanson did not appear at the said County Court; and that it does not appear by the declaration, nor by the breach assigned therein, that the said John Hanson hath not prosecuted his said action with effect. Joinder in demurrer.

The points marked for argument on the part of the defendant were, the point of law stated in the special causes; also that the condition of the bond is not according to the statute 11 Geo. 2, c. 19, s. 23, and therefore the bond is not assignable; also that the assignee cannot take advantage of such a breach as that assigned in the declaration. The case was argued in Easter Term by

Gray, in support of the demurrer. A replevin bond is assignable by virtue of the stat. 11 Geo. 2, c. 19, s. 23, by which it is enacted, that "all sheriffs and other officers having authority to grant replevins, may and shall, on every replevin of a distress for rent, take in their own names, from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more credible witness or witnesses, not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded, before any deliverance be made of the distress; and that such sheriff, or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, or person making cognizance, assign such bond to the avowant, or person aforesaid, by indorsing the same, and attesting it [481] under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant or person making cognizance may bring an action and recover thereupon in his own name; and the Court where such action shall be brought may, by a rule of the same Court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to such bond."

That section requires that the bond shall contain three conditions: to prosecute

with effect, to prosecute without delay, and to return the distress if a return shall be awarded; and it cannot be contended that this bond is assignable, unless it contain some one of those conditions. It has been decided that a condition not within the statute does not prevent the bond from being assignable, where it contains a condition which is within the statute; but it has never been held that an assignee of a replevin bond can assign a breach of a condition not within the statute. The bond here declared on contains none of the conditions required by the statute. The condition is, that "the said defendant John Hanson shall appear at the then next county court to be holden in and for the county of Warwick, and then and there shall prosecute his suit with effect against the said plaintiff, &c." Now it is contended that the words "prosecute the suit with effect," have reference to the termination of the suit, and that only, and that there can be no prosecution with effect until the suit is determined; and such prosecution with effect is, by the terms of this condition, to be then and there, viz. at the then next county court: so that this bond is forfeited unless the suit is brought to a termination at the first county court, and this the statute never contemplated. The statute of Westminster 2, 13 Edw. 1, c. 2, requires the sheriff, besides taking [482] pledges de prosequendo, to take pledges de retorno habendo: the pledges to prosecute existed at common law, Co. Litt. 145 b., and were not first introduced by the Statute of Westminster: that statute introduced only the pledges pro retorno habendo. At common law, the pledges to prosecute incurred no responsibility until the suit was terminated by a judgment against the plaintiff; *Mansfield v. Richman* (Fortescue, 330). In that case there was a demurrer to the declaration, on the ground that no pledges were on the writ or mentioned in the declaration, and it was held, per totam curiam, that "he may enter pledges at any time before judgment, because pledges are not liable before judgment, and not then if it be for the plaintiff, and Bains, Serjt., said it had been so determined before; Cro. Car. 91, 92; Hutton, 92; Hobart, 93." There is no instance, after the Statute of Westminster 2, of their being made liable until the termination of the suit, and that that statute only introduced the pledges de retorno habendo, is further shewn by the fact, that the pledges de prosequendo and pledges pro retorno habendo appear to have been in some instances different persons: Co. Ent. 637; Dalton, 434. There were two ways in which the sheriff acted after the Statute of Westminster 2; sometimes the pledges entered into a recognizance, of which the case in Co. Ent. is an example; and sometimes the sheriff took a bond, which was held to be legal in *Blackett v. Crissop* (1 Ld. Raym. 278). The form of that bond seems to have been continued in many cases after the statute of 11 Geo. 2, c. 19, the words "without delay" being added. In the bond used before that statute the words always were "to prosecute with effect;" which shews that it was only the common law liability of the pledges to prosecute, introduced by the statute into the bond. There is no instance of a breach of this condition until the suit terminated; all which shews, that the meaning of prose-[483]-cuting with effect was prosecuting to a termination of the suit. [Parke, B. To a successful termination?] Rather to a not unsuccessful termination. Now the words "to prosecute with effect" in the statute are taken from the old bond, and must therefore have the same meaning. There are several authorities, since the statute of Geo. 2, to shew that prosecuting with effect implies, to a termination of the suit. In *Brucknury v. Pell* (12 East, 587), Le Blanc, J., says, "What is prosecuting with effect? what else can it mean than that it was prosecuted to judgment?" In *Perrau v. Bevan* (5 B. & C. 301), Holroyd, J., says, "But there was only an allegation that the suit was not prosecuted with effect in the Court above, that is, with final success." In *The Duke of Ormond v. Bierly* (Carthew, 519), cited in the last case, it was held to be a prosecuting with effect, if the plaintiff dies and the suit abates. In *Turnor v. Turner* (2 B. & B. 111), Dallas, C. J., says, "We think the condition of the bond was broken; by the plaintiff in replevin becoming nonsuit, he has not prosecuted his suit with effect." In *Harrison v. Wardle* (5 B. & Ad. 153), Parke, J., says, "Where the breach assigned is, that the plaintiff in replevin did not prosecute his suit with effect, it is a sufficient answer to shew that that suit is still pending, but it is no answer where the breach also is that he did not prosecute it without delay." The meaning of the condition may be further illustrated by the way in which the statute contemplated the protection of the landlord by this bond. Three things are intended to be secured to the avowant; first, a return of the distress; second, his rent under the statute of Charles 2nd and costs; in other words, the fruits of his judgment; and third, that there should be no undue delay.

There is nothing else which can be suggested. With respect to the first and last, they are provided for by distinct conditions in the statute. [484] *Oxford v. Perrott* (4 Bing. 586) is an instance of the latter condition being enforced. As to the second, viz., the security for rent and costs, the condition to prosecute with effect gives him that; and as he cannot be entitled to the rent and costs until the suit is terminated, this condition would be useless, except as having reference to the termination of the suit. [Alderson, B. The question is, whether the bond is in accordance with the statute. Parke, B. Is not the meaning of the condition this, that the defendant should appear at the County Court and prosecute, and then prosecute with effect?] The words "then and there" can only refer to the next County Court. The statute does not require the suit to be terminated at the first County Court; this bond does; and therefore the condition is not in accordance with the statute. In assigning the breach, the plaintiff has given that meaning to the condition. If it be said that the words "then and there" only require so much of the prosecution of the suit to be with effect as takes place at that Court, the answer is, that the condition, not extending beyond the first Court, is then performed, and if the suit fails at a subsequent stage, there is no condition remaining to be broken. If a party were bound to prosecute the suit to a termination at one Court, the inconvenience would be very great; indeed it would be impracticable, and the Court will not, therefore, hold this condition to be within the statute.

Cases may probably be cited where the words "then and there" are to be found in the condition; but there is no instance where, in an action by an assignee, the objection has been taken. In most of the old cases the words are absent. [He cited *Lane v. Foulk* (Comberbach, 228), *Chapman v. Butcher* (Carthew, 249), and mentioned that there were five or six precedents in *Wentworth*, some of which contained the words "then and there," and in some they were absent.] In no case, however, where the words occur, has the breach [485] been assigned as here, but a breach of some one of the statutory conditions has always been shewn. Consistently with the breach here assigned, the defendant may have appeared at the first Court, and the suit may still be in the course of prosecution.

Crompton, *contra*. The breach is well assigned. [Parke, B. I very much doubt that: had you not better amend? It is impossible to prosecute the suit to a termination at one Court: of that we may take notice, and obviate the absurdity, by reading the condition—to appear at the next County Court, and afterwards there prosecute the suit with effect; but then the breach is bad, because it amounts to nothing to shew that the plaintiff did not appear.] The breach is that he did not appear. [Parke, B. And then and there prosecute with effect: he may have appeared and may have since prosecuted the suit with effect.] The other part of the breach is, and did not then and there prosecute, &c. [Parke, B. Would not that be double?] No; in *Phillips v. Price* (3 M. & Selw. 180), it was held that a declaration by the assignees of a replevin bond, conditioned for prosecuting the suit with effect, and for making a return of the goods, was not double, because it alleged that the defendant did not prosecute his suit with effect, and had not made a return. The effect of the breach here is, that he did not appear, and it is sufficient to prove any part of the breach: *Short v. Hubbard* (2 Bing. 349). There is no demurrer on the ground of duplicity. Where there is an obligation conditioned to do several things, the obligation is forfeited on the breach of one; *Turnor v. Turner* (2 B. & B. 107). Here three things are required to be done, and a breach of any one of them is sufficient, and in effect the breach here is, that the defendant did not do either of them. In *Dias v. Freeman* (5 T. R. 195), the [486] breach was that the defendant did not appear at the County Court next after the giving of the bond, according to the condition, and did not then and there, or in any manner, or at any time or place, prosecute his suit with effect. The Court said the breach assigned was for not appearing. In *Com. Dig.*, "Pleader" (C. 48), it is said, "it is sufficient that the breach be assigned in the words of the covenant, promise, &c.:" also "covenant by an apprentice for not finding victuals et alia necessaria, in the words of the covenant, is sufficient." If the party is bound to do all, then the word "and" may be used, but otherwise if not bound to do all. [Parke, B. This breach is not good, unless the meaning of the condition be that all shall be done at the first County Court.]

Gray, in reply. It is not contended that the breach is bad for duplicity. The plaintiff has not assigned as distinct breaches that the defendant did not appear at the

next County Court, and that he did not prosecute with effect, but the substance of the breach is, that he did not prosecute with effect at the next County Court. It is not inconsistent with the breach as worded, that the defendant may have appeared at the next Court, and then taken some steps in the suit, and if so, the condition required by the statute would not be broken, the suit being still pending. The suit may have subsequently been prosecuted with effect.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. (His Lordship stated the pleadings, and continued :) The difficulty in this case has arisen from the improper form in which the condition of the replevin bond has been drawn : viz., to appear at the then next County [487] Court, and then and there to prosecute his suit with effect. The form of the condition should have pursued the words of the act, 11 Geo. 2, and should have been for the defendant John Hanson to appear at the then next County Court, and prosecute his suit with effect and without delay. Upon the condition of the bond in the form in which it is drawn, the question first arises, what is its meaning? If it be that the defendant is to appear at the then next Court, and at that Court prosecute his suit to a not unsuccessful termination (which is the true import of the term "with effect"), the breach is properly assigned, and that Mr. Gray, who argued very ably for the defendant, admitted. If, however, the true meaning of the condition is that he shall appear at the next County Court, and then and there prosecute his suit, that is, begin to prosecute it, and afterwards prosecute it with effect, then the breach is improperly assigned, for it is consistent with the averments in that breach, that the suit may have been begun at the first County Court, and though not terminated at that Court, may still continue; and then the condition has not been broken. And we think that such is the true meaning of the condition: for if we do not so construe it, the consequence would be, that the bond would, under ordinary circumstances, certainly be forfeited on the day after the first County Court should be held, as it would be impossible for the defendant, according to the course of the County Court to levy his plaint, issue a summons, and make it returnable, and proceed to trial or judgment in one day, or at one Court; and though there is a bare possibility of the penalty being saved by the death of either party before the first Court, or the abatement of the suit on the same day that the first Court should be held after the plaint levied, we think that the condition is to be construed with reference to the ordinary course of a suit, and not with a view to such remote contingencies: the object of the bond [488] being, that the question whether the goods were rightly taken should be properly litigated, in the ordinary way, but with reasonable speed. The condition, therefore, ought to be construed in the sense last attributed to it, and consequently our judgment should be for the defendant. But as the form of declaration adopted in this case is the one given in the late Mr. Chitty's Pleadings, vol. 2, p. 173, and the plaintiff may have been misled by it, we think that he may amend on payment of costs.

Leave to amend accordingly.

WILLIAMS v. JOHN MORRIS, DAVID DAVIES, AND OTHERS. Exch. of Pleas. June 3, 1841.—A licence is not implied by law to the purchaser of goods, (though sold under an execution or distress,) to enter upon the premises of the former owner and take them away, although they have remained there with his assent. To support a plea of leave and licence to an action of trespass for taking away goods under such circumstances, there must be proof of an express agreement that the purchaser should enter on the premises and take the goods.—(Quere, whether there can be an irrevocable licence to enter upon land, without its amounting to an interest in land, which therefore can pass only by deed.

[S. C. 11 L. J. Ex. 126.]

Trespass for breaking and entering the plaintiff's house, barn, stable, and two closes called the rickyard and the foldyard, breaking to pieces locks and doors, &c., and seizing and carrying away the plaintiff's cattle and goods. There were two counts in the declaration, the first for a trespass on the 1st November, 1839, the second for a similar trespass on the 5th February, 1840.

Pleas, first, not guilty; secondly, a general plea of leave and licence; thirdly, to the first count, that the dwelling-house, barn, stable, closes, doors, &c., cattle, goods, and chattels in that count mentioned were not, nor was any of them, nor was any part thereof, the dwelling-house, &c. &c. of the plaintiff, *modo et formâ*: fourthly; a similar plea to the second count. The plaintiff joined issue on the first, third, and fourth pleas, and to the second replied *de injuriâ*, on which also issue was joined.

At the trial before Williams, J., at the last Denbighshire assizes, the following facts appeared:—

The plaintiff, who occupied a small farm in the parish of [489] Abergele, in Denbighshire, being indebted to one Roberts in a sum of about 80*l.*, was sued by him to judgment, and in November, 1839, a *fieri facias* issued against him, under which the cattle, corn, hay, &c., and other goods on his premises, were taken in execution. The sheriff being about to proceed to a sale, the plaintiff applied to the defendants Morris and Davies, who were farmers in the neighbourhood, to befriend him by buying in goods at the sale, and giving him a short time for the repayment of the money advanced for that purpose. The defendants accordingly attended at the sale, on the 6th and 7th of December, 1839, and bought in their own names, Morris to the amount of 72*l.* 9*s.* 11*d.*, and Davies to the amount of 9*l.* 9*s.* 5*d.*, making together 81*l.* 19*s.* 4*d.*; the whole proceeds of the sale being 100*l.* 1*s.* 4*d.* One of the conditions of the sale was, that the property purchased was to be paid for immediately, and taken off the premises, but if left there, to be at the risk of the purchaser. Evidence was given of statements made by both these defendants at the time of the sale, that they were buying for the plaintiff, in consequence of which several persons refrained from bidding for some of the articles put up to sale. All the cattle and goods so bought by the defendants remained on the premises, and in the possession of the plaintiff, but the defendants disposed of several quantities of corn and beans, and a few other articles, to different purchasers, who paid the defendants for them. About a week after the sale, the defendants Morris and Davies came to the plaintiff's house, telling him they wanted some understanding about the property bought in at the sale; that they wanted no profit, but he ought to pay them interest on the amount they had purchased for him. The plaintiff promised that they should have the money in two months from the time of the sale, with which they expressed themselves satisfied. A short time afterwards, an account was drawn out as between the defendant Morris and the plaintiff, on the debit [490] side of which were placed the sums paid by Morris and Davies at the sale, together with an item of 1*l.* for interest to the 7th February, 1840, and on the credit side different sums received by them for the corn, beans, &c., sold subsequently to the sale, and shewing a balance of upwards of 25*l.* due from the plaintiff to the defendants. At the same time, the articles bought by the defendants which still remained on the premises, were marked with their names in the plaintiff's presence. On the 23d January, 1840, the same two defendants came again to the plaintiff's house, when the account was read over, and the defendants required that the plaintiff should find sureties for the repayment of the money, and on his stating that he was unable to do so, said they should take the goods away: and after considerable discussion and negotiation, they accordingly, assisted by the other defendants, broke open several of the farm gates, and the barn door, and took away the horses from the stable, together with several carts and harrows, some hay, vetches, &c. On the 5th February, they came again to the premises, broke open the door of the house, which the plaintiff had bolted against them, and took away all the rest of the cattle and goods left from the sale. Some evidence was given to shew that certain articles of small value were also carried away by the defendants, which had not been put up at the sale. For the defendants, it was contended that the goods were *bonâ fide* purchased by them, subject only to an agreement that the plaintiff might repurchase them within a reasonable time, and that under the circumstances the defendants were entitled to enter and retake them. The learned Judge, in summing up, left it to the jury to say, first, whether the goods were bought by the defendants out and out, so that the property in them passed out of the plaintiff; and secondly, whether any articles were taken away by the defendants which were not included in the sale: and with respect to the plea of leave and licence, he expressed his [491] opinion that it was entirely unsupported by the evidence. The jury found a verdict for the plaintiff, damages 40*s.*

In Easter Term, Townsend obtained a rule nisi for a new trial, on the ground that

the learned Judge had misdirected the jury as to the issue on the plea of leave and licence; citing *Wood v. Manley* (11 Ad. & Ell. 34; 3 P. & D. 5):—against which

Jervis and Welsby now shewed cause. The jury could only have found for the plaintiff upon one of two grounds: either that there was not a bonâ fide transfer of the property in the goods to the defendants at the sale, or that they took away some articles not included in the sale. The smallness of the damages leads rather to the latter conclusion. In either case, the plaintiff is clearly entitled to retain his verdict. But even if there was a bonâ fide transfer to the defendants of all the goods taken, yet the supposed leave and licence could not apply to the trespasses in breaking the doors of the house, barn, &c. The case of *Wood v. Manley* is altogether distinguishable from the present. There the plaintiff's goods were sold under a distress, one of the conditions of sale being, "that the purchasers might let the hay and corn remain upon the premises until the Lady Day following, if they required it, and were to have the use of the plaintiff's barns to thrash out the corn, and to enter on the premises as often as they thought proper, to remove such hay and corn." The defendant in that case, therefore, bought under the express agreement that he should have the right for a certain time to enter upon the premises and take the goods. No such agreement appeared in the present case. Here, moreover, it was clear upon the evidence, especially from the item of interest set down by the direction of the defendants, that payment was not to be made to them until two months after the sale; they had, therefore, at all events, no right to take the goods within that period.

[492] Kelly and Townsend, in support of the rule. If upon the evidence the jury had distinctly found that goods were taken away by the defendants which were not included in the sale, undoubtedly they could not have complained of a misdirection; but the jury probably found nominal damages on the ground that the plaintiff's house was forcibly invaded, although they believed that the goods belonged to the defendants. Under the circumstances of this case, as soon as the plaintiff agreed that the goods should remain upon his premises, there was a licence in law to the defendants to enter and retake them in case of nonpayment of the price, which licence was irrevocable. [Parke, B. To bring the case within *Wood v. Manley*, you must make out an agreement for valuable consideration, co-extensive with the trespasses. What consideration was there here?] The leaving of the goods on the plaintiff's premises for his benefit and accommodation. In *Wood v. Manley*, there was no valuable consideration whatsoever given to the plaintiff; the goods remained on the premises for the sole benefit of the purchasers: the present case is therefore stronger than that. The cases of *Webb v. Paternoster* (Palmer, 71; Poph. 151; 2 Roll. Rep. 152), *Taylor v. Waters* (7 Taunt. 384), and others, shew that a licence to enter on land, in consequence of which the licensee has incurred expense, or suffered detriment, is irrevocable. [Parke, B. Considerable doubt has been thrown on the authority of those cases in a very learned work, Messrs. Gale and Whatley's Treatise on the Law of Easements (page 42 et seq.). But, at all events, you cannot support this general plea of leave and licence except by an express agreement, of which I see no proof in the present case. How far the facts might have been a defence if they had been pleaded specially, I give no opinion.] There is a presumed licence in law, under the circumstances which were proved in this case.

[493] PARKE, B. I think no ground has been laid for a new trial. I am not satisfied that this point was distinctly made at the trial: but at all events, there was no evidence of a bargain by the plaintiff, for good consideration, to allow the defendants to enter upon his premises and take the goods, if they were not paid for within a given time. In *Wood v. Manley*, there was proof of an express agreement that the purchasers of the goods might enter upon the premises when they pleased, in order to remove them. Here the plaintiff's case was, that the goods were not bought by the defendants at all, but that they were acting merely as his agents. With respect to the cases which have been referred to, much doubt, as I have already observed, has been thrown upon their authority in a recent work of great ability and learning; and it certainly strikes one as a strong proposition to say that such a licence can be irrevocable, unless it amount to an interest in land, which must therefore be conveyed by deed. It is not necessary, however, to decide that point in the present case: it is sufficient to say that there is no proof of any agreement by which the defendants were authorized to enter upon the plaintiff's premises and take the goods. The rule must therefore be discharged.

The other Barons concurred.

Rule discharged.

[494] CHARLES MARSTON v. ALLEN. Exch. of Pleas. May 22, 1841.—Declaration on a bill of exchange drawn by J. H. upon and accepted by the defendant, alleging that J. H. indorsed it to E. M., and E. M. indorsed it to the plaintiff. Plea, that J. H. did not indorse the bill to E. M. At the trial, J. H. proved that the name J. H. written on the back of the bill was written by himself; that he had received the bill as the accountant to the Imperial Bank, for a debt due to the bank, and that after writing his name on it he had delivered it to W. M., who was also employed in the bank, to be kept by him for the bank. E. M. proved that he had received the bill from W. M., as he said, for value, and indorsed and delivered it for value to his father, the plaintiff. The defendant proposed to controvert this, and to shew that both E. M. and the plaintiff received the bill with full knowledge of the fraud committed by W. M. in handing over the bill. The learned Judge rejected this evidence as inadmissible under the plea denying J. H.'s indorsement, and the plaintiff obtained a verdict:—Held, on motion for a new trial, that the evidence tendered ought to have been received, as, if the facts stated had been fully proved, the jury ought to have found for the defendant on the issue that J. H. did not indorse the bill to E. M., for although there was an indorsement on the bill, there was no valid delivery by J. H., or by any authority from him, and so no complete transfer by indorsement to E. M.

[S. C. 1 Dowl. (N. S.) 442; 11 L. J. Ex. 122. Referred to, *Bradlaugh v. De Rin*, 1868, L. R. 3 C. P. 543; *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 584.]

Assumpsit on a bill of exchange for £100, drawn by one John Harrop upon and accepted by the defendant, payable two months after date to his own order; and the declaration averred that the said John Harrop then indorsed the same to one Edward Marston, and the said Edward Marston then indorsed it to the plaintiff.

Pleas, 1st, that the defendant did not accept the bill; secondly, that the said John Harrop did not indorse the said bill of exchange to the said Edward Marston; thirdly, that Edward Marston did not indorse the bill to the plaintiff. Issue thereon.

At the trial before Rolfe, B., at the Middlesex Sittings after last Hilary Term, Harrop, the drawer of the bill, was called, and he proved that the name John Harrop, on the back of the bill, was in his own hand-writing. He stated, on cross-examination, that he was the accountant to the Imperial Bank, and that he had received the bill in question as an officer of the bank, for a debt due to the bank: that after writing his name upon the bill, he had delivered it to a person named William Marston, also employed in the bank, to be kept by him in safe custody for the bank, whose property it was. Edward Marston was then called, and he proved that he had received the bill from William Marston, as he stated, for value, and that he had indorsed and delivered it for value to the plaintiff, who was his father. The counsel for the defendant, in answer to this evidence, proposed to shew that both Edward Marston [495] and the plaintiff received the bill with full knowledge of the fraud committed by William Marston, in handing over the bill to them. The learned Judge, however, was of opinion that the evidence was inadmissible under the plea denying Harrop's indorsement, and rejected it accordingly, and the plaintiff obtained a verdict. E. V. Williams having, in Hilary Term last, obtained a rule to shew cause why there should not be a new trial, on the ground that this evidence was improperly rejected,

W. H. Watson shewed cause in Easter Term (April 23). The question in this case arises on the simple issue, whether Harrop indorsed the bill to Edward Marston. The evidence tendered was that the indorsement was obtained under circumstances of fraud, of which the indorsee was cognizant at the time. But the only question to be tried on this issue was, whether Harrop had in point of fact indorsed the bill; and therefore that evidence was inadmissible, and was properly rejected at the trial. The rule of H. T., 4 Will. 4, R. 1, s. 3, is that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." According to that rule, when the indorsement is obtained by fraud, it must be answered by a special plea; and that is the very defence attempted to be set up in the present case. It is not open to the defendant to set up that defence under these pleadings. [Alderson, B. The giving the bill to the party for safe custody is not an indorsement. By so doing the other

does not indorse it to him. If I indorse a bill, and it is stolen from me, is it not enough for me to say, I did not indorse it for the purpose of passing it? No doubt it is a good defence if the party took it with a knowledge of the circumstances, but such a defence must be pleaded specially. [Alderson, B. Is it [496] an indorsement? Is not the meaning of "indorsed" "transferred by indorsement?" No; the writing is the indorsement in fact; the circumstances under which it is made are extrinsic. The effect of allowing such a defence to be set up under this plea, would be a direct violation of the new rules; and parties must come in every case prepared to prove the circumstances under which the bill passed, and the consideration which the holder gave for the bill. The words of the rule seem to refer to an indorsement in fact, but which is void on the ground of fraud: and that is the defence in the present case; that although Harrop indorsed his name upon the bill, such indorsement was void on the ground of fraud. The defendant cannot set it up as a limited or restricted indorsement, for a limited indorsement must be expressed to be so on the face of the bill, and when it is so indorsed, it does not affect third parties, unless the terms are complied with: *Sigourney v. Lloyd* (8 B. & Cr. 622; 3 Man. & Ry. 38), *Edie v. The East India Company* (2 Burr. 1227); and Mr. Roseoe, in observing on those cases, says (Roseoe on Bills, 387), "So in France the holder may, by a restrictive indorsement, prevent the indorsee from transferring the bill." What, by the law of merehants, is an indorsement? It is the writing the name on the bill. [Alderson, B. For any purpose which is to be carried into effect by a transfer of the bill.] This may be a defence, but it should be set forth on the record. [Alderson, B. Would not that be putting something on the record which was contradictory?] If the law be as is contended for on the other side, parties must come to trial prepared to prove every fact attending the indorsement. The meaning of the rule is, that the indorsement, as respects third parties, is the hand-writing on the bill; though not so as respects the immediate parties to it, as in the case of an accommodation bill. But when a bill is in the hands [497] of a third party, fraud must be shewn in order to defeat his title, and that must be pleaded. In *Adams v. Jones* (4 P. & D. 474), where to a declaration against the acceptor of a bill of exchange indorsed by the drawer to the plaintiff, the defendant pleaded that he accepted it on account of a debt due from him to the drawer; that the drawer indorsed it in blank, and delivered it to the plaintiff as agent for one Roberts, for the purpose that the plaintiff should deliver it to Roberts, in payment of a debt due from the drawer to Roberts; that the plaintiff gave no consideration for it, and wrongfully retained it in breach of his duty as Roberts' agent; that Roberts claimed to be entitled, and dissented from the plaintiff's suing; it was held that the plea amounted to a constructive denial of the alleged indorsement to the plaintiff, and was therefore good after verdict: the Court, however, expressed a doubt whether the plea would have been good on special demurrer. [Alderson, B. What the defendant will probably contend is, that if these facts were extended on the record, they would not shew any thing amounting to an indorsement.] It would clearly be an indorsement in the hands of a bona fide holder. In the notes to Jervis's Rules, p. 128, it is said, in referring to the cases decided with reference to the rule H. T. 4 Will. 4, R. 1., s. 3, "If the defence be that the bill or note was drawn, indorsed, or accepted, by way of accommodation, or that it was obtained by fraud, or under any circumstances which disentitle the plaintiff to sue upon it, this defence must be pleaded specially." Now, this defence being that the bill was obtained under circumstances of fraud, it ought therefore to have been pleaded, that the principles of the rules may be carried out.

E. V. Williams, contra. At the common law this would have been the only proper plea, and the new rules do not [498] affect that mode of pleading. If the circumstances had been pleaded specially, the plea would have been bad as amounting to an argumentative denial of the indorsement. Perhaps this defence might have been pleaded by giving express colour, but a party is never bound to give express colour. As to the argument of the hardship upon the plaintiff by being called upon by surprise at the trial to meet such a defence, if the party is not a bona fide holder, he must know it. The rule as to pleading matters specially is not so general as has been contended. It has been decided since the new rules, that, in trover by the assignee of a bankrupt, a plea that the plaintiff is not assignee puts in issue the petitioning creditor's debt and the act of bankruptcy: *Butler v. Hobson* (4 Bing. N. C. 290; 5 Scott, 798). So also, pleas that the plaintiffs are not assignees, and were not possessed as assignees, have been held to put in issue the trading, the petitioning creditor's debt, and the act

of bankruptcy: *Buckton v. Frost* (8 Ad. & Ell. 844; 1 P. & D. 102). So in *Nicolls v. Bastard* (2 C. M. & R. 659), it was held that the plea of no property in the plaintiff means no property as against the defendant. And in *Ashby v. Minett* (8 Ad. & Ell. 121; 1 Nev. & P. 231), where, in trespass for taking the plaintiff's goods, the defendant pleaded that the goods were not the plaintiff's; the plaintiff proved that the sheriff had seized goods, the property of B., under an execution against B., and had sold them to him, the plaintiff; it was held that the defendant might shew, on the issue joined, that the sale was fraudulent as against creditors; that he himself had taken the goods under an execution against B., and that this was the alleged trespass. He also cited *Carnaby v. Welby* (8 Ad. & Ell. 872; 1 P. & D. 98). What is the meaning of the averment in the declaration, that Harrop indorsed the bill to Edward Marston? It is that he indorsed and delivered it. The traverse in the plea, therefore, is not merely of the fact [499] that Harrop wrote his name on the back of the bill, but that he transferred it by delivery. It is not necessary, in a declaration on a bill, to state the delivery of it; that is included in the allegation that the defendant accepted it, as was decided in *Churchill v. Gardiner* (7 T. R. 596), and *Smith v. McClure* (5 East, 476). And in the former case the Court said, "If the maker did not intend to put the bill into circulation when he made it, it would be open to the defendant to make that defence on the plea of the general issue." In *Cox v. Troy* (5 B. & Ald. 474), where the defendant, having once written his acceptance with the intention of accepting a bill, afterwards changed his mind, and before it was communicated to the holder, or the bill delivered back to him, obliterated his acceptance, it was held that he was not bound as acceptor. That shews that "indorsement" does not mean merely the putting the name on the bill. *Brind v. Hampshire* (1 M. & W. 372) is another authority to shew that the meaning of an indorsement is not the mere writing on the bill, but a delivery over to the indorsee. Suppose I give a bill to a person to carry to the bank for me, and he sues me upon it, would it be necessary for me to plead that I did not mean to give him any property in it? Would it not be enough to say, I did not indorse it to him? In *Thompson v. Giles* (2 B. & Cr. 422), a customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit to the full amount, and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when they were due and paid, and had credit, on interest, upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they [500] thought fit. The bankers having become bankrupts, it was held that the customers might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. There it was held that the property in the bills did not pass. In *Goggerly v. Cuthbert* (2 New Rep. 170), where a bill was drawn by one P. in favour of the plaintiff, who, having got it accepted, indorsed it to himself, and put it into the hands of D., for the purpose of getting it negotiated, and raising money upon it for his, the plaintiff's, benefit; but D., instead of getting it discounted, gave it to his brother, from whom it came into the hands of the defendant two years after it became due; it was held that the plaintiff was entitled to recover back the bill from the defendant in trover; that the delivery of the bill not being absolute, but conditional, was in the nature of an escrow. So, in *Cranch v. White* (1 Bing. N. C. 414), where R., being employed to procure a bill of exchange to be discounted for the plaintiff, instead of doing so, indorsed it, and placed it in the hands of the defendant, who was clerk to a creditor of R., and who carried the bill to R.'s account with his creditor; and afterwards, though apprised of the circumstances under which R. held the bill, refused to restore it; it was held that the plaintiff was entitled to recover in trover. If this action had been brought by William Marston, who claimed the bill from Harrop, it would not have been necessary to plead that there was no indorsement to him. Then does it make any difference that the person who obtained it fraudulently from him had fraudulently transferred it? Where there is a bona fide holder, who has paid value for the bill, the parties to the bill are estopped from disputing his title; but as soon as you shew that he has notice of the fraud, the estoppel is at an end: it becomes then a mere matter of fact. Although a party may plead an estoppel by deed, he [501] cannot plead an estoppel in pais, because that will immediately shew

that he is pleading matter of evidence. In *Hazard v. Treadwell* (1 Stra. 506), where the defendant, being known to a tradesman, sent a person to him for goods on trust, and afterwards paid for them, and a second time sent the same person with ready money, who received the goods, but did not pay for them, it was held that the master was estopped from disputing that he had authority to order the goods, as by sending him for goods on trust the first time, and paying for them, he had given him credit, so as to charge himself upon the second contract. But if the plaintiff had shewn that the tradesman had notice of this, he would not be liable. Such a defence could not, however, be pleaded specially, as it would be matter of evidence. Where a bill is drawn by one partner in fraud of his copartners, they are estopped from saying that it is not their bill, unless they can shew that the bill was so drawn to the knowledge of the party in whose favour the bill was drawn; but such a defence could not be pleaded. *Adams v. Jones*, if not extra-judicial, is precisely in point.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. This was a case tried at the Westminster Sittings in last Hilary Term, before my Brother Rolfe, and was argued in the last term before my Brothers Gurney and Rolfe and myself. The declaration was upon a bill of exchange drawn by John Harrop upon and accepted by the defendant, and indorsed by John Harrop to Edward Marston, and by Edward Marston to the plaintiff.

The only plea to which it will be necessary to refer was the second, by which the defendant denied the indorsement by John Harrop to Edward Marston.

At the trial, the plaintiff called John Harrop, who proved [502] that the name, John Harrop, written on the back of the bill, was written by himself. He stated on cross examination, that he was the accountant to the Imperial Bank, and that he had received the bill as an officer of the bank for a debt due to the bank, and had, after writing his name thereon, delivered it to another person of the name of William Marston, also employed in the bank, to be kept by him in safe custody for the bank to whom it belonged. Edward Marston then was called, and it appeared that he had received the bill from William Marston, as he said, for value, and that he had indorsed and delivered it for value to his father the plaintiff.

On the part of the defendant, however, it was proposed to controvert this, and to shew that both Edward Marston and the plaintiff, his father, received the bill with full knowledge of the fraud committed by William Marston in handing over the bill to them, contrary to his duty to the bank.

My learned Brother rejected this evidence, as inadmissible under the plea denying Harrop's indorsement; and the question is, whether in so doing he was right.

On the argument, it was very strongly urged by Mr. Watson, that, to admit this evidence, would be contrary to the new rules of pleading. But it appears to us that the new rules of pleading have really nothing to do with this question. The only point for us to consider is this—what in point of law is the indorsement of the bill denied by the plea on this record. We have to decide whether, if the facts opened by the defendant had been fully proved, my learned Brother ought to have directed the jury that this bill had not been indorsed by John Harrop. If the indorsement denied by this plea simply means the writing the name of John Harrop on the back of the bill, the plaintiff is right; for these facts have no tendency to disprove that proposition: or, if it means such an act of writing on the bill, followed by the bill [503] being afterwards under any circumstances in the hands of a holder, then also the verdict ought not to be disturbed. But we think neither of these propositions can be sustained in point of law.

The law as laid down by the Court of Queen's Bench in the case of *Adams v. Jones*, after time taken to consider the question, seems very strongly applicable to this case. Lord Denman there describes an indorsement thus:—"A bill may be indorsed in two ways, either by a special indorsement making it payable to a given person, or by a blank indorsement and delivery to him. In the latter way, at all events, if not in the former, the bill must be delivered to the party as indorsee; but this plea," he adds, "avers that it was indorsed in blank and delivered to the plaintiff, not as indorsee, but as agent only for another, to whom he was to deliver it, and who was the real indorsee. We think, therefore, that it was a constructive denial that the bill was indorsed to the plaintiff." And in *Brind v. Hampshire* (1 M. & W. 369), this Court came to the same conclusion, both Lord Abinger and Mr. Baron Parke holding in that

case that a delivery to the indorsee is necessary to complete an indorsement, by which those learned Judges clearly mean a transfer by indorsement. Again, Mr. Justice Bayley, in his book on Bills of Exchange, expresses himself very clearly to the same effect: "Bills and notes are assigned," he says, "either by delivery only, or by indorsement and delivery." And immediately after this passage he adds, "On a transfer by delivery only, without indorsement, the person making it ceases to be a party to the bill or note. On a transfer by indorsement, he is, according to the legal operation, a new drawer" (page 98, 4th ed.). Then what is the meaning of the plea, "did not indorse," in this case? In order to ascertain this, we ought to look at the declaration, for this is only a traverse of one of the averments therein. Now the declaration, after setting out the making and accepting of the bill, adds, that the drawer indorsed it to Edward Marston, and that Edward Marston indorsed it to the plaintiff. But these averments, introduced into the declaration for the purpose of tracing the plaintiff's title to sue, must necessarily mean that the drawer transferred the bill by indorsement to Edward Marston, and that Edward Marston transferred the bill by indorsement to the plaintiff. The plea, therefore, must have the same construction, and must be taken to mean a denial of that transfer by indorsement stated in the declaration. If, then, a transfer by indorsement, as we have before shewn, consists in an indorsement (or writing the name of the party transferring the bill on the bill) and a delivery for the purpose of completing such transfer, it will follow that the issue "did not indorse" involves both these propositions.

But then we were pressed in argument with the difficulty that here there has been a delivery to the plaintiff, and one for the admitted purpose of transferring the bill; and no doubt, if such delivery had been *bonâ fide* and for value, it would have been quite sufficient to give a title to the plaintiff. The law merchant, for the purposes of currency, and the advantages flowing from an unchecked circulation of bills of exchange, no doubt provides that a *bonâ fide* holder for value shall not be affected by an intermediate fraud. We do not indeed adopt the proposition, that the previous party to the bill is estopped from setting up the defence of fraud against the case of a *bonâ fide* holder for value. We think it better to say, that, by the law merchant, every person having possession of a bill has, (notwithstanding any fraud on his part, either in acquiring or transferring it), full authority to transfer such bill, but with this limitation, that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it or a [505] person through whom the holder claims. Anything, therefore, which shews that this restriction applies, shews that the party making the transfer had no authority, and that the transfer is not valid. In this case, if the evidence rejected had been received, and the jury had thereby been satisfied that this bill was delivered, after John Harrop's writing his name thereon, to William Marston for a special purpose, that William Marston delivered it in fraud of such purpose to Edward Marston, and that Edward Marston, at the time of such delivery, was fully aware that in so doing William Marston committed a fraud, we think that they ought to have found a verdict for the defendant on the issue that John Harrop did not indorse the bill (i.e. did not transfer the bill by indorsement) to Edward Marston. For, although there was an indorsement, there was no valid delivery by Harrop or by any authority from him, and so no complete transfer by indorsement of the bill to Edward Marston.

For these reasons, we are of opinion that the evidence tendered ought to have been received, and that there must be a new trial.

Rule absolute for a new trial.

TODD AND ANOTHER v. EMLY AND ANOTHER. Exch. of Pleas. May 26, 1841.—

In an action against the defendants, to recover the price of wine furnished to a subscription club, of the committee of which the defendants were members, it was proved that the wine was ordered by the house-steward, who stated that he had authority to do so from the members of the committee. It was not shewn that the defendants had either personally interfered in ordering the wine, or been present at any meeting of the committee when the authority to order the wine was given; but merely that they were members of the general body of the committee:—Held, that, under these circumstances, the question for the jury was not,

whether the defendants, by their course of dealing, had held themselves out as personally responsible to the plaintiffs, but whether they had individually authorized the making of the contract in the ordering of the wine.

[S. C. 10 L. J. Ex. 262. See also 7 M. & W. 427; 9 M. & W. 606.]

Assumpsit for goods sold and delivered, and on an account stated. Plea, non assumpsit.

This was an action brought to recover the price of wine supplied by the plaintiffs to the Alliance Club, during the time that the defendants were members of the committee, [506] and was tried before Lord Denman, C. J., at the last Spring Assizes for the county of Surrey, when the following facts appeared in evidence.^(a)

The club was formed in the year 1836, and the members of it were the proprietors of the club and the renters of the house. The members, on admission, paid entrance-money and an annual subscription, and all provisions consumed in the club were paid for in ready money. The funds were deposited at a banker's appointed by the members of the club, and were drawn out by cheques signed by three of the committee, who had authority so to do, and countersigned by the secretary. It appeared that the house-steward, Mr. Chapman, was the agent of the committee for the purpose of ordering articles for the use of the club, and, amongst others, wine from the plaintiffs; that he so ordered it by authority of the members of the committee, and that the committee were aware that the wine was obtained upon credit. It also appeared that a Mr. Stewart, one of the committee, had gone to the plaintiffs' for the purpose of tasting wine for the club, with the knowledge, as he stated, of "the members of the committee." It did not appear whether by those words were meant all those who were elected to that office by the club, or merely such of them as formed a committee at some particular meeting when the authority was given. The defendants had not ordered the wine personally, nor was it shewn that they were present at any particular meeting when an authority to order it was given to the steward. The Lord Chief Justice, in summing up the case to the jury, told them that the question was, whether the committee-men were authorized to pledge the personal credit of the members; and that the evidence also raised another question, whether all the members of the committee had not, by their general and known course of dealing, held themselves out to the plaintiffs as parties personally liable, and not individually as a committee contracting to pay for such goods, as any partnership might do. The jury found a verdict for the plaintiffs, with £194 damages.

Thesiger, in Easter Term last, moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection, and contended that the question which ought to have been left to the jury was, whether the defendants had made the contract in question either personally or by means of their agent, and not as it was left to them. The Court having granted a rule to shew cause,

Platt and Petersdorff now shewed cause. The direction of the learned Judge was right. The substance of what he left to the jury was, whether the parties choosing the wine were authorized by the defendants to purchase it of the plaintiffs upon credit. He left it to them in effect to consider, whether the defendants had not given the steward authority, as their agent, to enter into a contract which would render them liable for wine purchased for the use of the club; and the jury must be taken to have so found.

Thesiger, contra. The question that ought to have been left to the jury was not at all a question of partnership, or whether the defendants had rendered themselves liable by holding themselves out as partners in the concern, and thereby procuring credit, but whether they authorized the steward, as their agent, to make the contract with the plaintiffs on their account. It was not enough to shew that the plaintiffs were to be satisfied out of the funds of the club. There was no evidence of the defendants having personally ordered the wine, and nothing to shew that they had even [508] constituted the house-steward their agent to order it. That was the question which ought to have been left to the jury, but it was not. Had that question been left to them, they never could have found their verdict for the plaintiffs, as there was no proof of the defendants having ordered the wine, or of their having been present

^(a) The case had been before tried, but a new trial was granted, for the report of the argument and judgment on which case see 7 M. & W. 427.

at any meetings of the committee when the steward was authorized to order it. [Alderson, B. It does not appear that the plaintiffs knew at the time that there were such persons as the defendants, and therefore there is no evidence of any holding out so as to induce them to give credit; but there is evidence of authority by the committee to the steward to give the order for the wine. Rolfe, B. The question is, whether, where a certain body authorize their agent to order goods, they are liable individually. Alderson, B. It might be that the majority only gave authority, and that the defendants dissented from it. If so, I should think they only were liable who voted for it.] The only question was, whether there was an authority given by the defendants to the steward to order the wine. Had the question been properly left to the jury, they would probably have found that the defendants had not contracted nor authorized any contract with any particular individual, and that the plaintiffs, in supplying the wine, had given credit to the club at large, trusting to the general respectability of the members of it.

LORD ABINGER, C. B. It is fit that this case should be considered again, as it is one of considerable difficulty. Supposing the jury to have been of opinion that the majority of the committee had a right to bind the minority, they might still think that the defendants had never done anything to shew that they concurred in the authority given to the house-steward; yet upon the general summing up of my Lord Denman, they might come to the conclusion that the defendants were liable: for, hearing the evidence, and [509] particularly what the steward said, that he was the agent of the committee, and that he by their authority ordered the wine for the use of the club, the jury might think, if he had the authority of all the members of the committee in so dealing with the plaintiffs, that they were parties to the contract, and might reasonably infer that the defendants were liable. It appears that there was abundant evidence to warrant the Judge in leaving it to the jury to consider whether the defendants concurred in the authority to the steward to order wine given by some of the committee, and upon that ground they might probably have found for the plaintiffs; but the question of the individual liability of the defendants does not appear to have been brought distinctly to the notice of the jury. As the evidence has been reported to us, we cannot say we see any proof that any member of the committee held himself out as personally liable to the plaintiffs. If the jury had given their verdict upon the notion that the majority bound the minority, that might be a different question. I think there ought to be a new trial.

ALDERSON, B. The point for consideration is a very important one, arising upon a contract for buying goods upon credit, by the steward of a club; and the question is, whose agent he is in making the contract. The plaintiffs undertake to shew that he is the agent of the committee, and they are bound to make out that proposition. They might prove it undoubtedly by shewing that the defendants, with a great number of other persons, all of them and each of them, concurred in authorizing the steward to make the contract with the plaintiffs; and there is abundant evidence here from whence the jury might, if they thought fit, infer that. That is the true view of the case; because Mr. Stewart says he was one of the committee who went to choose the wine, and that all the members of the committee knew it; and then, if the two de-[510]-fendants were members of the committee, they would be liable. Whether the general expression "members of the committee" did include all the committee, or only those who attended, may be a matter of doubt—it may mean the persons who attend the meetings, or each and every individual member of the committee, including the two defendants. In order to make the case out, and to establish the liability of the defendants, the jury should be satisfied that what was done was not only within the knowledge of the committee generally, but that it was within the particular knowledge of the two defendants. But when we see the generality of the expression used by the witness, it is not as a matter of course to be inferred by us that the jury would have come to the conclusion they did, if they had been told that it was necessary to shew a particular authority by each of the two defendants.

ROLFE, B. I am of the same opinion; but I cannot help expressing my regret that this case has to be tried again, because there is the strongest evidence to prove the point intended to be disputed, namely, whether or not the committee either altogether agreed to be bound by what any of them might do, or individually authorized what was done. The steward distinctly states that he had the authority of all the members of the committee, and two members of the committee make the same statement; but

at the same time it does not appear that that point was left to the jury ; and therefore I must concur, though reluctantly, in there being a new trial.

Rule absolute.

[511] MITFORD v. FINDEN AND ANOTHER. Exch. of Pleas. May 27, 1841.—To an action by the payee against the makers of a promissory note, the defendants pleaded, that there was no consideration for the note, and that it was made subject to the condition that the defendants should not be called upon to pay the same if they were not able, but that it should be renewed. There was an affidavit that the plea was false. The Court set aside the plea, on the ground of its being false and tricky, and calculated to embarrass the plaintiff.

[S. C. nomine *Mitford v. Trinder*, 10 L. J. Ex. 473 ; 5 Jur. 511.]

Assumpsit by the payee against the makers of a promissory note. The defendants, (who were under terms of pleading issuably), pleaded that there was no value or consideration for the making of the said note, and that it was made subject to certain terms and conditions, viz. that the defendants should not be called upon to pay the same if they were not able, but that the note should be from time to time renewed, until they should be able to pay it. Cowling had obtained a rule to set aside this plea as frivolous, upon an affidavit stating that the plea was entirely false.

W. H. Watson now shewed cause. The Court will not set aside a plea merely on the alleged ground that it is false. *Miles v. Walls* (1 Dowl. P. C. 648) may perhaps be cited as an authority for the plaintiff, but that case was decided before the New Rules, which have abolished the general issue in actions on bills of exchange. Although, under the old practice, the Court would set aside a sham plea, when it was not in the usual form, upon affidavit that it was false, and for the purpose of delay, they would not do so merely on the ground that it was sworn to be false. In *Cowper v. Jones* (4 Dowl. P. C. 592), which was a similar application to the present, Patteson, J., said, "Unless the defendant was under terms of pleading issuably, or the plea pleaded raised a different issue, the Court cannot interfere. The plea may contain a statement of facts which may or may not be true, and which are not sufficient in point of law as an answer to the action. That, however, is not a reason for setting it aside. I have not the power to do it. I know the Courts some years ago used to interfere when the plea was frivolous, [512] and authorize the plaintiff to sign judgment as for want of a plea. But the Courts afterwards retraced their steps, on the ground of a doubt they had as to their power so to do. The Courts, therefore, now never interfere unless the defendant is under terms to plead issuably, or under some special circumstances." *La Forest v. Langan* (4 Dowl. P. C. 642), and *Merington v. Beckett* (2 B. & C. 81), are also authorities to shew that the Courts will not interfere merely because the plea is false. In the former case, Tindal, C. J., says, "It is clear that this is a plea upon which a distinct issue may be taken ; and if we were to allow this rule, we should in effect be trying the case upon affidavit."

LORD ABINGER, C. B. In those cases the pleas were good upon the face of them. Here the plea is both tricky and false, and framed with a view to embarrass the plaintiff. The plaintiff must demur, or, if he reply, his replication is open to a demurrer. I think this a proper case for the Court to set aside the plea.

ALDERSON, B. If the plea had been good, the Court would not try the truth of it on affidavit ; but it is absurd, and both tricky and false : and in cases of that kind, the rule of the Courts seems to have been to set them aside.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[513] BARKER v. HOLLIER. Exch. of Pleas. May 27, 1841.—The Court has no jurisdiction to review the discretion exercised by a Judge at Nisi Prius in granting a certificate to entitle the plaintiff to costs, under the stat. 3 & 4 Vict. c. 24, s. 2.

[S. C. 1 Dowl. (N. S.) 32 ; 10 L. J. Ex. 474 ; 5 Jur. 489. Referred to, *Husley v. West London Extension Railway Company*, 1886, 17 Q. B. D. 376.]

This was an action on the case against the defendant, for selling a preparation called "Atkinson's Infant Preservative," wrapped up in printed covers in imitation of those used by the plaintiff for the same purpose.

At the trial before Gurney, B., at the Middlesex Sittings after Hilary Term, the jury found a verdict for the plaintiff, damages 1s., and the learned Judge certified, under the statute 3 & 4 Vict. c. 24, s. 2, that the grievance for which the action had been brought was wilful and malicious. The Master having taxed the plaintiff his full costs, pursuant to the above certificate,

Erle now moved for a rule to shew cause why the Master should not review his taxation. This is not a case in which the Judge ought to have granted a certificate under the act, as appears from the case of *Marriott v. Stanley* (1 Man. & G. 853; 2 Scott, N. R. 60). [Alderson, B. It seems to be an absolute discretion. If the Judge has exercised his discretion, I do not see how we can interfere.] The power of the Judge is not to be exercised without being subject to the revision of the Court; for suppose he were to certify in the case of an action not within the statute at all? Surely there ought to be some remedy.

LORD ABINGER, C. B. The Judge has a discretion vested in him whether he will certify or not, in all cases of trespass or trespass upon the case; with the exercise of which discretion we have no right to interfere. The present action, being in trespass on the case, comes within the act. The Judge having exercised his discretion on the subject, I think we have no right to review it.

[514] ALDERSON, B. The Judge has an absolute discretion, with which the Court has no authority to interfere.

GURNEY, B., and ROLFE, B., concurred.
Rule refused.

DOE D. TODD v. DUESBURY. Exch. of Pleas. May 26, 1841.—Devise to T. D. and his assigns during his natural life, and from and after his decease unto all and every his child and children; if only one child, then to such child, his or her heirs, executors, administrators, or assigns; but if more such children, then equally to be divided amongst them share and share alike, and to the heirs, executors, administrators, and assigns of such children respectively, as tenants in common, and not as joint tenants; but in case the said T. D. should happen to die without leaving lawful issue, then to R. T., E. D., and M. D., and to their heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants, charged with the payment of 1000l. in that case given and bequeathed to E. H., to be paid to her at the end of twelve months after the said R. T., E. D. and M. D., their heirs, &c., should come into the possession of the same premises. At the time of the testator's death, T. D. and several of his children were living:—Held, that the limitation over to R. T., E. D., and M. D., did not operate by way of executory devise, nor vest in them a remainder in fee.

[S. C. 10 L. J. Ex. 410. Referred to, *Brookman v. Smith*, 1872, L. R. 7 Ex. 277.]

Upon ejectment brought, and issue joined therein, the following case was, under an order of Lord Abinger, C. B., stated for the opinion of this Court:—

The premises in question in this action are parcel of certain estates situated at Hunsley, Ripplingham, and Rowley, in the East Riding of the county of York, of all which estates Mrs. Catherine Younge, widow, before and at the time of the execution of her will hereinafter mentioned, and thenceforth continually until and at the time of her death also hereinafter mentioned, was seised in fee-simple.

By will dated 17th July, 1796, duly executed and attested as is by law required for the devising of estates of inheritance, Mrs. Catherine Younge devised certain premises, not now in question, to her cousins, Esther Duesbury and Mary Duesbury, the daughters of her late uncle, Matthew Duesbury, their heirs and assigns for ever, as tenants in common, and not as joint tenants; and among various other devises, the said Catherine Younge thereby devised her said premises at Hunsley, Ripplingham, and Rowley, together with other property, to certain trustees, for a term of 21 years, to commence, as to the said pre-[515]-mises at Hunsley, Ripplingham, and Rowley, from and immediately after her decease, upon trust to provide for and secure the payment of certain legacies and annuities therein mentioned; and from and after the end or sooner determination of the said term, and in the mean time subject thereto, she devised the said premises at Hunsley, Ripplingham, and Rowley, by the words following:—"I also give, devise, direct, limit, and appoint all my said freehold

messuage, farm, closes, lands, and hereditaments, with the appurtenances, situate at Lower Hunsley, and also my oxgang of freehold land, with the appurtenances, in Riplingham fields, in the parish of Rowley aforesaid, now or late in the tenure, &c.; also all those my said messuages, farms, closes, lands, tenements, and hereditaments, situate at Riplingham aforesaid, with the appurtenances, in the occupation, &c.; and also all other my freehold, leasehold, and other real estates not hereinbefore disposed of, from and immediately after the end or sooner determination of the said term of twenty-one years, and in the mean time subject thereto, unto and to the use of Thomas Duesbury, the son of my cousin William Duesbury, and his assigns, during his natural life; and from and after the decease of the said Thomas Duesbury, I give, devise, limit, direct, and appoint the said messuages, lands, hereditaments and premises last mentioned, and so situate at &c., unto all and every the child and children of the said Thomas Duesbury, if only one child, then to such child, his or their heirs, executors, administrators, or assigns, but if more such children, then equally to be divided amongst them, share and share alike, and to the heirs, executors, administrators, and assigns of such children respectively, as tenants in common and not as joint tenants; but in case the said Thomas Duesbury shall happen to die without leaving lawful issue, then I give, devise, limit, direct, and appoint all and every &c., (the same premises), unto Rebecca Thornton, the sister of the said Thomas Duesbury, and to the said Esther Dues[516]-bury and Mary Duesbury, and to their heirs, executors, administrators, and assigns, as tenants in common and not as joint tenants, according to such estates or interests as I myself have respectively therein, charged nevertheless with the payment of the legacy or sum of £1000, which I do hereby in that case give and bequeath to Elizabeth Harrison, the other daughter of the said Matthew Duesbury, the same to be paid to her at the end of twelve calendar months next after the said Rebecca Thornton, Esther Duesbury, and Mary Duesbury, their heirs, executors, or assigns, shall come into the possession of the same premises, and also charged with and subject to such annual and other payments as hereinafter expressed." And the testatrix thereby directed the said trustees, out of the rents and profits of the said estates so vested in them for twenty-one years, and out of the rents, and arrears of rent, debts, and sums of money due and owing to the testatrix at the time of her death, and also out of the money to arise by certain sales therein directed, to pay and discharge the several debts, sums of money, expenses, annuities, and other charges thereinafter mentioned, certain of which said several annuities were to continue to be paid until the end or other sooner determination of the said term; and after payment of the said annuities, to pay and apply the surplus for and towards payment of the several legacies or sums of money therein-after given, bequeathed, or directed to be made, in such order, manner, and priority of payment, as the same were thereinafter set down or expressed, and when and so soon as sufficient money was received for the payment of the same, or of any of them, according to such priority, that is to say, to divers persons therein successively named, the respective sums therein mentioned, many of which are small sums, for rings and mourning, and amongst which is a legacy in the following words:—"To such of the children of the said Elizabeth Harrison as shall be living at the decease of their mother, the legacy or [517] sum of £20 apiece;" and also a legacy of £400 to Emma Kirk, and last in succession, to the said Esther Duesbury and Mary Duesbury, the legacy or sum of £750 apiece, and to the said Rebecca Thornton, a legacy or sum of £800: and the testatrix thereby directed, that when and as soon as the said legacies or sums of money before mentioned should be raised, levied, and satisfied, the said term, or the residue thereof unexpired, should cease, and that from the end or sooner determination of the said term of twenty-one years, certain annuities and legacies specified should, if not before extinguished, be charged on the estates devised to the use of the said Thomas Duesbury and his assigns as aforesaid; and that in case the said Emma Kirk should happen to die before the said legacy should become payable, leaving lawful issue, then she directed, limited, and appointed that the said legacy or sum of £400 so given or directed to be paid to her, should go and be paid to all and every the child and children of the said Emma Kirk, who should be living at her decease; if only one child, then to such child; but if more than one, then to and equally amongst such children, share and share alike, at their respective ages of twenty-one years; and if it should happen that the said Emma Kirk should die before the said legacy should become payable, without leaving lawful issue, then she directed that the said legacy

should sink, lapse, and not be raised; and she also thereby directed that in case the said Rebecca Thornton should happen to die before her said legacy should become payable, leaving lawful issue, then and in such case the legacy or sum of £800 so given or directed to be paid to her should go and be paid to all and every the child and children of the said Rebecca Thornton which should be living at her decease; if one only child, then to such only child, but if more than one, then unto and equally to be divided among such children, share and share alike, at their respective ages of 21 years, and also that the said sum of £800 should in that case be placed out at in-[518]-terest by the said trustees from and immediately after the time the same would have been payable to the said Rebecca Thornton, and the interest thereof applied by them towards the maintenance and education of such child or children as last mentioned: and if it should happen that the said Rebecca Thornton should die before the said legacy should become payable, without leaving lawful issue, then that the said legacy of £800 should lapse, and not be raised and paid by the said trustees. And the testatrix also directed, that in case the said Esther Duesbury and Mary Duesbury, or either of them, should happen to die before their said legacies should become payable, leaving lawful issue, then and in such case the legacy or legacies of such of them so dying should go and be paid to their respective child or children at their respective ages of twenty-one years; if more such children than one, then to be equally divided among them, share and share alike; but in case either of them the said Esther Duesbury and Mary Duesbury should happen to die unmarried or without leaving lawful issue, and before her respective legacy should become payable, then and in such case the legacy of her so dying should go and be paid to the survivor of them, as and when the original legacy of such survivor should become payable by virtue thereof; and in case both of them the said Esther Duesbury and Mary Duesbury should happen to die unmarried before their said legacies should become payable, then that the said several legacies or sums given or directed to be paid to them respectively should go and be paid to Elizabeth Harrison, when and as the said legacies would have become payable by virtue of that will.

On the 6th of June 1798, Mrs. Catherine Younge made a codicil, which does not affect the premises in question in the present case, and she died on the 7th of September 1798, without further altering or revoking her said will. Esther Duesbury and Mary Duesbury were the daughters of the testatrix's late uncle Matthew Duesbury. The said Tho-[519]-mas Duesbury was the heir-at-law of the testatrix. The said Thomas Duesbury survived the testatrix, and upon her death entered into and during his life retained the possession of the said Hunsley, Riplingham, and Rowley estates, and took all the profits for his own use. The other property devised and bequeathed to the said trustees was amply sufficient to pay all the annuities, legacies, and charges, and they were all paid, before the year 1820. All the children of the said Thomas Duesbury died without issue and unmarried. He had five children, viz. Robert the eldest, who was born in June 1795 and died in July 1805; William and Thomas, born in August 1796, who died, the one in September, the other in October of the same year; John, born in July 1798, who died in September 1798, and William, born in November 1800, who died in 1801.

On the 6th and 7th of January 1832, indentures of lease and release of those respective dates were executed by the said Thomas Duesbury; and by the release, which is made between the said Thomas Duesbury of the first part, Thomas Hutton of the second part, and Richard Lambert of the third part, it was witnessed, that, for the purpose of barring and destroying all estates tail, and all remainders and reversions thereupon expectant or dependant, mentioned, limited, or contained in the said will of the said C. Younge, of and concerning the said estates therein mentioned, the said Thomas Duesbury did grant, bargain, sell, release, and confirm unto the said Richard Lambert, as in his actual possession then being by virtue of the said lease, and to his heirs, the said estate at Hunsley, and Riplingham and Rowley (inter alia), with their appurtenances; to have and to hold the same unto and to the use of the said Richard Lambert, his heirs and assigns, to the intent and purpose that the said Richard Lambert might be and become an actual tenant of the freehold of all the said estates, to the end that one, two, or more good and perfect common recovery or recoveries with double voucher should and [520] might in due form of law be thereof had and suffered, in such manner and for such intents and purposes as thereafter mentioned; and it was agreed and declared that it should be lawful for the said

Thomas Hutton, at the expense of the said Thomas Duesbury, to sue forth one, two, or more writ or writs of entry sur disseisin en le post, thereby demanding against the said Richard Lambert the hereditaments and premises thereinbefore mentioned, to which Lambert should appear and vouch Duesbury, &c., so that one or more good and perfect common recovery or recoveries with double voucher should and might be suffered of all such hereditaments; and that the same should be and enure to and for the only proper use and behoof of the said Thomas Duesbury, his heirs and assigns for ever. This deed was registered at the office in and for the East Riding of York on the 23rd November, 1836. In Hilary Term 1832, two several recoveries were suffered of the said estates accordingly, but in which recoveries one Henry William Hutton was the demandant, the said Richard Lambert tenant, and the said Thomas Duesbury vouchee, who duly vouched over the common vouchee.

Henry William Hutton was partner of the said Thomas Duesbury as bankers. No recovery was suffered in which Thomas Hutton was a party.

Thomas Duesbury died on the 28th day of June, 1837, having first made a will duly executed to pass real estates, and devised his real estates to the defendant. The defendant is the second son of the said Rebecca Thornton, who survived the testatrix, and also survived her husband; and on the 19th day of October 1819, being then a widow, made a will whereby she devised her real and personal estates to trustees to sell for the use of her children. She died on the 28th of June 1822.

Upon the death of Thomas Duesbury, the defendant entered upon and has since received the rents and profits of the said estates.

[521] The said Esther Duesbury and Mary Duesbury also survived the testatrix. Esther Duesbury died unmarried and intestate as to real estate in 1815, leaving her sister, the said Mary Duesbury, her sole heiress at law her surviving. The said Mary Duesbury married John Todd, who died in August 1838, and she is the Mary Todd named in the declaration as the lessor of the plaintiff. Elizabeth Harrison was married at the time of the death of Mrs. Catherine Younge, and died on the 13th of September 1815, being at the time of her death a widow.

The said Mary Todd claims in this action one undivided third part of the premises in question under the said devise in her favour in the said will of Catherine Younge contained, and also one other undivided third part of the said premises as heiress at law of her late sister Esther Duesbury, under the same devise in favour of the said Esther Duesbury in the same will.

The several wills, deeds, &c., are to be referred to as part of the case, if thought necessary by either party.

The question for the opinion of the Court is, whether the said Mary Todd is entitled to the said two undivided third parts, or either of them, of and in the said premises. If the Court shall be of opinion in the affirmative thereof, then judgment is to be entered for such part for the plaintiff by confession, and 1s. damages, immediately after the decision of the said case, or otherwise as the Court may direct. If the Court shall be of a contrary opinion, then a judgment of nolle prosequi is to be entered.

In Michaelmas Term last, the case was argued by

J. Henderson for the lessor of the plaintiff. The limitation over to Rebecca Thornton, Esther Duesbury, and Mary Duesbury, if operative by way of executory devise or vested remainder, is not affected by the recovery.

First, that limitation took effect as an executory devise.

[522] Thomas Duesbury was merely tenant for life. The devise in his favour is, in terms, for his life only, and the other parts of the will do not, by implication or operation of law, enlarge his estate beyond what the terms of that devise import. There is neither necessity nor room for such an implication, the will in express and apt words defining his estate to be for life, and giving in remainder to his children an express estate of inheritance. The rule in *Shelley's case* (1 Rep. 104) does not apply, the limitation over being to children, who take, not as by descent, but equally amongst them, with words of express limitation to the heirs of the children. *Wyll's case* (6 Rep. 17), *Archer's case* (1 Rep. 66), *Doe d. Ginger v. White* (Willes, 348), *Goodtitle v. Woodhull* (Willes, 592), *Doe d. Barnard v. Reason* (3 Wills. 244), *Doe d. Liversage v. Vaughan* (5 B. & Ald. 464; 1 D. & R. 52).

The remainder vested in the children living at the time of the testatrix's death. In *Goodright v. Dunham* (1 Doug. 264), *Doe d. Comberbach v. Perryn* (3 T. R. 484), and

Burnsall v. Dary (1 Bos. & Pul. 215; and see 6 T. R. 30), similar remainders over were held to be contingent; but in those cases there was no child to take a vested interest. In the present case, there being children, they took a vested remainder in fee, subject to open and let in those children who might be born afterwards; *Right v. Creber* (5 B. & Cr. 866; 8 D. & R. 718), and the limitation over to Rebecca Thornton, E. Duesbury, and Mary Duesbury took effect by way of executory devise. *Doe d. Barnfield v. Wetton* (2 Bos. & Pul. 324; and see *Doe d. Herbert v. Selby*, 2 B. & Cr. 925; 4 D. & R. 608).

It will be contended for the defendant, that the contingency on which this limitation over depends is too remote for an executory devise, and that therefore this case is not [523] within the rule in *Pells v. Brown* (Cro. Jac. 590). This objection raises the question, whether the words "in case the said Thomas Duesbury shall happen to die without leaving lawful issue," refer to issue living at his death, or to an indefinite failure of issue. If this were the devise of a term, these words would be construed in that which certainly appears to be their natural and obvious sense, that is, as denoting issue left by Thomas Duesbury,—issue living at his death. *Targett v. Gaunt* (1 P. Wms. 432). The distinction taken in *Forth v. Chapman* (1 P. Wms. 663), in the construction of the testator's meaning of the same words as applied to different kinds of property, Lord Kenyon doubted in *Porter v. Bradley* (3 T. R. 143), and reprobat in *Roe d. Sheers v. Jeffery* (7 T. R. 589); but it was insisted on by Lord Eldon in *Crooke v. De Fandes* (9 Ves. 197), and is adverted to in the late case of *Doe d. Cadogan v. Ewart* (7 Ad. & Ell. 636; 3 Nev. & P. 197). If this distinction prevails, still it is clear on all the cases, that where, on the whole will, it appears that the testator contemplated a failure of issue within the limits prescribed to executory devises, the words will be construed accordingly. Thus, such an intention was inferred in *Pells v. Brown* from the word "living" applied to the devise over; in *Porter v. Bradley* from the words "behind him" added to the words "leaving no issue:" and in *Roe d. Sheers v. Jeffery* from the circumstance that the devise over was for life. The case of *Doe d. Smith v. Welber* (1 R. & Ald. 713) affords a more direct authority on this point. There, the contemplation of failure of issue living at the death of the first devisee was inferred from a bequest on the death of the first devisee without leaving a child or children (there held to mean issue) to her executors or administrators, or such person as she should by will appoint. Here the [524] charge of £1000 in favour of Elizabeth Harrison, indicating a benefit to a person then living, and to be realised within twelve months after the event, shews that the testatrix contemplated an event not too remote for an executory devise.

This question, however, does not arise, if, as is contended secondly, the children of Thomas Duesbury took a vested estate tail, the immediate remainder wherein vested in Rebecca Thornton, E. Duesbury, and Mary Duesbury in fee.

The estate limited to the children in remainder to T. Duesbury, the tenant for life, is expressly an estate of inheritance, and the immediate devise over to Rebecca Thornton, E. Duesbury, and M. Duesbury, on failure of issue of Thomas Duesbury, shews that the testatrix intended that such estate of inheritance should not subsist longer than the existence of lineal descendants of Thomas Duesbury. The intention thus manifested restrains the meaning of the word "heirs," used in the limitation in favour of Thomas Duesbury's children, to "heirs of their bodies," and the estate in fee-simple, which the words used would, per se, have conferred on them, to an estate tail. The case of *Doe d. Barnard v. Reason* (3 Wils. 244) affords a direct authority for the plaintiff on this point. There it was held that the intention apparent on the will, that those in remainder should take in fee, on failure of the line of the tenant for life, narrowed the estate of the issue of the tenant for life to an estate tail, although limited to them and their heirs generally; and that the estate limited thereon was a vested remainder. So here, the clearly apparent intention that the estate conferred on the children of T. Duesbury should not continue after failure of lineal descendants of T. Duesbury, reduces the estate of the children to an estate tail, and R. Thornton, E. Duesbury, and M. Duesbury, the next in remainder, took a vested remainder in fee. [525] The cases of *Jones v. Legg* (9 Mod. 461; and S. C., nomine *Ives v. Legge*, 3 T. R. 488, note (a)), *Tenny v. Agar* (12 East, 253), are to the like effect; and the cases of *Doe d. Ginger v. White* (Willes, 348), *Goodtitle v. Woodhall* (Willes, 592), *Denn d. Geering v. Shenton* (Cowp. 410), *Goodright v. Dunham* (1 Doug. 264), *Doe d. Comberbach v. Perryn* (3 T. R. 484), *Doe d. Dary v. Burnsall* (6 T. R. 30), *Lees v. Mosley* (1 Y. &

Coll. 584), and *Dansen v. Griffiths* (4 M. & Selw. 61), sustain or consist with this view. On the death of the testatrix, therefore, estates vested in Thomas Duesbury for life, in his children in fee tail in remainder, with cross remainders among them. (Powell on Devises, vol. 1, pp. 604 et seq.) and in Rebecca Thornton, E. Duesbury, and Mary Duesbury, in remainder therein in fee simple.

Cresswell, for the defendant. Thomas Duesbury took an estate tail. The limitation in terms for his life does not exclude the operation of words importing an intention to confer on him an estate tail, and from such words an estate tail will be implied, to effectuate that intention. *Doe dem. Cock v. Cooper* (1 East, 229), *Pierson v. Fickers* (5 East, 547), *Doe dem. Blandford v. Applin* (4 T. R. 82), *Jesson v. Doe dem. Wright* (2 Bligh, 1; 5 M. & Selw. 95), *Doe dem. Atkinson v. Featherstonhaugh* (1 B. & Adol. 944). The devise over is on failure of issue, not of the children, but of Thomas Duesbury: and a limitation over in default of issue of T. Duesbury gives him, by implication, an estate tail. If a child of T. Duesbury had married and died in the testatrix's lifetime, leaving issue which continued, the limitation over to R. Thornton, E. Duesbury, and M. Duesbury could not take effect, there being issue of T. [526] Duesbury, although all the children who survived the testatrix and their issue had failed. If then it be held that the children took an estate tail, T. Duesbury took an estate tail in remainder therein. *Doe dem. Bean v. Halley* (8 T. R. 5), *Doe dem. Garrod v. Garrod* (2 B. & Adol. 87), *Doe dem. Gallini v. Gallini* (5 B. & Adol. 621; S. C. in error, 3 Adol. & Ell. 340; 4 Nev. & M. 894), *Parr v. Swindels* (4 Russ. 283).

Then as to the executory devise, the gift over to R. Thornton, E. Duesbury, and M. Duesbury, is clearly too remote to be valid as an executory devise. The words "die without leaving issue" have never, in relation to freeholds, been held, per se, to refer to issue living at the time of the death. As to freeholds, a long series of cases, from *Forth v. Chapman* (1 P. Wms. 663) down to *Doe dem. Cadogan v. Ewart* (7 Ad. & Ell. 636) have conferred on these words a technical meaning, which must be adopted, unless a different intent is otherwise apparent; and here no such intent is apparent. He cited *Crooke v. De l'andes* (9 Ves. 197), *Franklin v. Ley* (6 Madd. 258), *Tenny d. Agar v. Agar* (12 East, 253), *Broulthurst v. Morris* (2 B. & Adol. 1), *Marshall v. Hill*, (2 M. & Selw. 608), *Dunsey v. Griffiths* (4 M. & Selw. 61), *Doe d. Cadogan v. Ewart*.

Henderson in reply. It is not contended that the words "for life" necessarily exclude any implication of an estate tail. But the express words of inheritance to all the children remove the ground and necessity for any such implication, and distinguish this case from such of the cases cited for the defendant as bear on this point. In *Doe dem. Bean v. Halley* the limitation over on the estate for life being to the eldest son only and his heirs, if the words, "in default of issue male," had not been construed as implying an estate tail, no issue but an eldest son and his descendants [527] could have taken. Here the limitation over is to all the children. *Doe dem. Gallini v. Gallini* is so peculiar, that it cannot govern the decision of the present case. The language of the judgment there may indeed be cited in answer to that suggestion, on which the defendant's argument upon this point is mainly founded, namely, that a child of T. Duesbury might have married, and died in the lifetime of the testatrix, leaving issue. Upon a similar suggestion, Tindal, C. J., in delivering the judgment of the Court, observes (3 Ad. & Ell. 353), that "As this supposed event takes place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might think fit, on this change in his family taking place; and the argument, therefore, is not entitled to the same weight as where the construction put upon a will is such that a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death, at which time he can have no control over, and no means of applying a remedy to, the contingency which has taken place." If the event suggested had happened in the present case, the testatrix might, and if she thought fit, no doubt would, have altered her will in conformity with the alteration in the family of her kinsman T. Duesbury, the members of which are the objects of her bounty. The will not having been revoked or altered as to the devise in question, must be read as speaking the intention of the testatrix up to and at the time of her death, and to support an implication which would defeat her intention clearly expressed, in the event which has actually occurred; it is not enough to suggest the possibility of the occurrence in her lifetime of an event which did not occur, and for which, if it had occurred, she might, and if she had seen fit, no doubt would have made a suitable provision.

The case of *Doe dem. Barnard v. Reason* (3 Wils. 244), and others [528] already cited to the like effect, have not been questioned or distinguished, as authorities for the proposition that R. Thornton, E. Duesbury, and M. Duesbury took a vested remainder in fee-simple under the devise.

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B. This was a special case, which was argued before us in last Michaelmas Term. The question turns on the construction of the will of Catherine Younge. She, by her will, dated the 19th of July, 1796, devised the residue of her freehold, leasehold, and other real estates, including the lands in question, which are freehold, to Thomas Duesbury for his life, and after his decease, unto all and every the child and children of the said Thomas Duesbury, if only one child then to such child, his or her heirs, executors, administrators, or assigns, but if more such children, then equally to be divided among them share and share alike, and to the heirs, executors, administrators, and assigns, of such children respectively, as tenants in common; and she then proceeded thus—"but in case the said Thomas Duesbury shall happen to die without leaving lawful issue, then I give the said premises unto Rebecca Thornton, Esther Duesbury, and Mary Duesbury, their heirs, executors, administrators, and assigns, as tenants in common, charged nevertheless with the payment of the legacy of £1000, which I do hereby in that case give and bequeath to Elizabeth Harrison, daughter of the said Mary Duesbury, the same to be paid to her at the end of twelve calendar months, next after the said Rebecca Thornton, Esther Duesbury, and Mary Duesbury, their heirs, executors, administrators, or assigns, shall come into possession of the said premises."

The testatrix died on the 7th of September, 1798, leaving the said Thomas Duesbury her heir at law.

[529] Thomas Duesbury had several children, the eldest born before the date of the will, namely, in 1795, and the youngest in 1800, after the death of the testatrix.

The eldest survived all the others, and died in 1805.

On the death of the testatrix, Thomas Duesbury entered into possession of the lands devised, and continued in such possession until his death, which happened on the 28th of June, 1837. In the year 1832, Thomas Duesbury suffered a recovery of the lands in question to the use of himself in fee. On the death of Thomas Duesbury the defendant entered upon, and has since continued in possession of, the said estates.

Esther Duesbury died intestate in the year 1815, leaving the said Mary Duesbury her heiress at law. Mary Duesbury afterwards married John Todd: he died in August, 1838, leaving the said Mary his widow (who is the lessor of the plaintiff) him surviving.

This action is brought by her to recover possession of two undivided third parts of the said estates, which she claims as having passed to her under the will of Catherine Younge, on the death of Thomas Duesbury in 1837, without leaving lawful issue; as to one-third in her own right, and as to the other third as heiress of her deceased sister Esther Duesbury.

It was admitted by the counsel for the lessor of the plaintiff, that, in order to entitle her to recover, she must establish one of two propositions: either that Thomas Duesbury took for life, with remainder to his children in fee, with an executory devise over to Rebecca Thornton, Mary Duesbury, and Esther Duesbury, in the event of Thomas Duesbury dying without leaving issue living at his death; or else that Thomas Duesbury took for life, with remainder to his children in tail, with remainder to Rebecca Thornton, Mary Duesbury, and Esther Duesbury in fee.

We are, however, of opinion that she has failed in esta-[530]-blishing either of these as being the true construction of the will.

Assuming (according to the first hypothesis of the plaintiff), that Thomas Duesbury took for life, with remainder to his children in fee, we are of opinion, that, according to all the authorities, the gift over by way of executory devise was void as being too remote. It was to take effect in case Thomas Duesbury should happen to die without leaving lawful issue, and the question is, whether that means, and leave no issue at his decease, or whether it refers to a failure of issue at any distance of time.

That the words, when used in wills made prior to the year 1838, are (unless controlled by the context) to be taken, in respect to real estate, to refer to an indefinite failure of issue, is established by a long series of authorities. Indeed, the counsel for

the plaintiff hardly disputed that the gift over would be void for remoteness, if the case had rested simply on the words "if he shall die without leaving lawful issue:" but then he argued that there are circumstances apparent on the face of this will, which are sufficient to cut down and narrow the ordinary construction of dying without leaving issue, and to confine it to a dying without issue within a period of time allowed by law.

The circumstance on which the counsel for the plaintiff relied for that purpose was, that the testatrix has charged the property with the payment of a sum of £1000 to Elizabeth Harrison, to be paid within twelve calendar months next after the said Rebecca Thornton, Esther Duesbury, and Mary Duesbury, their heirs, executors, administrators, or assigns, shall come into possession.

The charge, it is said, is not a charge in favour of Elizabeth Harrison and her executors or administrators, but a gift personal to her, not payable unless she should be herself alive to receive it, and therefore, it is contended, the failure of issue contemplated must have been a proximate, not a [531] remote event: a failure of issue at the death of Thomas Duesbury, not an indefinite failure of issue at some distant time. But we are of opinion, that the foundation on which this argument rests wholly fails, inasmuch as there is nothing whatever to justify the inference, that the gift was intended to be personal to Elizabeth Harrison, and dependent on her being alive to receive it when payable. A legacy to A. is the same thing as a legacy to him, his executors, and administrators, and will be payable to them whether they are named or not, unless there is something in the will to point to a different construction. There is nothing of the sort in this will, for the mere circumstance of the gift being a gift to take effect after a failure of issue, clearly can have no such effect. That is a circumstance always occurring in the very common case of a devise to sons in tail, and on failure of their issue, over to collateral relations, subject in such case to pecuniary charges in favour of daughters. In such a case, the daughters may not be alive to take the benefit, but no one ever suggested it as a reason for construing the gift as personal to them, that it was made to take effect after a general failure of the issue of the sons. It would certainly go to the executors or administrators of the daughter, whether expressly named or not.

The present case, therefore, is clearly distinguishable from that of *Doe d. Smith v. Webber* (1 B. & Ald. 713), on which the plaintiff placed so much reliance; for there the party for whose benefit, or for the benefit of whose immediate nominee, the charge was to take effect, was herself the party the failure of whose issue was in question, and the Court, on the whole context of the will, felt itself warranted in concluding that the charge, which certainly was not to arise till after the failure of issue in question, was to arise (if at all) immediately on the death of the tenant for life; and the consequence necessarily was, that the failure [532] of issue contemplated by the testator, was a failure of issue at the death of the tenant for life.

As to the other cases cited in this branch of the argument, *Pells v. Brown* (Cro. Jac. 550), *Porter v. Bradley* (3 T. R. 148), *Roe v. Jeffery* (7 T. R. 589), and some others, it is only necessary to say, that whenever the words "die without leaving issue," have been construed to mean "die without leaving issue living at the death," the Courts have always relied, or professed to rely, on some other expressions or circumstances apparent on the face of the will, and have never assumed to act against that which we consider to be a long-established settled rule of construction, namely, that, in wills of real estates, these words refer to a general failure of issue at any time, however remote.

Whether the circumstances on which the Courts have relied, as justifying a different construction, have always been such as to warrant their decisions, is not now the question. It is enough for us to say, they have always professed to rest such decisions on some additional expressions or circumstances, not to be found in the will now before us; and we are therefore of opinion, that, assuming, according to the first hypothesis of the plaintiff's counsel, that Thomas Duesbury took for life, with a vested remainder in fee to his children, the gift over was void, as being a gift to take effect by way of executory devise after an indefinite failure of issue.

The other proposition of the plaintiff's counsel was, that Thomas Duesbury took for life, with remainder to his children in tail, with cross-remainders inter se, and with an ultimate remainder in fee to Rebecca Thornton, Esther Duesbury, and Mary Duesbury. And his argument on this part of the case was, that though, under the

first words of the devise, unto all and every the child and children of the said Thomas Duesbury, their heirs, executors, administrators, and assigns, &c., the children would have taken an estate in fee simple, yet that the subsequent words, "but in case the said Thomas Duesbury shall hap-[533]-pen to die without leaving lawful issue," must be taken to narrow the effect of the former words, and convert the estate of the children into an estate tail.

The only cases cited by the plaintiff's counsel which afforded any colour to such an argument, were the cases of *Jones v. Legg* or *Ires v. Legg*, (reported in 9 Mod. 461, and in a note at page 488 in 3 T. R.), and the case of *Doe d. Barnard v. Reason* (3 Wils. 244).

In the first of those cases, the testator devised his real estates to his daughter Marthana for her life, and after her decease to her children and their heirs, and for default thereof to his son William and his heirs. Lord Hardwicke there held, that the words "for default thereof" were to be referred to the immediate antecedent, namely, the heirs of the children, and not to the children themselves; and as the children could not die without heirs, so long as William or any of his heirs were in existence, Lord Hardwicke held, according to a well-established rule of construction, that the testator, in speaking of the heirs of the children of Marthana, must have meant heirs of her body, and not heirs general. That was the ground of the decision, as appears from the report given in the notes to *Doe v. Perryn* (3 T. R. 488), which therefore is obviously wholly inapplicable to the case now before us.

In the other case, of *Doe v. Reason*, the testator devised all his messuages to his niece for her life, and at her decease to such issue of her body as should be then living, as tenants in common, and to the heirs of such issue, that is to say, in case there should be only such issue one child, then the whole to that one child and its heirs, but if there should be issue two or more children, then to such two or more children, equally among them, and their heirs as tenants in common: and in case her said niece should die without issue then living, or in case all such issue should die without issue, so that all and every the descendants of [534] her body should be dead without issue, then she gave the said messuages, &c. to T. B. and J. F., the lessors of the plaintiff, and their heirs. In that case the Court held, that although the gift to the children of the niece was made in words which *primâ facie* imported a gift to them in fee, yet the subsequent words "in case all such issue should die without issue," &c. &c., plainly shewed that the word "heirs," as applied to the issue, meant heirs of the body, and not heirs general. The decision then turned entirely on those words which are not found in the case before us; the gift over in the present case not being in case all the children of Thomas Duesbury should die without issue, but in case there should be a failure of issue of the body of Thomas Duesbury himself. It was argued on the part of the lessor of the plaintiff, that, although there are not in the present case any words in terms giving the estate over in default of issue of the children, yet there is that which is tantamount to such words. The estate is given to Thomas Duesbury for his life, and at his decease to his children and their heirs, but in case at any time there shall be a failure of issue of Thomas Duesbury, (for such is the construction we put on that part of the will), then the estate is given over to those under whom the lessor of the plaintiff claims. If the gift over had been in case there should be a general failure of issue of the children, that, it was contended, would, on the authority of the case of *Doe v. Reason*, have cut down the estates of the children to estates tail; and what difference, it was said, can there be between a gift over on failure of issue of all the children of A. B., and a gift over on failure of the issue of A. B. himself? The event on which the gift over is to take effect is, it is contended, the same in both cases; for the failure of the issue of A. B. is the same thing as a failure of issue of all his children.

This argument, however, though very ingeniously put, is evidently founded on a fallacy. The death and failure of issue of A. B. is undoubtedly the same thing as the [535] death of A. B. and failure of issue of all his children, if by the word "children" is meant all the children he ever had. It is not necessarily the same thing, if by that word is meant all the children he may have living at a particular time, or born afterwards; because, in such case, there may be a failure of issue of all such children, and yet there may be issue living of A. B. by a pre-deceased child, and so no failure of issue of A. B. himself. Now, where, as in this case, a testator devises to a party for life, and after his decease to his children and their heirs, the word "children"

includes all the children who shall be living at the death of the testator, or who shall afterwards be born in the lifetime of the tenant for life, but it does not include a child of the tenant for life dying in the testator's lifetime, without leaving or not leaving issue. And applying this doctrine to the case now before us, it follows clearly that the failure of issue of Thomas Duesbury was not necessarily the same thing as the failure of issue of all his children, taking children to mean (as it certainly does mean) those children only who were alive at the death of Catherine Younge, or who were afterwards born in the lifetime of Thomas Duesbury.

For if a child of Thomas Duesbury had died in the lifetime of Catherine Younge leaving issue, and such issue were now living, it is plain there would now be a failure of issue of the children of Thomas Duesbury, taking children in the sense in which it was used by the testatrix, that is, children living at her death, or afterwards born, and yet there would be no failure of the issue of Thomas Duesbury himself.

For these reasons we are of opinion, that the counsel for the plaintiff has failed to bring this case within the doctrine acted on in the case of *Doe d. Barnard v. Reason*.

It may not be unfit to add, with reference to that case, that there is a difficulty in it which seems, according to the report, not to have been adverted to by the Court. [536] The ground of the decision there was that Elizabeth Croson took for life, with remainder to her children in tail, with remainder in fee to the lessors of the plaintiff. This remainder, it was contended, being a vested remainder in fee, was not defeated by the recovery suffered by Elizabeth Croson, the tenant for life. But it is to be observed, that the only children of Elizabeth Croson who were to take, were such of her children as should be living at her death. And as the remainder to the lessors of the plaintiff was not to take effect until all and every the descendants of the body of Elizabeth Croson should be dead without issue (an event which clearly need not necessarily happen on the death without issue of all the children living at her decease), it is difficult to understand how the remainder to the lessors of the plaintiff could be a vested remainder, unless indeed by holding that Elizabeth Croson herself took an estate tail in remainder expectant on the decease without issue of her children, living at her decease, in which case her recovery would certainly have defeated the title of the remainder-men. Perhaps the Court considered all and every the descendants of her body to mean all and every the descendants entitled under the will, in which case the decision may be supported: but this is certainly a very strained construction. It is not, however, necessary for the purpose of this case to question the authority of *Doe d. Barnard v. Reason*, inasmuch as we have already pointed out a very important distinction between that case and the present.

Upon the whole, therefore, we are of opinion that the counsel for the lessor of the plaintiff has failed to establish either of his propositions, and consequently that there must be judgment for the defendant.

Judgment for the defendant.

[537] *ECCLES v. COLE*. Exch. of Pleas. May 29, 1841.—The Court will amend a writ of summons, although more than four months have elapsed since it was issued, by altering the cause of action from debt to assumpsit, on an affidavit that if a fresh action were commenced, the Statute of Limitations would be a bar; but the Court cannot amend the copy of the writ served, as they have no power over it.

[S. C. 1 Dowl. (N. S.) 34; 10 L. J. Ex. 475.]

Ogle, on a former day, obtained a rule calling upon the defendant to shew cause why the writ of summons and the copy thereof should not be amended, by altering the cause of action from debt to assumpsit. The affidavit on which the rule was obtained stated, that the action was brought by the plaintiff, as indorsee of two bills of exchange, against the defendant as the acceptor thereof; that the bills were more than six years over-due, and that he was informed and believed, that the Statute of Limitations would be a complete bar to a fresh action.

Ball shewed cause. It does not appear that the writ has ever been served, or any thing done upon it, although more than six months have elapsed since it was issued, and if so, it has no longer any valid existence. [Parke, B. How do we know that it has not been served?] If it was served, no appearance has been entered. [Parke, B.

If the defendant has not appeared, he has now no right to appear.] At all events, if it has been served, the copy of the writ cannot be amended: *Byfield v. Street* (10 Bing. 27; 3 M. & Scott, 406).

Ogle, in support of the rule. If no proceedings have been taken on the writ, and no appearance entered, the defendant might have shewn those facts on affidavit.

PARKE, B. The rule must be absolute. We cannot amend the copy of the writ, because we have no power over it; but we may amend the writ itself, so that the declaration may agree with it. The defendant does not state that the Statute of Limitations will not be saved; and if the fact be otherwise, the writ will be nugatory, and he will receive no damage.

The rest of the Court concurred.

Rule absolute on payment of costs.

[538] *PITT v. PURSSORD*. Exch. of Pleas. May 29, 1841.—Where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due, paid the amount, although no demand had been made or action brought against him by the holder:—Held, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution.

[S. C. 10 L. J. Ex. 475; 5 Jur. 611.]

Assumpsit for money paid, and on an account stated.

Plea, non assumpsit.

The cause was tried before the under-sheriff of Middlesex, when it appeared that the plaintiff and defendant, together with a person named Boston, had signed a joint and several promissory note for £50, payable two months after date, the plaintiff and defendant being sureties for Boston. The latter paid only a portion of the amount, and on the note becoming due, the plaintiff paid the residue, and brought this action against the defendant to recover contribution. There was no proof of any demand of payment having been made upon the plaintiff, or that an action had been brought by the holder of the note, but a paper was put in, which purported to be the declaration in an action on the note by the payee against the present plaintiff. It was objected that there was no sufficient evidence of any demand having been made, nor of any action having been brought, the production of the declaration not being the proper mode of shewing that an action had been commenced. The jury, under the direction of the under-sheriff, found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

Willes now moved accordingly. This action cannot be sustained, unless it be shewn that the money was paid by the plaintiff at the express request of the defendant, or under compulsion of law for the defendant's benefit. The plaintiff should have shewn, either that the holder had called upon him for payment of the amount due on the note, or that he had brought an action against him. Neither of these was shewn, inasmuch as the declaration was not sufficient evidence of the action having been commenced. No man can make himself the creditor of [539] another by voluntarily, and without his request, paying a debt for him.

PARKE, B. We cannot grant a rule in this case. All the parties were jointly and severally liable to the holders of the note; and as all were liable, one party who has paid the note may bring an action against his co-surety for contribution, without shewing that he paid it by compulsion. He was not bound to delay payment of the note until an action was commenced against him. The law on this subject was fully gone into by this Court, in the case of *Davies v. Humphreys* (6 M. & W. 153).

ALDERSON, B. This is not a voluntary payment, nor is it like the case where one is liable as principal and another as surety. Here the sureties are not liable in default of the principal; they are all primarily liable, and are all equally so. This was not a payment made voluntarily, but was a payment in discharge of a debt due on an instrument on which the defendant was liable.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

[540] *FOULDES v. WILLOUGHBY*. Exch. of Pleas. June 1, 1841.—Trover for two horses. It appeared at the trial that the defendant was the manager of a ferry from B. to L., and that the plaintiff embarked on board the defendant's ferry-boat at B., having with him the horses in question, for the carriage of which he had paid the usual fare. When the defendant came on board, it having been suggested that the plaintiff had behaved improperly on board, he the defendant told the plaintiff he would not carry the horses over the water, and that he must take them on shore. The plaintiff refused to do this, and the defendant took them from the plaintiff and put them on shore, and they were conveyed to an hotel kept by the defendant's brother. The plaintiff remained on board and was conveyed over the water. On the following day the plaintiff sent for the horses, but they were not delivered up; a message was however afterwards sent to the plaintiff, that he might have the horses on sending for them and paying for their keep, but that if he did not send for them, they would be sold to pay the expenses. The latter was accordingly done, and this action was brought. The defence set up was, that the plaintiff having misconducted himself on board, the horses were put on shore in order to get rid of the plaintiff by inducing him to follow them.—The learned Judge, in summing up, told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct justified his removal from the steam-boat, and he had refused to go without his horses:—Held, that this amounted to a misdirection, as a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel.

[S. C. 1 Dowl. (N. S.) 86; 10 L. J. Ex. 364; 5 Jur. 534. Considered, *Fowler v. Hollins*, 1872, L. R. 7 Q. B. 629, affirmed, *Hollins v. Fowler*, L. R. 7 H. L. 757. See also, *England v. Cowley*, 1873, L. R. 8 Ex. 132.]

Trover for divers, to wit, two horses. Plea, not guilty. The cause was tried before Maule, J., at the last Spring Assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steam-boats over the River Mersey, from Birkenhead to Liverpool, and that on the 15th of October 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steam-boat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steam-boat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel [541] for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned Judge told the jury, that the defendant by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steam-boat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter Term last, a rule was obtained calling upon the plaintiff to shew cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages: against which rule

W. H. Watson and Atherton now shewed cause. The evidence shewed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [Lord Abinger, C. B. According to that argument every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a dis-[542]-tance, it is in law a conversion [Alderson, B. In that case there is a user of the horse. Lord Abinger, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. Alderson, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow* (2 Saund. 470), it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing Cro. Eliz. 824, *Bishop v. Montague*. [Lord Abinger, C. B. I cannot agree to that position, at least to the extent for which it is now used.(b)] In Bac. Abr., Trover (A), it is said, "If the goods of J. S. have been taken by J. N. in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie." So in Rolle's Abr. 4, "Action sur case" (L):—"If a man take my horse and ride him, and then re-deliver him to me, still I may have an action against him, for it is a conversion, and the re-delivery is no bar to the action, and only goes in mitigation of damages;" citing *The Countess of Rutland's case*. The mere exercise of dominion over a thing is, in law, a conversion of it. What is said by Buller, J., in *Syeds v. Hay* (4 T. R. 264), is applicable to the present case: "If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me." In *Mulgrave v. Ogden* (Cro. Eliz. 219), which was an action of trover for twenty barrels of butter, with counts that the [543] defendant tam negligenter custodivit, that they became of little value, it was held upon demurrer by all the justices, that no action on the case lieth in this case, for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment and suffers it to be moth-eaten; or if one finds a horse and giveth it no sustenance; but if a man finds a thing and useth it, he is answerable, for it is a conversion: so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c.; but for negligent keeping no law punisheth him." And in Buller's Nisi Prius, 44, it is said, "To determine what evidence will be sufficient to prove a conversion in the defendant, it must be known how the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; but it is not necessary to prove an actual demand, if an actual taking be proved, for the taking being unlawful, is itself a conversion." They also referred to the cases collected in Roseoe on Ev. 5th ed. 526.

As to the amount of damages, that was a question for the jury, and if they were satisfied that the defendant was guilty of the conversion, they were fully warranted in giving the full value of the horses, which were, in fact, wholly lost to the plaintiff.

Crompton, in support of the rule. The jury were not warranted in awarding the full value of the horses, because the loss to the plaintiff was the consequence of his own act, in not following them, and not the consequence of the defendant's act. He cited *Moon v. Raphael* (2 Bing. N. C. 310).

As to the other point, the case of *Bushell v. Miller* (1 Stra. 128) is in point. There it was stated that particular porters had a right to put small parcels of goods in a hut on the Custom House Quay, each porter having a box or cupboard within the hut for that purpose. The plaintiff, [544] being one of the porters, put in goods belonging

(b) In the case cited, the beasts were taken absolutely by the defendant's bailiff as for a heriot due, the defendant afterwards agreeing to the taking and converting them. The Court differed in opinion whether trover was maintainable, or whether the action should not have been trespass.

to A., and laid them so that the defendant, who was another of the porters, could not get to his chest without removing them. He accordingly did remove them about a yard from the place where they lay, towards the door, and, without returning them into their place, went away, and the goods were lost. The plaintiff having satisfied A. for the value of the goods, brought trover against the defendant; and it was held by Pratt, C. J., "that there was no conversion in the defendant; the plaintiff, by laying his goods where they obstructed the defendant from going to his chest, was a wrong-doer, and the defendant had a right to remove the goods: that, as to the not returning the goods to the place where he found them, if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion." It is not every wrongful interference with the chattel of another that will constitute a conversion. There must be an intention to deprive the owner of his general right of dominion over it. Here there was no such intention; the object merely was, to get rid of the owner as well as the horses. He referred to *Cooper v. Chitty* (1 W. Bla. 65), and *Garland v. Carlisle* (2 C. & M. 31).

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned Judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an [545] action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colourable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be, that those circumstances would amount to a conversion, I ask, at what [546] period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant

may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushell v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the Court there said, that [547] whatever ground there might be for an action of trespass, in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

[548] With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the Judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say, that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned Judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, [549] and in all places, I am entitled to make of it; and consequently amounts to an

act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognising throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognised them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go, if their argument in this case be sound. But such is (not the law; and the true principle is that stated by Chambre and Holroyd, Js., when at the bar, in their argument in the case of *Shipwick v. Blanchard* (6 T. R. 299), that "In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury, to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i.e. with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

[550] GURNEY, B. If it had been left to the jury, on the whole of the evidence in this case, to say whether a conversion had taken place or not, I think there was abundant evidence from which they might have drawn an affirmative conclusion. But the Judge only left that question to them on one part of the evidence, namely, that of the defendant's taking these horses out of the boat, and putting them ashore; and I cannot agree to the position, that that act, standing alone, amounts to a conversion.

ROLFE, B. I quite concur with the rest of the Court. During the argument I had some little doubt, owing to the difficulty which I felt in defining what is a sufficient exercise of an act of ownership over chattels to amount to a conversion, so as to support an action of trover, as distinguished from such an interference with it as will only afford ground for an action of trespass. But that such a distinction does exist in law between these actions, in this respect, appears from the long list of cases to be found in the books on the subject; so that, whatever difficulties may be experienced in applying that distinction, its existence must be recognised. In all the cases on this subject, there has been proof of a trespass having been committed; but there was a further question, namely, whether there was not a conversion also. In every case of trover, there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative: for if the principle be that any thing which controls the position of the chattel while in my possession, will amount to a change of ownership, I do not see how the effecting of that change by frightening [551] the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushell v. Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser ab initio; but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded,

between trespass and trover, continually recognised in law. I quite agree with my Brother Gurney, that if the learned Judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

Rule absolute.

[552] SELLMAN AND OTHERS v. BOORN AND ANOTHER. Exch. of Pleas. June 3, 1841.—An application to review the taxation of costs ought not to be made before the Master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow.

[S. C. 1 Dowl. (N. S.) 11; 10 L. J. Ex. 433; 5 Jur. 846.]

Ogle had obtained a rule, calling upon the defendants to shew cause why the Master should not review his taxation.

Whitehurst shewed cause. The affidavit on which this rule was obtained states that the Master has not yet made his allocatur: the rule must therefore be discharged, for the taxation cannot be reviewed till the Master has made his allocatur: *Cleaver v. Hargrave* (2 Dowl. P. C. 689).

Ogle, in support of the rule. The Master has made up his mind not to allow certain costs, which the plaintiffs contend he ought to have allowed, and that is sufficient. There is no reason why any further expense should be incurred.

PARKE, B. The Master has not finally decided as to the costs until he has made his allocatur. Until he has done so, it is still open to him to alter his mind, and he is not bound by any declaration he may have made as to what costs he intends to allow. We must abide by the decision in *Cleaver v. Hargrave*.

The rest of the Court concurred.

Rule discharged, with costs.

[553] DOE D. ROYLANCE v. LIGHTFOOT. Exch. of Pleas. 1841.—Under a devise of all the testator's real and personal estate, "after payment of his just debts and funeral expenses," lands mortgaged in fee to the testator do not pass.—By deeds of lease and release, dated 7th and 8th Sept., 1819, lands were mortgaged in fee, subject to a proviso, that if the mortgagor should well and truly pay the principal money and interest on the 25th day of March then next, the mortgagee, his heirs and assigns, should and would reconvey and reassure the mortgaged premises to the mortgagor, his heirs and assigns. There was also a covenant that it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after default should be made in the payment of the principal money and interest, contrary to the proviso aforesaid, peaceably and quietly to enter into, have, hold, occupy, possess, and enjoy the said premises: and also a covenant by the mortgagor for further assurance in case of such default:—Held, that the mortgagee had the right of possession, under this deed, from the time of its execution, and not merely from the 25th March, 1820: and therefore, that an ejectment for the recovery of the premises, brought by the heir-at-law of the mortgagee, within twenty years of the latter but not of the former day, (no interest having been paid in the mean time), was too late.

[S. C. 11 L. J. Ex. 151; 5 Jur. 966. Approved, *Doe d. Parsley v. Day*, 1841, 2 Q. B. 147; 2 G. & D. 757. Applied, *Hemming v. Blanton*, 1873, 42 L. J. C. P. 160; *In re Bellis's Trusts*, 1877, 5 Ch. D. 509. Referred to, *Knight v. Robinson*, 1856, 2 K. & J. 503: *Reg. v. Champneys*, 1871, L. R. 6 C. P. 396.]

Ejectment to recover several cottages, situate at Witton, in the county of Chester. The declaration was served on the 21st March, 1840. At the first trial of the cause, before Lord Denman, C. J., at the Chester Summer Assizes, 1840, it appeared that the lessor of the plaintiff claimed the premises as heir-at-law of Thomas Roylance, to

whom they had been mortgaged by one William Baxter, by deeds of lease and release bearing date the 7th and 8th of September, 1819. These deeds were attested by two witnesses, one of whom was dead, and the other had become disqualified as a witness by reason of his having been appointed, by the will of Thomas Roylance, the mortgagee, one of his executors. For the purpose of shewing this fact, (in order to let in evidence of the handwriting of the attesting witness), the probate of Thomas Roylance's will was put in : and it appeared that he thereby devised all his real and personal estates, after payment of his just debts and funeral expenses, to Thomas Hayward and Eliza Clementina Hayward, as tenants in common in fee. It was thereupon objected for the defendant, that this devise was sufficient to pass estates in mortgage to the testator, and therefore that the lessor of the plaintiff, as heir-at-law, had no title : and the Lord Chief Justice, being of that opinion, directed a nonsuit.

In Hilary Term, Jervis obtained a rule nisi to set aside the nonsuit, and for a new trial : citing *Roe d. Reade v. Reade* (8 T. R. 118), and *In re Horsfall* (McCl. & Y. 292). In the same term (Jan. 27),

[554] Evans shewed cause. This devise was sufficient to pass the legal estate in the premises in question to the devisee. The devise is of "all the testator's real and personal estate," after payment of debts and legacies. Estates of which he is seised as mortgagee clearly fall within those general words. It is true, that in the case *In re Horsfall*, where there was a general devise of "all the rest, residue, and remainder of and in all and singular the property, estate, and effects, which the testator should be possessed of or entitled to, or over which he should have a disposing power at his decease, of whatsoever nature or kind the same might be," an opinion was expressed by Alexander, C. B., that the legal estate in mortgaged premises did not pass under the devise, but descended to the heir-at-law. That, however, was not the material question in the case, which was decided on petition against the Master's report : and the judgment is opposed to all the leading authorities on this subject. In *Galliers v. Moss* (9 B. & Cr. 267), again, where, by a residuary clause, the testator bequeathed all his stock in trade, &c., money, and securities for money, debts, personal estate, and effects, of what nature or kind soever, to his executors, upon trust to sell the same, and invest the produce in the purchase of freehold estates, it was held that the legal estate in lands mortgaged to the testator did not pass under that bequest : but the reason was, that the words "securities for money" were coupled with other words which shewed that the testator meant only to bequeath personalty. So it was also held that the mortgaged premises would not pass under a devise in the same will of the testator's real estate, charged with the payment of annuities and legacies, and limited in strict settlement, because he had thereby subjected the property to limitations inapplicable to mortgaged property. But here the interest is in the devisees for their own benefit. In *Roe d. Reade v. Reade*, which will be relied on by the other side, the devise was of [555] all the testator's estates in the county of B., and at ———, in the county of C., or elsewhere in the kingdom of England, after payment of his debts, legacies, and funeral expenses ; and it was held, that an estate, which had been devised to the testator, in trust to sell, devise, or otherwise dispose of it amongst his four children, in such shares, &c., as he should by will appoint, did not pass under the devise. But there the testator had no beneficial interest whatever ; as Lord Kenyon, C. J., said, "he was a mere naked trustee, though the use was executed in him." In *The Duke of Leeds v. Munday* (3 Ves. 348), there was a general residuary devise by the mortgagee, subject to the payment of his debts, and of an annuity of £30, and it was held that the legal estate in the mortgaged premises did not pass thereby : but that case passed altogether without argument. In *Lord Braybrooke v. Inskip* (8 Ves. 417), in which this question was much considered, it was held that, under a devise of real estate in general terms, a trust estate will pass, unless an intention to the contrary can be clearly inferred from expressions in the will, or from the purposes or objects of the testator. There the devise was of "all real estates whatsoever and wheresoever, and also all personal estate and effects whatsoever and wheresoever." The Master of the Rolls, (Sir William Grant), declared his opinion to be, that the legal estate in the trust premises passed by the will ; and Lord Eldon said,—"I am disposed to concur with the opinion of the Master of the Rolls, meaning rather to state my judgment, that the rule is not, that in every case, where general words are used, the property shall or shall not pass ; but that in each case you must look at every part of the will for the intention with regard to such property." In *Mather v. Thomas* (10 Bing. 44),

there was a residuary devise of "messuages, buildings, chattels real, ready money, securities for money, debts owing, and personal estate," to trustees and [556] their heirs, in trust to pay the rents and profits to J. C. for life, and after his decease, to divide such residue among his children: and it was held to pass the legal estate in lands vested in the deviser as mortgagee. In *Renvoise v. Cooper* (6 Madd. 371), it was held that a gift of mortgages, and other securities for money, would pass the fee, if the estate were mortgaged in fee. In *Ex parte Barber in re Tyas* (6 Sim. 451), where the devise was of "all the testator's freehold estates, and all his farming stock, ready money, bills, bonds, notes, and other securities for money, and all the residue of his personal estate," to trustees, in trust to sell the real estates, and to sell, get in, and convert the personal estates, the Vice-Chancellor held, that a mortgage in fee passed thereby. *Silberschildt v. Schiott* (3 Ves. & B. 451), is another decision to the same effect. The result of all these authorities is, that, in a general devise of real and personal estate, or under any other words indicating an intention in the testator to dispose of all his property, estates in mortgage to him are *prima facie* included; and that the proof of intention to exclude them must be clear and unequivocal. It will be said, that such an intention is to be inferred here, from the words "after payment of all my just debts and funeral expenses." But those words are not sufficient to narrow the generality of the previous devise. It is not like the case of a mere naked trustee: the mortgagee has a beneficial interest, which, under this will, vests in the devisee; and the charge of debts and funeral expenses will be applied to those lands of which the testator was seised in his own right.

Jervis and Welsby, *contra*. This is entirely a question as to the intention of the testator, which intention is to be gathered from the whole of the will. It is not necessary in this case to contend that a general and unqualified devise of real and personal estate would not be [557] sufficient to pass mortgaged estates; although such appears to have been the opinion of Alexander, C. B., in *Ex parte Horsfall*, in which many of the authorities were cited: but the words by which this devise is limited, "after payment of my just debts and funeral expenses," clearly shew that the testator intended to include in the devise only such estates as he could subject to the payment of his debts and funeral expenses, i.e. those only which were his own,—in which he had a beneficial as well as a legal estate, and over which he had an absolute disposing power. Now a mortgagee is, as to the land, a mere trustee for the mortgagor, although no doubt he has a beneficial interest in the mortgage money. In *Roe d. Reade v. Reade* (8 T. R. 122), Lord Kenyon says, "In this case the trustee (the deviser) had no beneficial interest in himself; he was a mere naked trustee, although the use was executed in him; and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates 'after payment of his debts, legacies, and funeral expenses.' These latter govern and restrain the effect of the former words, and shew that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts; this satisfies me that he had no idea of disposing of the trust estate." These observations are strictly applicable to the case of a mortgagee, it being considered that he also is, as to the inheritance, a mere trustee. In *Galliers v. Moss*, Bayley, J., referring to *Sylvester v. Jarman* (10 Price, 76), says (9 B. & Cr. 278), "That case proceeded on this principle; there the words of the devise *per se* would have been sufficient to have carried the legal estate in the mortgaged premises; yet these being qualified by other words, subjecting the pro-[558]-perty devised to payment of debts, which was a purpose to which the legal estate of the mortgagee was not applicable, shewed that it was not the intention of the testator that it should pass." And in delivering the judgment of the Court, the learned Judge thus lays down the rule of law:—"In the first place, there must be words sufficient in order to pass the mortgaged property; in the next place, the property must not be limited to uses inapplicable to mortgaged property." In *Ex parte Morgan* (10 Ves. 101), a charge of an annuity on the estates given by a general devise of real estate, was held sufficient to exclude mortgaged estates. The cases cited on the other side are distinguishable. In all of them, there was either a general unqualified devise, or specific words indicating the intention of the testator to pass his mortgage securities. The general result of the authorities on this subject is thus stated in argument, in the case of *Bainbridge v. Lord Ashburton* (2 Y. & C. 347):—"In the majority of those cases in

which it was held that the legal interest in the trust estate did not pass to the devisee, there was either a direction to pay debts, or legacies were charged on the estate, or there were other words from which it was to be inferred that all the estates coming to the devisee were to be enjoyed by him beneficially.

LORD ABINGER, C. B. Upon consideration, I think this rule must be made absolute, although at first I had some doubt upon the question. But this is not the case of a general devise of all the testator's real estates, without any words of restriction, but a devise of all his real estates after payment of his debts and legacies, i.e. after payment of them by the devisee out of the estates devised. The cases which have been referred to shew that such a devise is not sufficient to pass estates of which the testator is seised only as a trustee, since he cannot have intended to subject them to the payment of his debts and legacies; and a mortgagee [559] is only, as to the land, a trustee for the mortgagor. The passage cited from the argument in *Bainbridge v. Lord Ashburton* appears to be a very accurate summary of the authorities relating to this subject. I am of opinion, therefore, that this case falls within the rule as laid down by Lord Kenyon in *Roe d. Reade v. Reade*, and that the rule must be made absolute for a new trial.

PARKE, B. I am of the same opinion. This is altogether a question as to the intention of the testator; and by a devise of all his real and personal estates, "after payment of all his just debts and legacies," he could not have intended that estates should pass of which he was seised merely as mortgagee, but only estates which he had power to subject to the payment of his debts and legacies, that is to say, those which were equitably as well as legally his own. The property in question, therefore, did not pass by this will: the heir-at-law was consequently entitled to recover, and the nonsuit cannot be supported.

ALDERSON, B., and ROLFE, B., concurred.
Rule absolute.

The cause was tried again at the last Cheshire Spring Assizes, before Williams, J., when the mortgage deed (dated 8th September, 1819) was put in and read. The premises in question were thereby released and assured to the said Thomas Roylance, his heirs and assigns, for ever, to hold, &c., to the intent and subject to a proviso, that if the said W. Baxter should well and truly pay or cause to be paid to the said Thomas Roylance the said sum of £200 thereby secured, with interest for the same at £5 per cent. per annum, on the 25th day of March then next ensuing, without any deduction or abatement whatever, then the said Thomas Roylance, his heirs and assigns, [560] should and would reconvey and reassure the said hereditaments and premises unto the said W. Baxter, his heirs and assigns, &c., and from thenceforth the use and estate thereinbefore limited to the said T. Roylance, his heirs and assigns, should cease, determine, and be utterly void. The deed then contained a covenant by Baxter for payment of the principal money and interest on the said 25th day of March, the usual covenants for title, and also a covenant that it might and should be lawful for the said Thomas Roylance, his heirs and assigns, from time to time and at all times after default should happen to be made in the payment of the said principal sum of £200, and the interest thereon, or any part thereof, contrary to the form and true intent of the aforesaid proviso and covenant, peaceably and quietly to enter into, have, hold, occupy, possess, and enjoy, without disturbance, &c., all and singular the said premises: and further, that if default should happen to be made in payment of the said principal sum of £200, and the interest thereon, or any part thereof, at the day and time and in the manner thereinbefore mentioned, the said W. Baxter and his heirs should and would, at the request of the said Thomas Roylance, his heirs or assigns, acknowledge, levy, and suffer, do, make, and execute, all such further and other assurances, &c. &c., (pursuing the ordinary form of a covenant for further assurance). The deed was executed by Baxter only.

No interest, it appeared, had ever been paid on the mortgage debt; but evidence was offered on the part of the lessor of the plaintiff, to shew an agreement between the executor of Thomas Roylance, the mortgagee, and Baxter, the mortgagor, immediately after the death of Roylance, that Baxter should keep the two children mentioned in the will for the interest on the mortgage. This evidence was objected to on the part of the defendant, but was admitted by the learned Judge. The jury, however, found that there had been no such agreement. It was also con-[561]-tended

for the defendant, that this ejectment was not brought in time; that the action ought to have been commenced within twenty years from the date of the mortgage deed. For the plaintiff, it was insisted, that, upon the true construction of the stat. 3 & 4 Will. 4, c. 27, s. 3, and with reference to the terms of the deed, the ejectment was well brought within twenty years from the 25th March, 1820. The learned Judge reserved this point, and under his direction a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

In Easter Term, Evans obtained a rule accordingly; against which

June 3.—*Jervis* (Welsby with him) now shewed cause. In order to ascertain the effect of this deed, the whole of its provisions must be looked at. And although the construction, that the mortgagee is to have the immediate possession, may be consistent with the words whereby the estate is actually conveyed to him, that interpretation is not reconcilable with the subsequent covenant, that it shall be lawful to him, on default in payment of the principal or interest according to the proviso and covenant for payment thereof, that is, on the 25th March, 1840, to enter into, possess, and enjoy the premises. That implies, that, until such default, the mortgagor should retain the possession: and the covenant for further assurance points to the same construction. That being so, the ejectment was brought in time, within the words of the stat. 3 & 4 Will. 4, c. 27, s. 3, which enacts, that “where the person claiming any land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in receipt of the rent, &c., then his right shall be deemed to have first accrued at the time at which [562] the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.” Here, the mortgagee did not become entitled to the possession and receipt of the profits of the land, by virtue of the deed, until the default made on the day of payment. The Court will imply a re-demise to the mortgagor during the interval. In *Doe d. Fisher v. Giles* (5 Bing. 421; 2 M. & P. 741), where it was held, that where the mortgagor remains in possession, and the money is not repaid on the stipulated day, the mortgagee with power of entry and sale, on non-payment, may eject the mortgagor without notice to quit or demand of possession, Best, C. J., says—“We must look at the covenant he [the mortgagor] has made with the mortgagee, to ascertain what his real situation is. We find from the deed, that the possession of his estate is secured to him until a certain day, and that if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. . . . The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same.” In *Wilkinson v. Hall* (3 Bing. N. C. 508; 4 Scott, 301), land was mortgaged in fee, subject to a proviso for redemption, on payment of the principal money on the 5th June, 1833: but it was agreed that the mortgagee should not call in the principal until the 5th December, 1840, if the interest were regularly paid in the mean time: and the deed contained provisos, that if the principal or interest should not be paid conformably with the provisos for payment thereof, it should be lawful for the mortgagee, his heirs or assigns, at any time or times thereafter, to enter into the mortgaged premises, and peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, &c., without disturb[563]-ance, &c., from the mortgagors, or any persons claiming under them; and that it should be lawful for the mortgagors peaceably and quietly to have, hold, occupy, possess, and enjoy the premises, and receive and take the rents and profits, to their own use, until default made in payment of the principal or interest. The Court held, that this operated as a re-demise to the mortgagor until the 5th December, 1840. Tindal, C. J., says—“The instrument falls within the principle laid down in Bacon’s Abridgment, tit. Leases, (K), ‘that wherever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose.’ Here there was an estate vested in the mortgagor by re-demise.” The present case falls within the same principle.

Evans (Martin with him) contra. The operative words of this deed clearly had the effect of at once vesting the legal estate in fee in the mortgagee, subject to a re-conveyance of it by him to the mortgagor, on payment of the mortgage-money: and there is nothing in the subsequent part of the deed to divest that estate. It is said that the covenant for quiet enjoyment affords an inference in favour of such a construction: but that might well be introduced, consistently with the other parts of the deed, as being to take effect, as against the mortgagor and those claiming under him, only from the time that default might be made in payment, leaving the mortgagee in the mean time to rest upon his own title against any acts of interruption on the part of strangers. *Wilkinson v. Hall* differs from the present case in this very material circumstance, that there was [564] an express covenant by the mortgagee that the mortgagor should remain in possession until default in payment of principal or interest. How can a re-demise be implied in this case, when the deed is executed by the mortgagor only? He referred to Powell on Mortgages, vol. i. p. 171 (5th edit.), and was then stopped by the Court.

PARKE, B. I am of opinion that this rule must be made absolute. There is a passage in Sheppard's Touchstone, p. 272 (8th edit.), which was not referred to in *Wilkinson v. Hall*, but which appears to be a strong authority in favour of the defendant in this case. It is there said—"If A. bargain and sell his land to B., on condition to re-enter if he pay him £100, and B. doth covenant with A. that he will not take the profits until default of payment, or that A. shall take the profits until default of payment; in this case, however it may be a good covenant, yet it is no good lease." That passage would be a very strong authority in favour of the defendant, even if the words of this deed were much stronger than they are. But without reference to any authorities at all, it appears to me that there is nothing in this deed which implies that the mortgagor is to have the enjoyment of the land in the interval between the execution of the deed and default in payment of the mortgage-money. The covenant for quiet enjoyment may be satisfactorily explained in the manner suggested by Mr. Evans, namely, as a covenant for quiet enjoyment against interruption, not to come into operation until the 25th March 1820; in the mean time, although the mortgagee is equally to have full power to enter and enjoy the land, yet he must content himself with his own title against interruption by strangers; there is no covenant by the mortgagor to protect him during that period; whereas, if he be disturbed after that day, he may have recourse to his remedy on the covenant. But I see no reason for saying that the mortgagee is not to be entitled to enter [565] immediately upon the execution of the deed; and the foundation, therefore, of the argument for the plaintiff fails, there being neither an express nor an implied covenant that the mortgagor shall remain in possession. The legal estate passes by the deed of release, although the releasee cannot sue the releasor on the covenants, unless in case of non-payment on, or interruption after, the 25th of March, 1820. There is, therefore, no ground for saying that a re-demise was to be made until that day; and indeed it would be very difficult to support such a supposition, seeing that the deed is executed by the mortgagor only. It follows that the right of entry did not accrue to the party under whom the lessor of the plaintiff claims, within twenty years next before the commencement of this suit; he is therefore not entitled to recover, and the rule for entering a nonsuit must be made absolute.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

DOE v. AMEY. Exch. of Pleas. June 4, 1841.—The Court has authority, under the stat. 1 & 2 Viet. c. 110, ss. 18 & 19, to order a party by rule to pay a specific sum of money awarded by an arbitrator to be paid by him; and on such rule being made absolute, execution may issue against the party for the amount so specified in the rule.

[S. C. 1 Dowl. (N. S.) 23; 10 L. J. Ex. 466.]

An action of ejectment brought against the defendant, to recover possession of a farm occupied by him at Caxton, in Cambridgeshire, was tried at the Summer Assizes for that county, 1840, when the plaintiff had a verdict, and a writ of possession was executed in July, 1840. The present action for mesne profits was afterwards com-

menced against him, which, by submission dated 15th of February, 1841, was referred, together with all matters in difference, to an arbitrator, so as he should make his award on or before the 30th of April, 1841, with power to enlarge the time by indorsement on the submission; the submission to be made a rule of Court and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, [566] having duly enlarged the time, made and published his award on the 3rd of May, 1841, whereby he ordered that all proceedings in the action for mesne profits should be stayed, each party paying his own costs in the action; and that the defendant should, at the time therein mentioned, pay to the plaintiff the sum of £1850, together with the costs of the reference and award. On the 12th of May, the submission (having an indorsement thereon enlarging the time for making the award until the 1st of November) was made a rule of Court, and the costs were subsequently taxed by the Master at 86l. 14s. for which amount he made out an allocatur, and a person was sent to the premises at Caxton, with a power of attorney from the plaintiff, to demand the money. He found the premises in the possession of a daughter-in-law of the plaintiff, who stated that the father-in-law had left the country, and had assigned all his effects there to her.

On a former day in this term, Byles, for the plaintiff, obtained a rule to shew cause why the defendant should not pay to the plaintiff the sum of 1936l. 14s., in pursuance of the said award, rule of Court, and allocatur; and why, in default of payment, execution should not issue against him for that amount: it being also made part of the rule, that service of it upon the daughter-in-law on the premises should be deemed good service.

Kelly and Ogle now shewed cause. The Court has no power, either at common law or under the stat. 1 & 2 Vict. c. 110, ss. 18, 19, to make an order upon a party to pay a specific sum awarded against him by an arbitrator. Their only power, independently of the statute, is to order him to perform the award generally, and in case of his refusal or neglect, to punish him for his contempt by an attachment. And the only object of the statute was to give to orders and rules of Court an effect beyond that which they had before, viz. the force of judgments, whereon execution [567] might issue: but the legislature did not intend to confer upon the Courts the power of making any new species of rule or order, unknown to the existing law. The observations of Lord Denman, C. J., in *Jones v. Williams* (11 Ad. & E. 175; 4 P. & D. 217), on the authority of which this rule was obtained, that "there is no difficulty in giving effect to the 1 & 2 Vict. c. 110, s. 19, as to awards, by calling on the delinquent party to shew cause why he should not pay a certain sum of money pursuant to the award;" and that "if that rule be made absolute, an execution may issue for the sum so distinctly specified in the rule," are mere obiter dicta, forming no part of the judgment of the Court. The terms of this submission do not give the Court any unusual powers of enforcing payment.

But secondly, assuming that the Court has power to make such an order, this is an application analogous to that for an attachment, and the affidavit ought to disclose every fact which is necessary to shew that a valid award has been made, and disobeyed. Where the award is made after the time originally specified in the submission, it is necessary, in order to have an attachment, to shew by affidavit that the time was duly enlarged by the arbitrator: *Halden v. Glasscock* (5 B. & C. 390; 8 D. & R. 151), *Davis v. Vass* (15 East, 97), *Wohlenberg v. Lageman* (6 Taunt. 251; 1 Marsh. 579): and the same rule ought to be applied here. At all events, the Court will allow the rule to be enlarged for a few days, in order to give the defendant an opportunity of obtaining affidavits and moving to set aside the award.

Byles, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B. I am of opinion that no sufficient ground has been shewn to prevent us from making this rule absolute. As to the last suggestion, no grounds are laid before us for setting aside the award: if any such grounds existed, the defendant had the opportunity of availing [568] himself of them, by applying to the Court earlier in the term, when the rule might have come on together with this, and the whole question between the parties have been settled at once; but the circumstance of his keeping back his objection to the award until the moment when this rule to enforce it is about to be made absolute, shews clearly that his object is merely delay. But the main ground on which the defendant relies is, that the act of Parliament, 1 & 2 Vict. c. 110, s. 18, does not authorize the Court to call upon a party, by rule,

to pay a specific sum of money pursuant to an award. When the power of arrest on mesne process was abolished by that statute, it became necessary, in lieu of the imprisonment of the persons of debtors, to provide more ready means than had been previously known to the law, of coming at their property : and with that view, the statute made all rules and orders of Court, containing directions to parties to pay money, equivalent to judgments, and like them enforceable by execution. It is said, however, that notwithstanding those provisions, we have no power to make this order, and that our power extends only to the issuing of an attachment against the defendant. But it appears to me, that an attachment against a party for the nonpayment of money presupposes a power in the Court to direct him to pay it, although the practice has been to apply for the attachment in the first instance : it is clear that the Court have no power to issue an attachment at all, unless they have also the power to order the payment of the money ; the very word "attachment" implies the existence of such an order. I have no doubt, therefore, that in making this rule absolute, we are acting, not only strictly within the jurisdiction of the Court, but in accordance with the policy of the statute ; and I quite agree with the observations of the Lord Chief Justice, in the case which has been referred to. The rule will therefore be absolute, subject to any application which the defendant may hereafter make to set aside [569] the award. As to the necessity for an affidavit of the due enlargement of the time for making the award, it is true that that is required on motion for attachment, but that is because an attachment is a process against the person.

ALDERSON, B. I am of the same opinion. With respect to the latter objection, it is a sufficient answer to say, that the submission to arbitration, with the enlargement indorsed upon it, has been made a rule of court. Then with respect to the main question, I agree that we ought to make this rule absolute, not, indeed, in the terms in which it is drawn up, but simply that the defendant pay the money mentioned in the award ; and the rule will be discharged as to the rest. The rule laid down by Lord Denman, in the case of *Jones v. Williams*, seems to me a very sound one. The practice in this respect depends upon the general jurisdiction of the Court, and the form in which the Court shall enforce obedience depends upon its discretion. Before the 1 & 2 Vict. c. 110, the practice was for the Court to order the party generally to perform the award. But then it is found that that general order does not specify the amount of the sum to be paid, as mentioned in the award ; and consequently, according to the opinion of the Court of Queen's Bench in *Jones v. Williams*, in which I entirely concur, it is not a rule or order on which execution can issue, within the meaning of the statute. But the substance is the same ; for if the Court can order a man to pay the amount of the award, they can order him to pay the specific sum of £1850 ; if they can order him to perform an award, which directs him to pay £1850, surely they may, in the more direct way, order him to pay that sum. It would be a strange proposition to say, that the Court could punish a person by attachment for disobeying an award to pay money, the amount of which is unknown, but that the moment the amount becomes known, their power is at an end. Then if they have power to order the party to pay the money in question, all the [570] rest follows by force of the statute, which provides that on the order of the Court execution may follow as upon a judgment. We do not order an execution, for no additional powers in this respect are conferred on us by the statute, which we did not possess before. Before the statute, an intermediate order to pay the money would have been nugatory, because it was enforceable only by attachment, and therefore it was never worth while to make such an order ; but now that the statute has given an obligatory effect to the intermediate order, it becomes worth the while of the Court to exercise their general jurisdiction to make one. The present is a case in which the Court has the power ; and I agree also that it is one in which they ought to exercise it. The party against whom it is made will not be prejudiced, for he has the same right as before to move the Court to set aside the award ; and if he succeed in that application, every thing that has been done under it must fall to the ground : the rule and order would then be set aside, any execution issued under it would be set aside also, and the money levied would be restored to the defendant. It is alleged here, that the property has been assigned to another person ; if that assignment be a legal and valid one, the assignee can make her claim under an interpleader rule, by which she will be protected from injury : but if it be a merely fraudulent assignment, it will of course be void, and the sum awarded by the arbitrator will be levied on the property of the party,

which he has sought by that fraudulent assignment to make away with. This will be doing substantial justice between all parties, and the Court cannot better exercise its discretionary power than in making this rule absolute to the extent I have mentioned.

GURNEY, B., and ROLFE, B., concurred.(a)

Rule absolute for payment of the money, and discharged as to the residue.

[571] *WARING v. KING AND OTHERS*. Exch. of Pleas. June 4, 1841.—The defendants took certain premises of the plaintiff for nine months, at a rent certain, with the option, at the end of that time, of taking a lease for seven, fourteen, or twenty-one years. Before the expiration of the nine months, the defendants let the premises to a company for six months, who actually occupied them for that period:—Held, that at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff, in an action for use and occupation, for a year's rent.

[S. C. 11 L. J. Ex. 49.]

Assumpsit for use and occupation. Plea, non assumpserunt. At the trial before Gurney, B., at the London Sittings after Hilary Term, it appeared that the plaintiff had let to the defendants a forge and other premises situate in the Vauxhall Road, Liverpool, for a period of nine months, ending on the 19th November, 1839, at a certain rent, with the option to the defendants, at the end of that period, of taking the premises on lease for a term of seven, fourteen, or twenty-one years. Before the expiration of the nine months, the defendants (as the plaintiff alleged) let the premises for six months to a company called the Talacre Coal and Iron Company; the defendants contended that this letting was not by them, but by the plaintiff. At the end of the nine months, the defendants did not make any application for a lease, but the company continued in possession of the premises to the end of the six months, when they ceased actually to occupy them, but their machinery and retorts remained on the premises for some months longer. There was no evidence of any actual delivery up of possession of the premises to the plaintiff. The learned Judge, in summing up, left it to the jury to say whether the Talacre Coal and Iron Company came in as the tenants of the plaintiff or of the defendants; and stated his opinion to be, that, in the latter case, as there was a holding over by the under-tenants of the defendants, they were liable, as tenants from year to year, for the amount of a year's rent. The jury accordingly found for the plaintiff, damages £500, the amount of a year's rent.

In Easter Term, M. D. Hill obtained a rule to shew cause why there should not be a new trial, on the ground of misdirection.

Jervis and Crompton now shewed cause. The direction [572] of the learned Judge was right. It must now be assumed that the defendants, during their term, let the premises to the Talacre Coal Company, for a period of six months, extending beyond the expiration of that term. In the first place, there was an actual occupation of the premises by the defendants throughout the year, by reason of the property of their under-tenants remaining on the premises. But if this be not so, at all events the defendants continued liable in law, as having held over by their under-tenants. It is the duty of a tenant to deliver up complete possession of the demised premises at the expiration of his term; if he fail to do so, he is liable as holding over, and he cannot be rid of that liability at least in a shorter period than a year. The case of *Christy v. Tancred* (7 M. & W. 127) is a direct authority for the plaintiff. There A. let premises to four persons for a year certain, with a proviso that if, a month at least before the termination of the year, a request were made to him for that purpose, A. would grant them a lease for seven, fourteen, or twenty-one years. No agreement for a lease was made, and the premises having been held over by two of the leases for a quarter beyond the year, (the others having ceased to occupy during the year) the four original lessees were held liable for the rent of that quarter. Parke, B., says—“It is the simple case of the lessees holding over by their under-tenants, and consequently they continue liable.”

(a) See *Richards v. Patterson*, ante, 313; *Jones v. Williams*, ante, 349.

Hill and Cowling, in support of the rule. The question was never considered at the trial, how long the defendants held over by the Talacre Coal Company: the learned Judge laying it down, that if the defendants held over, a new tenancy from year to year thereby commenced. But the holding over does not per se create a tenancy. The party is liable for so doing in the double value, by way of da-[573]-mages, but the relation of landlord and tenant does not accrue. Suppose the tenant to remain in possession, whether by himself or his under-tenants, for a few days or weeks, can that render him liable for a year? If he be, he is liable to all the provisions contained in the previous agreement between the parties. Now suppose the premises had doubled in value, could the defendants have said they had a right to continue to occupy them at the old rent? But even if the law be so, it can only apply where the first demise was for a year; otherwise it would follow, that, where the first lease is for a few weeks, the tenant holding over becomes liable for a year's rent. No case goes to such an extent. In *Jenner v. Clegg* (1 M. & R. 213), it was held that a tenant holding over, after notice to quit, is not liable to a distress, without some evidence of a renewal of the tenancy; and Parke, B., says,—“The landlords may recover the double value during the period of the holding over, or they may bring an action for use and occupation, and recover such sum as a jury may think proper to award; but they cannot distress, unless they can shew an agreement between the parties to hold on at the old rent.” And the learned Judge refers to a case tried before Bayley, B., “in which he ruled that a tenant holding over, after his notice to quit, was liable in an action for use and occupation only for the period of time during which he continued in possession, and not for the whole half year.” If the defendants remained liable for a year, on the ground that they had become tenants from year to year, they must remain liable still, the tenancy not having been determined by notice to quit. *Christy v. Tancred* is quite distinguishable; there the plaintiff recovered only for the time during which the parties actually occupied. The defendants here do not dispute that they are liable for the period of the actual occupation by the Company, but they deny that, in this action for use and occupation, they can be made liable for a whole year.

[574] LORD ABINGER, C. B. It is now to be assumed that the defendants let the premises to the Talacre Coal Company, they being themselves tenants under a written contract for nine months certain, with the option of taking a lease for seven, fourteen, or twenty-one years. Then, at the end of the nine months, they exercise their option of holding the premises on, by letting them to the Talacre Coal Company. By what authority or in what capacity did they thus deal with the premises, except under the interest which their contract gave them, of compelling the plaintiff to grant them a lease for a longer period? They exercise the right they had, as if the lease had been obtained, to grant a term to the Talacre Coal Company. In what capacity, then, is the plaintiff to look to the defendants? Not as trespassers, but as tenants, having exercised their option under the original contract, by communicating an interest to other parties. They stand, then, in the relation of landlord and tenants, and for aught I see, when the first year had expired, the plaintiff might have declared against the defendants in debt for the rent. Then what has occurred in the meantime to affect that right? I see nothing. Now the action of use and occupation may be maintained as well where the rent is uncertain as where it is certain, although in the former case there can be no distress; I consider, therefore, that until something be done on the one side or on the other side to put an end to the interest these parties held under the contract, they remained in the relation of landlord and tenant. After the expiration of a year without notice to quit on either side, and without any abandonment of the contract, the plaintiff might have declared for a year's rent, and therefore also he may recover it in an action for use and occupation.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. The argument [575] urged for the defendants is this: inasmuch as the original agreement was for nine months only, how can you, because the tenant holds over, infer that he becomes tenant from year to year? It is not necessary to infer any thing so preposterous. Here is not only an agreement for nine months, but the parties come in with an option, to be exercised at the end of that time, of taking the premises for seven, fourteen, or twenty-one years. Then, after the nine months, what do they do? I think they continue in the occupation for a year; not indeed by themselves, but by the Talacre Coal Company. They are in actual occupation for six months; and I think the plaintiff is entitled to say

that they shall pay rent for the year, because they have not restored the possession to him. Under these circumstances, I think the ruling of the learned Judge was perfectly right, and that the rule ought to be discharged.

LORD ABINGER, C. B., added—I quite agree to the law, that if a party takes premises for a certain time, and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to shew the existence of a new contract.

Rule discharged.

GILLARD v. BRITTAN AND OTHERS. Exch. of Pleas. June 4, 1841.—Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking would be no answer to an action by the seller for the price. Therefore, in an action of trespass by the buyer against the seller, for so taking the goods, the plaintiff is entitled to recover their full value, and the jury cannot, in estimating the damages, take into consideration the debt due to the defendant, nor treat it as being diminished pro tanto by the value of the goods retaken.

[S. C. 1 Dowl. (N. S.) 424; 11 L. J. Ex. 133. Questioned, *Johnson v. Lancashire and Yorkshire Railway*, 1878, 3 C. P. D. 506.]

Trespass de bonis asportatis. Plea, payment into Court of £10, and no damages ultra. Replication, damages ultra. At the trial before Wightman, J., at the last Somersetshire Assizes, the facts appeared to be as follows:—The defendant Brittan is a woollen draper in the [576] city of Bristol, and the plaintiff, until the month of January, 1841, carried on the business of a tailor in the same city, and had purchased goods of Mr. Brittan, to whom, in December, 1840, after various payments made on account, he was indebted in a balance of £67, in part payment of which he gave his acceptance for £30, and was to provide for the remainder by weekly payments. On Sunday the 10th of January, however, the plaintiff, having first disposed of his furniture to a broker, left Bristol secretly, taking with him all his other effects. The defendant, after some difficulty, traced him to a place called Bradwick, near Collumpton, in Devonshire, where he had a brother-in-law living of the name of Rowland, and on the 31st of January, Mr. Brittan, accompanied by the other defendants, who were police officers, went to Rowland's house, and there, and in the adjoining house, found a quantity of ready-made clothes, which had been brought by the plaintiff, and the greater part of which Brittan was able to identify as having been made from the materials furnished from his shop; all these the defendants took away, amounting in value, according to the lowest estimate made by the plaintiff's witnesses, to £50 or £60. A few of them, which Brittan could not identify, were subsequently returned to the plaintiff. The learned Judge, in summing up, left it to the jury to say whether the plaintiff had sustained damage to a greater amount than the sum paid into Court, or whether that was not a sufficient compensation; and told them, that in estimating the damages, they must take into consideration all the circumstances of the case, and, amongst others, the plaintiff's debt to the defendant Brittan, which would be reduced pro tanto by the value of the goods taken away. The jury found a verdict for the defendants.

In Easter Term, Erle obtained a rule nisi for a new trial, on the ground of misdirection, against which

[577] Bompas, Serjt., and Carrow now shewed cause. The jury had a right, in estimating the amount of damage which the plaintiff had sustained, to take into consideration all the circumstances of the transaction. If the re-taking of the goods by the defendant Brittan would have been an answer to an action of debt against the plaintiff for the price, the direction of the learned Judge was correct; and it is submitted that it would. Where a man sells goods to another in the way of his trade, and has reasonable ground for believing that the party never intends to pay for them, he is entitled to re-take them, if he can do so without any breach of the peace; but even if such retaking of them be wrongful, he surely cannot afterwards sue for the price. That being so, in an action of trespass for so taking them, it is a material circumstance in the consideration of the damages, that the debt is thus extinguished

pro tanto. There are many authorities to shew, that in trespass the jury are at liberty to take into their consideration all the surrounding circumstances. Thus, they may consider the malicious intention of the defendant, and are not confined to the actual damage sustained by his act: *Sears v. Lyons* (2 Stark. 317). Where the alleged trespass consisted in destroying a picture which contained a scandalous libel, it was held that the jury, in assessing the damages, might take that into consideration, and were only to award the plaintiff the value of the canvas and paint, and not the full value of the picture as a work of art: *Du Bost v. Beresford* (2 Campb. 510). So, in trespass for breaking the plaintiff's house, and taking his woollen yarn, it was held that, under not guilty (before the new rules), the defendants might shew that the yarn was afterwards condemned under the stat. 17 Geo. 3, c. 56, in order to make out that the plaintiff could have no lawful property in it: *Davis v. Nest* (6 C. & P. 167): see also *De Gondouin v. Lewis* (10 Ad. & Ell. 117; 2 P. & D. 283). It has been held, that, in case for selling goods distrained [578] for rent without an appraisalment, the measure of damages is not the full value of the goods, but their value minus the rent: *Biggins v. Goode* (2 C. & J. 364). *Sowell v. Champion* (6 Ad. & Ell. 407; 2 N. & P. 627) will probably be relied on for the plaintiff: but that case is distinguishable, because there the trespass was committed in the irregular execution of process: and all that was decided was, that the plaintiff might recover the full value of the goods, not that he necessarily must.

Erle and Cockburn, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B. I am of opinion that the ruling of the learned Judge was wrong. It would lead to this consequence, that a party may set off a debt due in one case against damages in another. The verdict in this case does not at all affect the right of the defendant to recover the whole £67 due to him from the plaintiff. The learned Judge was, therefore, clearly in error in telling the jury that they might consider the debt to the defendant as diminished pro tanto by the value of the goods taken: he ought to have excluded that consideration altogether. The rule must be absolute for a new trial.

ALDERSON, B. No doubt the jury may consider the whole of the circumstances really belonging to the case; but here the learned Judge has directed them to take into consideration a circumstance which ought to be excluded, viz. the existence of a debt due from the plaintiff to the defendant. That consideration ought to have been excluded altogether: otherwise it is equivalent to allowing a set-off in trespass.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. It has been [579] contended, that where the party wrongfully retakes his own goods, he thereby debars himself from suing for the price. No authority has been cited which supports that position. It is unnecessary, however, to give any opinion on that point, because here the goods seized were in no respect the same as those which the defendant had supplied to the plaintiff, but were altogether altered in character: neither did it clearly appear that they were made of cloth which had not been paid for.

Rule absolute.

DOE D. LEGH v. ROE.(a) Exch. of Pleas. 1811.—The stat. 1 & 2 Geo. 4, c. 69, has not the effect of vesting in the Board of Ordnance any of the ancient hereditary possessions of the Crown.—The Board of Ordnance, in the year 1823, put their servant W. into possession of a house and land adjoining Hurst Castle, which castle has been, from the time of Henry VIII., a possession of the Crown of England. An action of ejection having been brought to recover possession of this house and land, and the declaration served on W. and on the Board of Ordnance, the Court, on motion made on behalf of the Crown, set aside the declaration and stayed the proceedings.

[S. C. 11 L. J. Ex. 57. Applied, *Dillon v. Balfour*, 1871, 20 L. R. Ir. 600.]

A rule had been obtained by the Attorney-General, calling upon the lessor of the plaintiff to shew cause why the declaration in ejectment in this cause should not be set

(a) This case was decided in Easter Term (April 22).

aside, and why all proceedings should not be stayed. It appeared from the affidavits in support of the motion, that the present action was brought to recover possession of a house and land adjoining to Hurst Castle, in the county of Hants, in which a person of the name of Watson had been placed, in 1823, by the authority of the Board of Ordnance, as master gunner, in charge of the defences of Hurst Castle, which commands the passage of the Needles: that Hurst Castle had been, from the time of the reign of Henry VIII., a possession of the Crown of England; and that the premises sought to be recovered were part of the hereditary possessions of the Crown, and were in the possession of the Crown. The declaration had been served upon Mr. Watson, and also upon the Board of Ordnance. [580] The affidavits in opposition to the rule denied that the property in question belonged to the Crown, and stated various acts of alleged ownership exercised over the locus in quo by the lessor of the plaintiff, and those under whom he claimed.

Erle and Bere shewed cause against the rule. This ejectment is not, as is assumed for the purpose of this application, brought against the Crown, but against the officers of her Majesty's Ordnance, who, by virtue of the statutes 1 & 2 Geo. 4, c. 69, 3 Geo. 4, c. 108, and 2 Will. 4, c. 25, are in the nature of a corporation. By the 9th section of the 1 & 2 Geo. 4, c. 69, the officers of the Ordnance department are empowered "to bring, prosecute, and maintain any action or actions of ejectment, or other proceedings at law or in equity, for recovering any manors, messuages, tenements, and hereditaments by that act vested in them:" and by another branch of the same section, they are empowered also to "defend any action or suit in respect of, or in relation to, the said manors, messuages, tenements, or hereditaments." [Lord Abinger, C. B. The object of that act was only to enable the Board of Ordnance to manage the Ordnance property, without being compelled to resort on every occasion to the Attorney or Solicitor-General.] The Board of Ordnance is, in this respect, in the same situation as an ordinary subject, and is liable to an action of ejectment. The action is not brought to try any title of the Crown, or to turn the Queen out of possession, but to establish affirmatively the title of the plaintiff to this particular portion of land. Suppose Watson had trespassed on the lands of the plaintiff, and had assaulted him, could he be allowed to set up the title of the Crown in answer to an action by the plaintiff, and thus obtain an injunction against him? It will be said for the Crown, that the proper proceeding on the part of the lessor of the plaintiff is by a *mons-[581]-trans de droit*. But it is doubtful whether that remedy applies to the present case. In *The Warden and Commonalty of Saddlers' case* (4 Rep. 55 a.), the cases are enumerated in which the party is put to his *monstrans de droit*, viz. "when the king is seised of any estate of inheritance or freehold by any matter of record, be his title by matter of record, judicial or immaterial, or by conveyance of record, or by matter in fact, and found by office of record." The Court ought, therefore, before they deprive the party of his remedy by action, to have a record as a foundation for the proceedings, and will not act upon conflicting affidavits. They cited also *Friens v. Duke of Richmond* (Hardr. 460), and an *Anonymous case*, 1 Anstr. 215. [Rolfe, B. The act of 1 & 2 Geo. 4 relates to recent purchases of lands, &c., vested in individuals as trustees for the Crown, for the service of the Ordnance department; can you say that it includes by implication the ancient possessions of the Crown? Lord Abinger, C. B. The act of Parliament applies to lands taken by persons as trustees for the Crown, not to lands taken in former times by the Crown itself.]

The Attorney-General and the Solicitor-General, (with whom was Rowe), *contrâ*. The foundation of this application is, that the premises sought to be recovered in this ejectment form part of the ancient hereditary possessions of the Crown, and that the Crown is in possession by its officer; and the question is, whether an action of ejectment can be brought, the effect of which may be to change that possession. Such a proceeding is wholly without precedent. It might as well be said that an ejectment might be brought to recover possession of the Tower of London. The lessor of the plaintiff is not without a remedy, if he really have any title; he may proceed by petition of right. [They were then stopped by the Court.]

[582] LORD ABINGER, C. B. This rule must be made absolute. The only doubt I have had was, whether the act of Parliament of the 1 & 2 Geo. 4 had not some application to this case. It is quite clear the Court could not issue any process to turn the Crown out of possession; and the only doubt I had was, whether this property was not, by the operation of the act of Parliament, in the possession, not of

the Crown, but of the Board of Ordnance. But on looking more fully into the act, my doubt is entirely removed. It does not apply to any of the ancient possessions of the Crown, but only vests in the officers of the Ordnance, as a sort of corporation, certain manors, messuages, lands, &c., which it recites to have been at various times purchased for the use of the Ordnance, for the general defence of the realm. But it appears, from the affidavits in this case, that Hurst Castle has been in the possession of the Crown since the reign of Henry VIII.: and we find the Board of Ordnance in possession for the Crown, but not in that sort of possession which is contemplated by the act of Parliament. The rule must therefore be made absolute.

ALDERSON, B. I am of the same opinion. No ejectment can be maintained against the Crown, to turn the Crown out of possession by the authority of the Crown itself. The lessor of the plaintiff may proceed by petition of right. The stat. 1 & 2 Geo. 4, as it seems to me, has nothing to do with the case: its only effect is to make the principal officers of the Ordnance trustees for the Crown, for certain purposes, of the Ordnance property, so as to prevent the necessity of its being transferred from one set of officers to another. I doubt very much whether the 9th section enables the Ordnance to defend an ejectment.

ROLFE, B. I am of the same opinion. The question may [583] be tested thus: suppose there were no trial, but judgment went against the casual ejector: then there would only be a writ to turn the Crown out of possession, which clearly cannot be. On the other hand, there is no more difficulty in prosecuting a petition of right than an action of ejectment; and although that remedy may be a dilatory one, it presents no such incongruity and anomaly as in the case of an ejectment, which is to be followed by the issuing of a process which cannot be executed.

Rule absolute.(a)

[584] WILSON, Public Officer, &c., v. CRAVEN AND OTHERS. Exch. of Pleas. June 7, 1841.—C. & Co., being insolvent, compounded with their creditors, by agreeing to pay them a composition of 7s. 6d. in the pound at three instalments, and execute a conveyance of their real and personal estate to the defendants, in trust to permit them, C. & Co., to carry on the business, subject to the control of the defendants, and to pay thereout to the creditors the said three instalments; and in case of full payment thereof, to re-convey and re-assign the estate to C. & Co., but upon default of such payment, then in trust to sell, and, after deducting out of the proceeds interest, costs, and amount of mortgages, &c., to divide the remainder amongst themselves and the other creditors. C. & Co. continued, accordingly, to carry on the business, and opened an account with a banking company, from whom they obtained large advances. The bank applied to, and obtained from the defendants the following guarantee:—"C. & Co. having assigned over all their real and personal estate to us, in trust for securing a composition of 7s. 6d. in the pound to their several creditors executing such deed, and it being necessary to open a banking account for the purpose of carrying on the said trade, in order that the stock and goods on hand may be wrought up and converted into money, for the purpose of paying such dividends; and you having, at our request, consented to open a banking account, or on the credit of the names of the said C. & Co., or of any person or persons for the time being carrying on that concern; we do hereby promise and engage, that any sum or sums of money to become due to you or to the said banking company, in respect of such account, shall, in the first instance, be paid to you out of the net proceeds of the said trust estate, so far as the same will extend to pay." Further advances were made by the bank to C. & Co. subsequent to this guarantee. The defendants subsequently sold the property of C. & Co. under the provisions of the composition deed, and the proceeds were insufficient to pay the creditors the composition of 7s. 6d. in the pound:—Held, that the meaning of the guarantee was not that the defendants should be liable to the bank only out of the proceeds realized from the estate of C. & Co., after payment of the composition of 7s. 6d.

(a) Lord Abinger, C. B., stated also, that he was much disposed to think that no affidavit was necessary in support of such an application, but that it was sufficient that it was made by the Attorney-General, appearing on behalf of the Crown.

to the creditors, but that they were liable in the first instance to repay out of the proceeds the whole amount of the advances made by the bank to C. & Co., as well before as after the guarantee.—In 1833, a joint stock bank was established, under the provisions of the stat. 7 Geo. 4, c. 46, by the name of the Mirfield and Huddersfield District Banking Company. In 1836, H. & Co., bankers, relinquished their business in favour of, and all took shares in, this Company: and it was subsequently agreed, that the title of the bank should thenceforth be the West Riding Union Banking Company; that the capital should be increased by the creation of new shares; and that additional directors should be appointed:—Held, that the public officer of the West Riding Union Banking Company might, notwithstanding the change of name, and the accession of new proprietors, maintain an action on a guarantee given to the Mirfield and Huddersfield District Banking Company, before their junction with H. & Co., for advances made by them.

[S. C. 10 L. J. Ex. 448.]

Assumpsit on a guarantee. The declaration commenced thus:—Thomas Wilson, one of the public officers for the time being of certain persons united in co-partnership by the name and description of the West Riding Union Banking Company, which said banking company or co-partnership was, before the 10th of October, 1836, known and called by the name of the Mirfield and Huddersfield District Banking Company, for the purpose of carrying on the business of bankers, under the stat. 7 Geo. 4, intituled &c., complains &c. The declaration then recited, that Thomas Carr and William Hartley Carr, woollen manufacturers, were insolvent, had compounded with their creditors, and had assigned their estate to the defendants, in trust to pay the creditors 7s. 6d. in the pound: that it was deemed necessary by the defendants that the trade of T. [585] Carr and W. H. Carr should be carried on, and that for that purpose a banking account should be opened, and the said banking company was requested to open the same; that, in consideration of the company's consenting to open an account and make advances to T. Carr and W. H. Carr, the defendants promised, that any sums due to the company should, in the first instance, be paid out of the net proceeds of the said trust estate, as far as the same would extend to pay. Averment, that the company opened an account, and made advances to T. Carr and W. H. Carr; that T. Carr and W. H. Carr, although requested, had not paid the company; and that, although the net proceeds of the estate were sufficient to pay the company, the defendants had not paid the sums so due.

The defendants pleaded non-assumpserunt, and several special pleas, of which the sixth was as follows:—That the said West Riding Union Banking Company was not known and called by the name of the Mirfield and Huddersfield District Banking Company; but the said Mirfield and Huddersfield District Banking Company and a certain other private banking establishment, the members whereof were not, nor was any of them, subscribers, partners, or shareholders in the Mirfield and Huddersfield District Banking Company, after &c., to wit, &c., joined and united themselves, that is to say, the said Mirfield and Huddersfield District Banking Company and the said private banking establishment, into one banking company together in co-partnership in banking, and called the same the West Riding Union Banking Company, and the said private banking establishment then merged in the said other district banking company, and the partners thereof became and were partners of the said West Riding Union Banking Company: without this, that the said West Riding Union Banking Company was known and called by the name of the Mirfield and Huddersfield District Banking Company, modo et formâ. Issues were joined and taken on these pleas.

[586] At the trial before Coltman, J., at the Yorkshire Summer Assizes for 1839, a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on the following case:—

In November, 1834, the Messrs. Carr, who were woollen manufacturers at Dewsbury Moor, Yorkshire, became embarrassed, and their creditors agreed to accept a composition. A deed of composition was accordingly prepared and executed, the parties to it being the Messrs. Carr of the first part, the defendants of the second part, and the creditors of the third part. By this deed it was agreed, that Messrs. Carr should pay their creditors 7s. 6d. in the pound, at three instalments, and execute a conveyance to the defendants of their real and personal estate, upon certain trusts therein

mentioned; namely, to permit Messrs. Carr to carry on the business, subject to the control of the defendants, and to pay thereout to the creditors the said three instalments; and, in case of full payment thereof, to re-convey and re-assign the estate to Messrs. Carr, but upon default of such payment, then in trust for the defendants to sell and convert the said estate, &c., into money, and after deducting thereout interest, costs, and amount of mortgages, &c., to divide the remainder amongst themselves and the creditors. The Messrs. Carr continued to carry on the business as provided for in the deed. On the 4th of February, 1835, they opened a banking account with the Mirfield and Huddersfield District Banking Company, and received from them large advances from time to time. The bank, however, becoming dissatisfied with the account, applied to and obtained from the defendants the following guarantee:—

“Gentlemen,—Messrs. Carr and W. H. Carr, both of Dewsbury Moor, in the parish of Dewsbury, in the county of York, woollen manufacturers, carrying on business there under the firm of John Carr & Sons, having, by deed of assignment bearing date the 8th of January last, assigned [587] over all their real and personal estate to us the undersigned, in trust for securing a composition of 7s. 6d. in the pound to their several creditors executing such deed, and it being necessary to open a banking account, for the purpose of carrying on the said trade, in order that the stock and goods in hand might be wrought up and converted into money for the purpose of paying such dividend; and you having, at our request, consented to open a banking account for that purpose, and to make advances on such account, or on the credit of the names of the said Thomas Carr and William Hartley Carr, or of the person or persons from the time being carrying on that concern; we do hereby promise and engage, that any sum or sums of money to become due to you, or to the said banking company, in respect of such account, shall in the first instance be paid to you out of the net proceeds of the said trust estate, so far as the same will extend to pay. Dated the 13th day of May, 1835.”

At the time when this guarantee was given, the defendants knew that the banking company were under considerable advances to Messrs. Carr on the above-mentioned account so opened. After this, advances continued to be made down to the 31st of December, 1835, when the bank closed the account. At this time there was due to the bank the sum of 3002l. 19s. A second account was then opened, and was closed on the 19th of April, 1837. In April 1837, the defendants, with the knowledge and consent of the bank, took possession of the property of Messrs. Carr, and sold the same for £5700. An account was taken at the time, from which it appeared that the property of the Messrs. Carr was altogether inadequate to the payment of the composition of 7s. 6d. in the pound to the creditors.

The Mirfield and Huddersfield Bank was established in 1833, by the name of the Mirfield and Huddersfield District Banking Company: it was a joint-stock bank, carrying on its business under the act of Parliament regulating joint-stock banks, and was regulated by deed of settlement. Early in 1836, Hagues & Co., then carrying on business as bankers, and the Mirfield and Huddersfield Bank, came to an arrangement, whereby the banking establishment of Hagues & Co. was relinquished in favour of, and united with, the said company. In May, 1836, it was resolved, at a general meeting of the company, that, after the 10th of October, 1836, the title of the bank should be “The West Riding Union Banking Company;” that the capital should be increased from one to two millions, by the creation of 10,000 new shares of £100 each, and that the number of future directors should be increased from five to seven. Other resolutions were also agreed upon, which it is not material to mention. An issue of new shares accordingly took place, some of which were allotted to the partners in the house of Hagues & Co., all of whom had, before the change of name, been parties in the banking company. At the commencement of the action, some persons were proprietors of the new company who were not proprietors before the junction, and some of them held shares of the company created upon the junction, which were not in existence at the time of the defendants’ guarantee, nor at any time in 1835.

It is agreed that the Court shall draw any inference of fact in the same manner as the jury.

The question for the opinion of the Court is, whether the plaintiff, as a registered officer of the West Riding Union Banking Company, is entitled to recover on the

defendants' guarantee; if so, the Court will direct, on the report of the arbitrator, for what damages the verdict shall be entered, and in what manner the issues shall be disposed of.

The case was argued on the 2nd of June, by

Cresswell, for the plaintiff. The first question in this case is as to the meaning of the term "net proceeds," in the [589] guarantee given by the defendants. It is perfectly clear that the object of this arrangement was, that the defendants, in their character of trustees for the benefit of the creditors, should be enabled to work up the stock of the Messrs. Carr, and convert it all into money, so as ultimately to produce a composition of 7s. 6d. in the pound, by carrying on the business. To carry this object into effect, they require a fund, and the bank make the advance upon the guarantee for that purpose, and are to be repaid in the first instance out of the net proceeds of the trust estate. [Lord Abinger, C. B. The trustees are first to pay to the bank, in the same manner as if they had used their own money, and sought to retain it out of the proceeds of the trust estate.] Yes; it is perfectly clear that the bankers were to have priority in payment over the creditors under the composition deed.

Secondly, it may be said that the defendants are discharged by time given to the Messrs. Carr. But there was no such giving of time as can discharge a surety; but merely a delay in suing the principals, which amounts to nothing. What the creditor is not allowed to do, is to tie up his hands from suing the principal. [Alderson, B. The mere delay in suing is nothing.] Neither is this a case of principal and surety; it is not a conditional guarantee on Carrs' failing to pay, but an absolute undertaking to pay out of the trust funds realized by the defendants as trustees.

Lastly, as to the change of name of the Banking Company. This was originally a company carrying on business under the stat. 7 Geo. 4, c. 46, calling itself "The Mirfield and Huddersfield District Banking Company." Then the private banking firm of Messrs. Hagues & Co., not being (according to the statement in the plea) proprietors in the company, unite themselves with the Company, and it is then called "The West Riding Union Banking Company;" and the plea concludes with a special traverse that the latter company was known and called by [590] the name of the Mirfield and Huddersfield District Banking Company. But the case finds that Hagues & Co. were partners in the Mirfield and Huddersfield Banking Company, so that there was no change of persons as stated in the plea, and the inducement to the special traverse, therefore, was disproved. [Hoggins, for the defendants, suggested that the question arose equally on the general issue.] That is not so. Here the plaintiff sues as public officer of a banking company once called by one, and now by another, name: if it is the same copartnership, that is enough; the defendants have contracted with that copartnership. The act of Parliament permits a change in the individual members, and the contract nevertheless subsists. This being, therefore, a promise to a fluctuating body, where an identity of persons is not necessary, if the identity of the concern be averred, that is sufficient. It is not like the case of an ordinary firm; the law allows it to be a fluctuating body, retaining nevertheless all its rights against debtors, and liabilities to creditors. The plea of non assumpsit, therefore, admits the identity of the two banks, and the question can only arise on the 6th plea. Then the case of *Craven v. Sanderson* (4 Ad. & Ell. 666; 2 Nev. & P. 641) is an authority to shew that it is necessary, in order to support such a plea, to prove the inducement as well as the traverse. The inducement contains the premises which are to warrant the deduction in the traverse, and in proving the traverse, the defendant must prove the inducement. But independently of this objection, this company possesses a corporate character under the 7 Geo. 4, c. 46, and continues the same, and with the right to sue by the same public officer, notwithstanding the change of name. The 8th section clearly contemplates the bringing in of new additional members, as well as the change of members by the transfer of shares; yet there is no provision for thereupon [591] appointing a new public officer. But if this has become a new firm, how can the original public officer be a public officer appointed for that new firm? It is clear, therefore, that the firm is considered to continue one and the same, for the purpose of carrying on its quasi corporate business. The rights and liabilities of an ordinary partnership are not applicable to banking companies established under this act. [Alderson, B. The statute seems to constitute what may be called the code of external liability of such partnerships: as to being sued and

suing, they are one and indivisible; but as to the division of profits, and their other rights inter se, the ordinary law of partnership applies.] They are, as to all their relations with third parties, a corporation. This is still more clear from the clauses as to judgments and executions against the company, to which the existing members are primarily liable, although the contract was made by others. The change of name alone would not have affected the case, even if it had been that of a private bank; nor will a change of partners, in the case of a copartnership established under this act of Parliament. If it were otherwise, their business could not go on for a single day. Under the new name, therefore, it retains all the rights of the old, and the existing body may sue upon this contract, although it was made with the body which used the old name.

Hoggins, contra. This is an action for a breach of contract, brought against the defendants by the West Riding Union Banking Company, through their public officer who sues for them and on their behalf. The defendants' answer is, that they never contracted with the West Riding Union Company. The plaintiffs are composed of the persons constituting the company at the time of action brought; whereas this guarantee was given in May 1835, to a different body, the Mirfield and Huddersfield Banking Company. All the dealings under this contract were with that bank, before [592] the West Riding Union Company had any existence. The former company was limited as to the district within which its business was carried on, as to its capital, and the number of its shares, by its deed of settlement. Then a union is formed between it and another bank, the object whereof was not merely to change the name, but to represent in the extent of its business, not the Mirfield and Huddersfield district only, but the whole of the West Riding: the nominal capital is greatly increased, and the number of shares doubled. It is a new joint-stock company, with a new constitution, a new circulation, and a new name. Then as to the form of the traverse. It is said that the inducement is not proved, and therefore that the averment of identity in the declaration is not properly met by the defendants. But the matter of inducement may fail upon the evidence, yet the traverse remains, and if it be proved by evidence, the defendant is entitled to judgment: *Cross-Keys Bridge Company v. Rawlings* (3 Bing. N. C. 71; 3 Scott, 400). This subject was also much considered in the recent case of *Negelen v. Mitchell* (7 M. & W. 612) in this Court. The matter of the inducement is immaterial in this case. It is clear that there has been a substantial change of parties, and the defendants are thereby discharged from their guarantee: *Dry v. Dary* (10 Ad. & Ell. 30; 2 P. & D. 249). The plaintiff here is suing for persons holding shares which were not in existence when the defendants' contract was made. The defendants are entitled to say, that they never had, and would not have had, any transactions with the West Riding Union Bank, and that they are liable only to the Mirfield and Huddersfield Bank. The latter is still in existence for the purpose of winding up its accounts, and ought still to have a public officer for enforcing the contracts made with it. Suppose the account were the other way, would not the defendants be entitled to hold the old members of the Mirfield and Huddersfield responsible [593]-ble? Would they be permitted to say they had transferred their liability to the West Riding Union Bank? This act of Parliament gives an existence to banking copartnerships only in a particular way, which requires the registration of the name at the Stamp Office. The change of name destroys the security given to the public by the registry. The plaintiff, therefore, does not prove the material allegations of his declaration, because he does not shew a contract with the West Riding Union Company, the members of which at the time of action brought are the parties represented on this record. The change contemplated by the act is, that of a change in the ownership of shares in the same banking company: whereas this is a new bank, founded indeed on the basis of the former, but with a new constitution, a new capital, and new members. [Alderson, B. In the case of *Cross-Keys Bridge Company v. Rawlings*, the special inducement was bad, and therefore did not qualify the traverse; but if it be good, it limits the traverse, and you cannot prove the traverse without proving the inducement. Here the inducement does limit the traverse; the defendants say, it is not the same company, by reason of the circumstances stated in the inducement. In *Cross-Keys Bridge Company v. Rawlings*, the defendant said in substance—"You, the plaintiff, did a wrongful act, and I was not guilty of negligence."] The defendants here say, the plaintiffs are not the same as they with whom they contracted, because Hagues & Co. came in and joined them; but though that is found

against the defendants, they have a right, under the special traverse, to prove that it was not the same bank from other circumstances. Suppose, before the new rules, (when the plea must have concluded with a verification), the plaintiff had taken issue on the plea; he must have replied that it was the same banking company; then the defendants might have shewn on the trial that it was not the same, by other evidence than that referred to [594] in the inducement, as in *Cross-Keys Bridge Company v. Rawlings*. The effect of the inducement is to inform the opposite party, but not to tie up the defendants.

Secondly, the case does not shew that any net proceeds have been received by the defendants. The power given to them by the trust deed (to which the bank were assenting parties) is to permit Messrs. Carr to carry on the business till payment of the composition of 7s. 6d. in the pound; but on default in payment, and notice thereof to the defendants, they are to enter and sell, and out of the proceeds of the sale to pay charges, &c., and to divide the residue among the creditors. Under this trust, Messrs. Carr carry on the business, and appear to all the world as the owners of the property. The defendants, if they come in on their default, are not to carry on the business, but to sell and pay the creditors. The meaning of the guarantee therefore is, not that the defendants are to commit a breach of this their trust, but that they are to pay the bank out of the proceeds next after the trusts of the deed are carried into effect. [Lord Abinger, C. B. Then the bank were to lend their money on the understanding that if the Carrs carried on the business, and paid the 7s. 6d. composition, they should get something back, but not otherwise? Alderson, B. You interpret the words "to be paid in the first instance out of the net proceeds of the trust estate"—to be paid last, after the composition, the realizing of which is the only trust, is paid. I should have thought the "net proceeds of the trust estate" meant the net proceeds of the estate assigned to the defendants on certain trusts.] They are not entrusted to carry on the business, but the Carrs: the defendants have no power or authority to intervene until default made by them. If the Carrs go on and realize the composition, there will be a surplus, out of which they will pay the bank; if they make default, the defendants will enter and sell, and pay the bank out of the proceeds.

[595] At all events, the monies received by the defendants after the date of the guarantee ought not to be applied in discharge of the items of the banking account antecedent to the guarantee. The words are—"it being necessary to open an account," &c. The defendants, therefore, are not responsible for the antecedent advances: the guarantee only contemplates something to be done thereafter.

The case was adjourned until this day for the reply, but now

LORD ABINGER, C. B., delivered judgment. We think the plaintiff in this case is entitled to the judgment of the Court. It was an action on a guarantee given by the defendants, who were trustees of an insolvent firm who had compounded with their creditors. [His Lordship stated the facts of the case, and continued:—] The defence was, that the trustees were liable only in respect of the net proceeds which the estate of the insolvent should realize, after payment of the composition of 7s. 6d. in the pound. We think, however, that it is impossible to put that construction upon the guarantee. There was, indeed, a point raised by Mr. Hoggins, which struck us at the time as worthy of consideration, viz. that as to advances made by the bank before the guarantee was given, that instrument, which recited that it had become necessary to open an account with the bank, would not enable the plaintiff to recover such money antecedently due, but extended only to advances to be afterwards made, under an account then to be opened; but, upon consideration, we think that is no ground for resisting the present demand, and that the plaintiff is entitled to judgment.

There was another point in the case, as to whether the plaintiff, suing as the public officer of the West Riding Union Banking Company, could maintain the action. It is clear, from the act of Parliament regulating joint-stock banks, that the person who is the provisional officer either [596] represents the whole banking company at the time of the action brought, or he represents those persons who constituted the bank at the time the contract took place; that being so, if it be the same bank, then the public officer represents either the body as constituted at the time of action brought, or at the time of the contract made; the act applies to all cases where it is the same bank. Here the allegation in the declaration is, that it is the same bank, with a different name; and that is not denied by the plea. The change of name, so long as the bank consists of the same body, is immaterial. If, indeed, there had been some-

thing to shew that the bank was differently constituted, and that point had been distinctly made out, it might have altered the case; there is, however, no occasion to say what would have been the judgment of the Court if that had been so, because, upon the pleadings and the case as they stand at present, that fact has not been established. There will therefore be judgment for the plaintiff.

Judgment for the plaintiff.

SUMMERS v. BALL AND ANOTHER. Exch. of Pleas. June 7, 1841.—A deed of separation between husband and wife contained a covenant by the wife and her trustees, that she, her executors or administrators, or the trustees, or some or one of them, should and would at all times save, defend, and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which she the wife had then, at the time of the making of the indenture, contracted, or which she should at any time thereafter, during the separation, contract:—Held, that this covenant included debts previously contracted by the wife for necessities, while living with the husband.—To an action on this covenant, assigning a breach in not indemnifying against a debt of the wife, the defendants pleaded, that the alleged debt in the declaration mentioned was not contracted within the true intent and meaning of the covenant; concluding to the country:—Held bad, as being a traverse of matter of law.

[S. C. 10 L. J. Ex. 368.]

Covenant on a deed of separation between the plaintiff and his wife, containing, (amongst others), the following covenant on the part of the wife and the defendants, [trustees for the wife]:—"That she the said Arabella Summers, her executors, administrators, or assigns, or they the defendants, or some or one of them, should and would from time to time, and at all times thereafter, well and sufficiently [597] save, defend, keep harmless and indemnified the plaintiff, and his lands and tenements, goods and chattels, of, from, and against the debt or debts, sum or sums of money, which the said Arabella Summers had then, at the time of the making of the said indenture, contracted, or which she should at any time or times thereafter, during the said separation, contract with any person or persons whomsoever, and every part thereof, and of, from, and against all such costs, charges, damages, and expenses, as should or might be recovered against, or be sustained or expended, or become payable by the plaintiff, on account or in respect thereof, or by reason of any act or default then already, or thereafter to be committed, done, or suffered by the said Arabella Summers." The declaration then averred the fact of the separation, by the choice of the wife, and with the consent of the plaintiff; that they had continued to live separate, and that the plaintiff had duly performed the covenants by him to be performed, and alleged a breach by the wife, and by the defendants, of the said covenant of indemnity, in this, that he the plaintiff had been called upon, and forced and obliged to pay, and did pay, to one Charles Howard, a certain sum of money, to wit, &c., being for a just and true debt contracted by the said Arabella Summers, before the making of the said indenture, for necessities suitable to her then degree and station in life as the wife of the plaintiff, whilst she the said Arabella Summers was so living with the plaintiff as her husband as aforesaid; of which said premises the defendants, and the said Arabella Summers, afterwards, and before the commencement of this suit, had notice, and were requested by the plaintiff to repay him the same: nevertheless the said Arabella Summers hath not, nor have the defendants, or either of them, as yet repaid the said sum of money, or any part thereof, to the plaintiff, or in any other manner whatsoever saved, defended, or kept him harmless from the said last-mentioned debt, &c.

[598] Plea, that the said alleged debt in the declaration mentioned was not, nor was any part thereof, contracted within the true intent and meaning of the said covenant of the defendants in that behalf, by the said Arabella Summers, in manner and form, &c.; concluding to the country.

Special demurrer, assigning for causes, that the plea attempts to put in issue, to be tried by the jury, not only a matter of fact, that is to say, whether the said debt in the declaration mentioned was contracted by the said Arabella Summers, in manner and form in the declaration mentioned, but also a matter of law, that is to say, whether the said debt, supposing it to have been so contracted, was or is a debt within the true intent and meaning of the said covenant of the defendants, which is a matter

of law for the decision of the Court: and also for that the plea is double, and contains both a traverse of facts averred in the declaration and of the law arising upon those facts; and also for that the said plea is uncertain, and contains a negative pregnant, in this, that it does not appear thereby whether the defendants mean to traverse that the said debt was in point of fact contracted by the said Arabella Summers, in manner and form as in the declaration mentioned, or whether they mean to confess that it was so contracted, and to avoid such confession by stating that it was not a debt within the true intent and meaning of the covenant; in which latter case, if the defendants relied upon any matter of fact not appearing upon the declaration, they should have averred such matter of fact in their plea, and concluded the same with a verification; or if they relied upon the facts as they appear upon the declaration, they should have demurred to the declaration, so as to have referred the matters therein stated to the Court, &c. &c.

The defendants also objected to the declaration, on the ground that, as the debt to Howard was contracted by [599] Mrs. Summers as the wife of the plaintiff, while she was living with him, and under such circumstances that the plaintiff was personally responsible for the amount, the defendants' covenant of indemnity does not extend thereto; and it does not appear in or by the declaration that the plaintiff has any cause of action against the defendants in respect of the premises therein mentioned.

Waddington, in support of the demurrer. This plea is bad, for some, if not all, of the causes of demurrer assigned. One clear ground of objection to it is, that it puts in issue a mere matter of law. Every traverse must regularly be of matter of fact, and not of law, for the Court alone is to judge of the law (1 Saund. 23, n. (5)). [Lord Abinger, C. B. I think there can be no doubt that the plea is bad on that ground.] Then as to the declaration. The covenant of indemnity applies in express terms as well to debts previously contracted by the wife, as to those which she should afterwards contract during the separation. The words are—"the debt or debts, sum or sums of money, which the said A. S. had then, at the time of the making of the said indenture, contracted, or should or might at any time or times thereafter during the said separation contract," &c. Unless the covenant was intended to apply to debts incurred before the separation, why were the words "had then contracted" introduced? There is no objection in law to such a covenant; and it is averred that the debt in question was a just and true debt contracted by the wife for necessities suitable to her station, while living with the plaintiff as her husband.

Crompton, contra. It never could have been the intention of the parties, that the debts which the wife had contracted as the mere instrument or agent of her husband, [600] while under his control,—which are in truth his debts,—should come within the scope and meaning of this deed, which is founded on the separation. The covenant can only be reasonably applied to debts contracted by the wife after separation, and not to such as the husband was personally liable for. What consideration is there, in the fact of the separation, and of the subsequent allowance to the wife, for relieving the husband from debts for necessities supplied to the wife while they were living together? The words of the covenant must therefore receive some qualification. It does not appear but that the parties had been living separate before the execution of the deed, and if so, the covenant might relate to past debts contracted during such separation.

Waddington, in reply, referred to *Jee v. Thurlow* (2 B. & C. 547; 4 D. & R. 11), and *Hindley v. Marquis of Westmeath* (6 B. & C. 203; 9 D. & R. 351).

LORD ABINGER, C. B. The defendants do not suggest that the covenant is void; and as to the construction to be put upon it, it seems to me as if the words made use of had been selected for the very purpose of making the deed applicable to all the wife's debts, past and future. Even supposing the deed to have been made after some period of the separation had elapsed, that would not limit or alter the meaning of words so extensive as these. Then as to the plea, that is clearly bad as taking a traverse on matter of law. The judgment must therefore be for the plaintiff.

ALDERSON, B. I am not altogether without doubt in this case, but my doubt is not so great as to make it worth while for me to differ from the rest of the Court.

[601] GURNEY, B. I agree that the judgment ought to be for the plaintiff.

ROFFE, B. I am of the same opinion. The covenant appears to me to be as extensive as words can make it.

Judgment for the plaintiff.

HOWARD v. CROWTHER. Exch. of Pleas. June 7, 1841.—The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy.

[S. C. 10 L. J. Ex. 355; 5 Jur. 914.]

Case for the seduction of Lucy, the sister and servant of the plaintiff, whereby, in consequence of her pregnancy and child-birth, the plaintiff lost and was deprived of the services of his said sister and servant, and also by means thereof was forced and obliged to and necessarily did pay, lay out, and expend, and also incurred and became liable to pay, divers large sums of money in and about the nursing and taking care of his said sister and servant, and in and about her delivery, &c.

The defendant pleaded a plea, setting forth that the plaintiff became bankrupt, and that a fiat in bankruptcy issued against him before the commencement of the action, by reason whereof the said cause of action in the declaration mentioned became and was, before the commencement of this suit, and still is, vested in one W. K., as the assignee of the plaintiff, and the said W. K. became and was, before the commencement of this suit, and still is entitled as such assignee to the said cause of action in the declaration mentioned, and every part thereof. Verification.

General demurrer, and joinder. The matter of law marked for argument in the margin of the demurrer book was, that the cause of action set out in the declaration does not pass to the assignee of the plaintiff.

[602] Hugh Hill, in support of the demurrer. There is no authority for such a proposition as that a right of action for seduction passes to the assignees of a bankrupt. It is not comprehended within either the language or the intent of the Bankrupt Act, 6 Geo. 4, c. 16. The 12th section enacts, that the commissioners shall have power under the commission "to take such order and direction with the body of the bankrupt as thereinafter mentioned, as also with all his lands, tenements, and hereditaments, &c., and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts." Can a right of action for seduction be said to fall within any of these words? So, by section 63, the commissioners are to assign all the present and future personal estate of the bankrupt, and all his debts, and all property which he may purchase, or which may come to him, before he shall have obtained his certificate: and the stat. 1 & 2 Will. 4, c. 56, s. 25, which dispenses with the assignment, vests in the assignees only such estate and effects as by the laws then in force passed under it. This is a right of action for a tort, which is purely personal. Even the large rights conferred by the law upon the representatives of a person deceased would not enable them to maintain an action of this nature. In *Raymond v. Fitch* (2 C. M. & R. 596), Lord Abinger, C. B., says, "Personal representatives may sue, not only for all debts due to the deceased by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime:" and he adds—"The reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee." But a right of action for an injury of this nature is no part of the personal estate. All the authorities shew, that the right of action in respect of a tort committed to the property of a trader, passes to his [603] assignees on his bankruptcy, but not the right of action for a personal tort. [Lord Abinger, C. B. Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?] It was expressly laid down in *Benson v. Flower* (Sir W. Jones, 215), that a right of action for slander does not pass to the assignees.

The Court then called on

Cleasby, in support of the plea. The later cases have extended the law as to the passing of rights of action to the assignees of a bankrupt. This action is maintainable only for the loss of service, which is an injury affecting the estate, and not for the injured feelings of the plaintiff. [Lord Abinger, C. B. But they are always considered in the damages.] In this case it must be presumed that the Judge would not so direct the jury. [Lord Abinger, C. B. Then the assignees would recover only nominal damages. But loss of service is only a personal inconvenience; it does not prejudice the estate.] Suppose the bankrupt's servant and also his horses to be injured at the same time by the same act, would the bankrupt have the right of

action for the loss of service, and the assignees for the damage to the horses? [Alderson, B. You are to shew that the right of action for every part of the injury passes to the assignees.] It was held in *Smith v. Coffin* (2 H. Bl. 451), that the right to bring a real action passes to the assignees. There Buller, J., says,—“All the statutes of bankrupts are in *pari materia*, and are to be taken together; and the object of them was, that every thing belonging to the bankrupt that can be turned to profit, shall pass by the assignment for the benefit of the creditors.” And in *Wright v. Fairfield* (2 B. & Ald. 727), it was held that the assignees might maintain an action for unliquidated damages, which had accrued before the bankruptcy by the [604] non-performance of a contract with the bankrupt. In *Hancock v. Caffyn* (8 Bing. 358; 1 M. & Scott, 521), the principle was carried even further. There the injury resulting to an under tenant from the breach of an implied indemnity by his immediate lessor to indemnify him against the non-performance of the covenants with the superior landlord, was held to give a right of action to his assignees: and Tindal, C. J., says,—“We should not give due effect to the statute 6 Geo. 4, c. 16, if we were to hold that a right did not pass, arising out of an injury which has lessened the amount of the fund belonging to the creditors.” Here the fund would clearly be increased by the damages recovered in the action. [Lord Abinger, C. B. And on the other hand, the estate might be put to great expense.]

LORD ABINGER, C. B. Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his assignees; but it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings; causes of action, therefore, which are, as in this case, purely personal, do not pass to the assignees, but the right to sue remains with the bankrupt.

ALDERSON, B. I am of the same opinion. The service, for the loss of which this action is brought, is of more value to one than another, and the loss of it is therefore only a personal injury. Assignees can maintain no action for libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

[605] JONES v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF CARMARTHEN. Exch. of Pleas. June 7, 1841.—The town-clerk of a borough cannot maintain an action of debt against the corporation for fees in respect of the performance of the duties imposed upon him by the Reform Act or the Municipal Corporation Act; although he received no stated salary as town-clerk, and although the then corporation, in several years before the passing of the Municipal Corporation Act, made payments to him for the performance of the duties imposed on him by the Reform Act.

[S. C. 10 L. J. Ex. 401. Approved, *Thomas v. Swansea Corporation*, 1842, 2 Dowl. (N. S.) 470; 12 L. J. Ex. 73. Not applied, *Newington Local Board v. Eldridge*, 1879, 12 Ch. D. 357. Referred to, *Munton v. Lord Truro*, 1886, 17 Q. B. D. 786.]

This was an action of debt, brought to recover the sum of 71l. 2s. 1d., as well for the price and value of work done, and materials for the same provided by the plaintiff, as the attorney, solicitor, agent, and clerk of the defendants, and for the defendants at their request, as for money paid by the plaintiff for the use of the defendants in respect thereof.

The defendants pleaded, except as to 33l., parcel &c., that they were never indebted, on which issue was joined: and as to the said 33l., parcel &c., the defendants paid 33l. into Court in discharge of the said 33l., parcel &c.; the plaintiff took the same out of Court, in discharge of the said 33l., parcel &c. The cause came on to be tried before Coleridge, J., at the Spring Assizes in 1839, for the county of Carmarthen, when a verdict was found for the plaintiff for 38l. 2s. 1d., subject to the opinion of the Court on the following case:—

The borough of Carmarthen was, by a charter of King James the First, constituted a county of itself, by the name of the county of the borough of Carmarthen. By a charter of King George the Third, the body corporate of the said borough took

and bore the name of "The Mayor, Burgesses, and Commonalty of the Borough of Carmarthen," and continued incorporated under that name until after the passing of an act, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales;" and after the first election of councillors for the said borough under that act, the said body corporate took and bore the name of "The Mayor, Aldermen, and Burgesses of the Borough of Carmarthen." By the last-mentioned charter, the said body corporate were authorized to choose a fit man to be town-clerk of the [606] borough, and for just cause to remove him at their free will and pleasure, and another to elect and assign in and to the said office; and to hold a Court of record within the said borough, for the trial of all causes of action arising within the same, and to hold a Court at the Quarter Sessions therein; and by the same charter, the town-clerk of the said borough was constituted clerk of the peace, clerk of assize, and prothonotary, within the said borough and the liberties thereof. The plaintiff, on the 6th of October 1823, being then and continually thenceforth hitherto an attorney and solicitor, was, by order of the said body corporate, duly appointed the attorney and solicitor of the said body corporate; and on the 2nd of March 1825, was, by a further order of the said body corporate, duly appointed town-clerk, and which last-mentioned order was then entered in the books of the said corporation, and was and is in the words following [setting it forth]. And the plaintiff was then duly sworn into the office of town-clerk aforesaid, and the records and documents relating to the offices of town-clerk, clerk of assize, and prothonotary aforesaid, were then delivered to the plaintiff as such town-clerk. The plaintiff continued to hold the several offices aforesaid, until he was removed therefrom by an order of the council of the said borough, on the 1st of January, 1836. On the 4th of January, 1836, the plaintiff received from the said body corporate the following notice. [This was a notice to deliver up all books, documents, &c., belonging to the office to his successor, and to pay all monies received by him for the corporation to the treasurer of the borough.] In pursuance of this notice, the plaintiff delivered to George Thomas, gentleman, his successor in the said office of town-clerk, the documents in the said notice specified, which comprised books of declaration, enrolments of burgesses, freemen's roll, ward lists, and the forms required by the Municipal Corporations' Act, which had been prepared and arranged by him, ready [607] for the election of councillors for the said borough, on the 26th of December, 1835, of aldermen of the said borough on the 31st of December, 1835, and of new mayor and sheriff on the 1st of January, 1836, and were used by the said body corporate at the said several elections respectively, and for the preparation and arrangement of which part of his charges sought to be recovered in this action is made.

By an order of three of the Lords Commissioners of his late Majesty's Treasury, made pursuant to the act intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," an annuity of 97l. 6s. 8d. was awarded to the plaintiff for his life, as a compensation for the loss of his offices as clerk of the peace and prothonotary aforesaid.

The plaintiff never received from the said body corporate, or was allowed by them, any stated salary whatever for the discharge of his said duties and appointments, or any or either of them, though he received fees and other emoluments incident to the said office of town-clerk, clerk of assize, and prothonotary. He also made out and delivered to the said body corporate detailed bills for work done, and attendance given, in respect of the public meetings of the corporation and burgesses, and also for certain other services rendered by him to the said corporation in his said office, of which the following are the items:—

In the year 1828, having received a letter from the Under Secretary of State, requesting a return of all prosecutions for forgery within the town and borough, the plaintiff charged the corporation for his trouble in making the necessary inquiries, and in also making the return, and was paid for the same by the corporation. The plaintiff also sent in a bill to the body corporate, making charges for money due to him, as to several other matters of public returns, required by government in respect of the corporation and county of the borough, pursuant to parlia-[608]-mentary orders and letters from the Secretary of State, during the years from January 1828 to August 1835, and was paid by the corporation for the same. In the bills so sent in and paid were also included charges for business done as attorney and solicitor, in respect of leases and sales of the corporation property. The same charge and

payment were made in respect of a return of the acting magistrate within the said town and borough, in consequence of another letter from the Secretary of State.

The sum of 15l. 8s. 4d., parcel of the said sum of 71l. 2s. 1d., is claimed by the plaintiff as the amount of fees, charges, and disbursements of the plaintiff as town-clerk aforesaid, for and in respect of work and attendances made and given by himself and his clerks, in and about preparing the lists of the burgesses and voters of the said borough, and copying, publishing, printing, and affixing the same, and in and about attending the revising barrister's court with the said respective lists, proving the same, and giving information in respect thereof, in the year 1835, in pursuance of an act intituled "An act to amend the Representation of the People of England and Wales;" part of which said sum of 15l. 8s. 4d., viz. the sum of 5l. 10s., consists of money actually disbursed by the plaintiff in respect of the said last-mentioned premises. The sum of 31l. 7s. 8d., other parcel of the said sum of 72l. 2s. 1d., is claimed by the plaintiff as the amount of the fees, charges, and disbursements of the plaintiff as town-clerk aforesaid, for and in respect of work and attendances made and given by himself and his clerks, in and about receiving the overseers' list, and copying, printing, and publishing and affixing the same, and in and about arranging notices of claims and objections, and preparing the lists of claims and objections, and copying, printing, publishing, and affixing the same, and in and about attending the revising barrister's court with the said respective lists, and proving the same, and giving information in respect thereof, [609] and in and about making alphabetical copies of the revised lists of the burgesses of the said borough, and making a burgess roll, and making, copying, and printing the ward lists, in the year 1835, in pursuance of the said act intituled "An Act to provide for the Regulation of the Municipal Corporations in England and Wales;" part of which said sum of 37l. 7s. 8d., viz. the sum of 16l. 11s., consisted of money actually disbursed and paid by the plaintiff in respect of the last-mentioned premises. The sum of 20l. 3s. 1d., other part of the said sum of 71l. 2s. 1d., is claimed by the plaintiff as the amount of fees, charges, and disbursements of the plaintiff, as town-clerk as aforesaid, for and in respect of attendances made and given by himself and his clerks, in and about procuring new corporation books, making and copying necessary oaths and declarations of corporators and others, preparing for and attending at the first election of councillors for the said borough, and the first election of a mayor, aldermen, and sheriff of the said borough, under the last-mentioned act, and in making minutes and entries of such respective elections, and in doing other matters incident thereto; part of which sum of 20l. 3s. 1d., viz. 6l. 2s. 9d., consisted of money actually disbursed by the plaintiff in respect of the last-mentioned premises, and the sum of 4l. 3s., residue of the sum of 71l. 2s. 1d., is claimed by the plaintiff for his work and disbursements done and made by him in and about collecting and arranging the several records, deeds, books, and other documents in the plaintiff's possession by virtue of his respective offices aforesaid, in and about drawing schedules and inventories of the same, and in and about delivering the said records, deeds, books, and other documents to the new town-clerk of the borough, pursuant to the order of the said counsel of the said borough in that behalf; part of which last-mentioned sum, viz. 1l. 6s., consisted of money actually disbursed by the plaintiff in respect of the last-mentioned premises.

[610] All and singular the several fees, charges, and disbursements claimed by the plaintiff as aforesaid are admitted to be fair and reasonable in point of amount, and the work and disbursements aforesaid are admitted to have been properly done and made by the plaintiff.

In the years 1832, 1833, and 1834, the plaintiff did and performed similar work, and made similar disbursements, to those for which he now seeks to recover, under the provisions of the said act for amending the representation of the people, for which he sent in bills in his own name only, as town-clerk, and was paid for the work and disbursements so done and made in each of these years by the said body corporate. In the month of May, 1832, Mr. J. B. Jeffries entered into partnership with the plaintiff as solicitor and attorney: and in the year 1834, two bills of costs, one for a prosecution for a riot by the mayor of Carmarthen, and another for a prosecution for misdemeanour, connected with the same transaction as the riot, were paid by Messrs. Jones and Jeffries, and these bills were headed "Jones and Jeffries," were sent to the corporation, and have been paid by the corporation to them jointly. A third bill, also extending from 1832 to 1835, for managing the sales of part of the

corporation estates, and preparing abstracts, advertisements, &c., was sent in to the corporation by Messrs. Jones and Jeffries, headed in a like manner with the two bills last-mentioned, and was also paid to them jointly by the corporation, but none of the items for which the plaintiff now seeks to recover were included in any of those bills.

The defendants at the trial contended, that if any part of the claim of the plaintiff could be supported as for work done as the attorney and solicitor of the corporation, the action should have been brought by the plaintiff and Mr. Jeffries jointly. The plaintiff admitted at the trial that the money paid into Court covered all the money actually disbursed by the plaintiff, which was claimed in this action. [611] The defendants further contended and objected at the trial, that assuming the plaintiff had any just claim in respect of any subject-matters, such claims were, in point of law, against the borough fund, and should have been enforced by mandamus, and not by an action against the defendants.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover all or any part of the said sum of 38*l.* 2*s.* 1*d.*; and if the Court shall be of opinion that he is, then a verdict is to be entered for the plaintiff for such sum as he shall be entitled to recover: but if the Court shall be of opinion that the plaintiff is not entitled to recover any part of the said sum of 38*l.* 2*s.* 1*d.*, then a verdict is to be entered for the defendants. And the Court is to be at liberty to draw any conclusion which a jury might draw from the facts.

Evans, for the plaintiff. The plaintiff is entitled to recover the whole of this demand. It appears upon the case, that he has never received any salary as town-clerk, nor have his services ever been remunerated in any other manner than by charges made by him upon the corporation, who as it is found in the case, have paid him for similar business done in former years, as also for his attendance at public meetings, and for other services performed by him, not connected with his official duties as prothonotary or clerk of assize. Some of the items in dispute are for matters done by him pursuant to the directions of the Reform Act, in preparing lists of voters, attending the revising barristers' courts, &c. It is true that that act does not contain any precise direction for the payment of the officers who perform these services; but it would be most unreasonable to suppose that the legislature meant to impose duties so onerous without any compensation. The claim for the preparation of the burgess lists and roll, and other services, under the Municipal Corporations Act, [612] stands upon a somewhat different footing. By that act, 5 & 6 Will. 4, c. 76, s. 92, the borough fund is chargeable with the salary of the town-clerk, and with the payment of the expenses incurred in preparing and printing the burgess lists, &c., and in other matters attending the municipal elections, and all other expenses not therein otherwise provided for, which shall be necessarily incurred in carrying into effect the provision of the acts. This provision may well authorize the payment to the town-clerk, where he receives no regular salary, of his reasonable charges for the trouble of performing those services. But further, a contract on the part of the corporation to pay these charges may reasonably be implied from their previous payments to the plaintiff in respect of similar services. It appears that in the years 1833 and 1834, his charges for the performance of the same duties were made to, and paid without dispute by, the then corporation. That affords ample ground whence the Court, acting in the place of the jury, may infer a contract on the part of the corporate body to pay him for the same services in the following year.

E. V. Williams, for the defendants. All the actual disbursements made by the plaintiff are covered by the money paid into Court, and he is not entitled to recover anything beyond. It is true that the plaintiff had no stated salary as town-clerk; but it appears that he held other offices under the corporation, and received fees payable in respect of them: and the legislature, when imposing these duties upon town-clerks, no doubt assumed that they were sufficiently compensated by their other emoluments. Where a duty is imposed by statute upon a public officer, he cannot, without an act of Parliament, or an express contract, make a third party pay for the performance of it. Acts of Parliament are full of enactments imposing burthensome duties upon public officers without remuneration. [613] Thus, many additional duties are imposed by different statutes upon clerks of the peace; so also, by the marriage acts, upon clergymen; and especially upon overseers, by the same statute (the Reform Act) under which a great part of the plaintiff's claim arises. The 46th and 47th sections of that act, which direct that the town-clerk of every borough shall, at the times

therein mentioned, make out and publish the lists of freemen, &c., are imperative and compulsory; and nothing in the act points to any compensation for the performance of the duties there enjoined. So, the 50th section makes it imperative upon the town-clerk to attend the revising barristers' courts, and the duty can be performed by no other officer. How can any contract be implied on the part of the corporation to pay him for the performance of such duties? They have not a choice of performing them by him or some other officer; nor have they any remedy, if the other supposed contracting party makes default. This is an action on an executed consideration, which must be laid and proved to have been done at the instance and request of the defendants. No doubt, where there is a legal liability, a request may be implied; as in an action against overseers for relief to casual poor, or against an executor for funeral expenses. But those cases, when examined, will be found all to turn upon an implied acquiescence. Here that ground fails; for there can be no acquiescence where there is no power of intervention or repudiation. The corporation cannot prevent the town-clerk from doing these acts, nor put forward another to do them in his stead. But it is said similar charges have been previously made by the plaintiff, and paid by the then existing corporation. No argument can be drawn from that:—they are not therefore legal. The very object of the 93rd section of the Municipal Corporations Act was, that the corporate expenses should all be minutely examined, and none paid but such as are strictly legal. It is not because [614] the former corporation have chosen to treat that as a legal and valid consideration which is none at all, that they can make such a contract binding upon their successors.

The case of the duties performed under the Municipal Corporations Act stands on a footing somewhat different from the rest of the plaintiff's claim, because the 92nd section of that act does undoubtedly refer to payments in respect of such matters. But the expenses therein mentioned mean only disbursements. There are no words to shew that there shall be any compensation to the town-clerk for his trouble or loss of time. If a town-clerk is to be allowed any thing beyond his actual expenses, why should not overseers also?

But even assuming that the town-clerk has a claim for remuneration, it does not follow that the corporation are his debtors. His proper remedy is by mandamus to them to pay out of the borough fund; or at all events, he ought to sue by a special form of declaration, averring that they have money in hand wherewith to pay him, as was done in *Curten v. The General Cemetery Company* (5 Bing. N. C. 253; 7 Scott, 97). A clerk of the peace would clearly be put to a mandamus for his fees; he could not sue the county in an action of debt.

Evans, in reply. The arguments urged for the defendants apply to an entirely different case from the present. They are founded upon an assumption that the plaintiff relies upon the statutes, instead of upon a contract to be implied from the previous dealings between the parties. The statutes do not interfere with the mutual relations of corporations and their officers. The directions to the town-clerk in the Reform Act and in the Municipal Corporations Act are directions to him as the servant of the corporation, by whom he was paid for his services, and known to be so: and though they contain no direct pro-[615]-vision for remuneration to him, that does not affect or invalidate his contracts with the corporation. The question comes to this, therefore, what was the implied contract between these parties? But with regard to the Municipal Corporations Act, it clearly intended that such services were to be paid for; and how, but by the same means as before, viz. either by a salary or by fees? Nor was it necessary to declare specially, unless the contract for payment were contingent on the defendants' having funds in hand, which it is not.

LORD ABINGER, C. B. I understand the plaintiff's claim to be confined to business done in pursuance of the directions of the Reform Act, and of the Municipal Corporations Act. In the former case, the business is directed to be done by the town-clerk, and he, and he alone, is bound to do it; but there is no provision that it shall be paid for at all; still less does the act create any contract between the town-clerk and the corporation, that it shall be paid for by them. There is, therefore, as to this part of the claim, no contract by virtue of the statute. I agree, that if the former payments to the plaintiff stood alone and unexplained, they would be evidence against the defendants; but when we see that this business was done under an act of Parliament which compels the plaintiff to do it, we must infer, that if any such payments were

made to him on former occasions, they were made by mistake. This, therefore, is a claim, not under any contract, but for services which the plaintiff was compelled by law to do, and to do without payment. With regard to the other branch of the plaintiff's demand, for duties performed under the Municipal Corporations Act, his remedy, if any, is founded upon the clauses of that act which have been referred to, and not upon any contract. They are to be paid for, if at all, out of a particular fund—negating thereby the idea that the corporation are to pay as con-[616]-tractors. The act directs him to do them, and does not direct that he shall be paid, except for his expenses, and that out of the borough fund. He is not, therefore, entitled to call upon the corporation by way of contract. More onerous duties than these are imposed by the Reform Act, without payment, upon overseers—a class of persons whom it is much more hard to subject to the performance of them than town-clerks.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. Whether there be any remedy of any kind, as regards the Municipal Corporations Act, I do not give any opinion.

Judgment for the defendants.

PITT, Public Officer, &c. v. CHAPPELOW. Exch. of Pleas. June 7, 1841.—Assumpsit by indorsee against acceptor of a bill of exchange drawn by B. Plea, that before the making of the bill, to wit, on &c., a commission of bankruptcy, under the Great Seal of Great Britain, was duly awarded against B. & C., then being traders and copartners, under which they were duly declared and adjudged bankrupts; that B. obtained his certificate under that commission, and was thereby discharged according to the laws concerning bankrupts; that afterwards, and before the making of the bill of exchange, to wit, on &c., B., being a trader subject to the bankrupt laws, and indebted to O. in £100, became and was a bankrupt, and afterwards, to wit, on &c., a certain other commission of bankruptcy was duly awarded against him on the petition of O., under which he was duly adjudged and declared to be a bankrupt, and O. was duly chosen and appointed and became assignee of his estate and effects as such bankrupt; that afterwards, to wit, on &c., B. duly obtained his certificate under the last-mentioned commission: and that B.'s estate did not then or at any other time produce, after all charges, sufficient to pay the several creditors who had proved their debts under the last-mentioned commission 15s. in the pound; that by reason of the premises, the bill of exchange in the declaration mentioned, after the acceptance and delivery thereof by the defendant to B., and before the indorsement thereof by B., became and was the property of O., as such assignee, and B. indorsed the bill without having any right, title, or authority so to do, and the plaintiff was not nor is the legal holder thereof.—Held, on special demurrer, that this plea was bad, on two grounds; first, that the defendant was estopped, by his acceptance of the bill payable to B.'s order, from saying that B. was incapable of transferring the bill by indorsement; and secondly, that the plea ought, even if the defendant could set up such a defence, to have set forth fully all the proceedings in the bankruptcy.

[S. C. 10 L. J. Ex. 487.]

Assumpsit by the plaintiff, as one of the public officers of a banking copartnership, on a bill of exchange [617] for £500, drawn by G. F. Baker on the defendant, by the name and description of the "Talaere Coal and Iron Company," payable to the order of Baker three months after date, accepted by the defendant, and indorsed by Baker to one J. H. Howard, and by him to the said copartnership.

Plea, that before the making of the said bill of exchange in the declaration mentioned, to wit, on the 18th day of April, A. D. 1826, a certain commission of bankruptcy, under the Great Seal of Great Britain, was duly awarded and issued against the said G. F. Baker and G. K. Pearson, then being traders and copartners, and subject to the laws then in force concerning bankrupts, under which said commission the said G. F. Baker and G. K. Pearson were duly declared and adjudged bankrupts; and afterwards, to wit, on the 1st of June, in the year aforesaid, the said G. F. Baker obtained his certificate of conformity under the said commission, and was thereby discharged, according to the form and effect of the laws then in force concerning bankrupts; and the defendant says, that afterwards, and before the making of

the said bill of exchange in the declaration mentioned, to wit, on the 4th day of October, A.D. 1831, the said G. F. Baker, being a trader subject to the laws then in force concerning bankrupts, and indebted to one G. B. Orchard in the sum of £100, became and was a bankrupt; and thereupon afterwards, to wit, on the 5th of October in the year last aforesaid, a certain other commission of bankruptcy was duly awarded and issued against the said G. F. Baker, on the petition of the said G. B. Orchard, under which said last-mentioned commission he the said G. F. Baker was duly adjudged and declared to be a bankrupt, and the said G. B. Orchard was duly chosen and appointed, and then became assignee of the estate and effects of the said G. F. Baker, as such bankrupt as last aforesaid; and afterwards, to wit, on the 1st day of December in the year last aforesaid, the said G. F. Baker duly obtained his certificate of conformity under [618] the said last-mentioned commission, according to the statute in that behalf made and provided; and the defendant says, that the estate of the said G. F. Baker did not, at the time of obtaining the said last-mentioned certificate, or at any other time, produce (after all charges) sufficient to pay the several creditors who had proved their debts under the said last mentioned commission, 15s. in the pound upon the amount of the said debts respectively; and that, by reason of the premises, the said bill of exchange in the said declaration mentioned, after the acceptance and delivery thereof by the defendant to the said G. F. Baker, and before the indorsement thereof by the said G. F. Baker, became and was the property of the said G. B. Orchard, as such assignee as last aforesaid, and the said G. F. Baker indorsed the said bill to the said J. H. Howard as in the said declaration mentioned, without having any right, title, or authority to indorse the same, and the said copartnership were not nor are the legal holders thereof. Verification.

Special demurrer, assigning for causes, that in the said plea no debt is stated on which the first-mentioned commission could legally have issued; that it does not appear by the said plea, that either of the said commissions was issued on the petition of any person to whom the said G. F. Baker was indebted, so that a commission of bankruptcy could issue; that no act of bankruptcy is stated whereon to ground either of the said commissions; that it is not in the said plea stated that the said G. F. Baker ever was twice, or once, a bankrupt; that the contents, dates, or purports of the said commissions, or the persons to whom they were respectively issued or directed, are not stated; that it is not in the said plea stated by whom, or under what authority, or when, the said G. F. Baker was ever adjudged to be a bankrupt; that the said commissions do not appear by the said plea to have issued under the Great Seal of the United Kingdom of Great Britain and Ireland; that the [619] said plea does not state the said G. F. Baker's conformity, on occasion of the said bankruptcies, to the statutes then in force concerning bankrupts; that the said plea does not state with sufficient certainty the certificates of conformity obtained by the said G. F. Baker; that no allowance or confirmation thereof is in the said plea stated; that it does not by the said plea appear that there were any creditors who had proved their debts under the second commission, or that they had not been paid 15s. in the pound, or that any debts due by the said G. F. Baker existed at the time of the said indorsement by him; that it does not by the said plea appear that the said bill of exchange in the declaration mentioned formed any part of the future estate and effects of the said G. F. Baker, nor how many or who were the assignees of the said G. F. Baker, nor where, or by whom, or how they were chosen, or who they were at the time of the said indorsement by the said G. F. Baker, or at the commencement of this suit; that the allegation in the said plea contained, that the said copartnership were not nor are the legal holders of the said bill of exchange, is too general and uncertain; that the said plea alleges no notice of the facts therein contained to the plaintiff, or to the said copartnership, or to the said J. H. Howard; that the said plea contains no allegation of the absence of consideration between any of the parties to the said bill of exchange; that it is not competent for the defendant to avail himself of the matters contained in the said plea; and that the plea is, in other respects, too general, informal, and defective.

Joinder in demurrer.

Byles, in support of the demurrer. In the first place, it is not competent to the defendant to set up the defence which this plea purports to make. Having accepted the bill, and made it payable to the order of Baker, he is precluded from denying in this manner Baker's authority to [620] put it into circulation by indorsing it. That

was decided in *Drayton v. Dale* (2 B. & Cr. 293; 3 D. & R. 534), where it was held that the maker of a promissory note, who had made it payable to A. B. or his order, was estopped from saying that A. B. had become bankrupt, whereby the title to indorse the note vested in his assignees, and thereby the indorsement by A. B. was void. The ground of the judgment in that case equally applies to the present. Bayley, J., said—"The defendant, by making such note, intimates to all persons that he considers A. B. capable of making an order sufficient to transfer the property in the note. The defence set up is, that although he has issued a security to the world, importing on the face of it that A. B. was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public; it is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such instrument, when he asserts by the instrument which he issues to the world, that the other has such power." The case of *Taylor v. Croker* (4 Esp. 187), there referred to, is also expressly in point. There a bill was drawn by two infants upon and accepted by the defendant, payable to their order; and Lord Ellenborough held, that inasmuch as the defendant had by the act of acceptance admitted that the infants were competent to indorse, he should not be permitted afterwards to say that they were incompetent. *Jones v. Darch* (4 Price, 300) is an authority to the same effect. So also, the acceptor of a bill, the drawing of which was a forgery with his knowledge, cannot set up the forgery as a defence: *Bass v. Olive* (4 M. & Sel. 13). In *Haly v. Lane* (2 Atk. 102), Lord Hardwicke held, that although a note given by a wife to her husband is void, yet if it is indorsed over by the husband, as between him and the indorsee it is good. There [621] is a case of *Barlow v. Bishop* (1 East, 432), which may appear to be inconsistent with these authorities, but when examined, it is clearly distinguishable. There a note was given to a married woman, the maker knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she had contracted with him in the course of a trade carried on by her in her own name, with her husband's consent; and it was held that the property in the note vested in the husband by the delivery to the wife, and that no interest, therefore, passed to her indorsee. But there, in the first place, it did not appear that it was an action by an innocent indorsee; secondly, the intention in giving the note was that she should sue in her own name; and lastly, the point of estoppel was never adverted to.

There are also other formal grounds of objection to the plea. First, it does not state that the bill in question was part of the bankrupt's estate, or that he had any beneficial interest in it. He might be a mere trustee of the bill. The defendant, therefore, has not brought himself within the terms of the act of Parliament, (6 Geo. 4, c. 16, s. 127), even if it is applicable. Secondly, the bankruptcy is not properly pleaded. The Bankrupt Act gives a general plea of the bankruptcy of a defendant; but in other cases the pleading ought to set forth all the facts which constitute the bankruptcy—the trading, the act of bankruptcy, the petitioning creditor's debt, the commission, and the adjudication. *Tully v. Sparks* (2 Ld. Raym. 1546, 1570). Thirdly, the assignment to the assignee ought to have been stated, so as to shew the mode in which he acquired the right to the bill. Fourthly, it is perfectly consistent with the allegations of the plea, that 15s. in the pound may have been paid under the second commission, before the indorsement of the bill by Baker. Neither does it shew that the debts to the creditors under that commission are still subsisting.

[622] Butt, contra. This plea is pleaded under the 127th section of the Bankrupt Act, 6 Geo. 4, c. 16, which enacts expressly, that if any person shall become bankrupt a second time, and obtain his certificate, unless his estate shall produce, after all charges, sufficient to pay every creditor under the second commission 15s. in the pound, his future estate and effects shall vest in the assignees under the second commission, who shall be entitled to seize the same in like manner as they might have seized property of which the bankrupt was possessed at the issuing of the commission. The words of this clause are essentially different from those of the former Bankrupt Act, 5 Geo. 2, c. 30, s. 9, which only said that under such circumstances the future effects of the bankrupt should be liable to the creditors. Under those words, the assignees had merely a right of claim, and unless they exercised it, the bankrupt might sue as a plaintiff, or indorse a bill: but under the present statute, the future effects, in the case provided for, absolutely vest in the assignees. The right to indorse this bill, therefore, had absolutely passed out of Baker, the bankrupt,

and his indorsement gave no title. The case of *Drayton v. Dale* was that of a bankrupt under a first commission, where he is in the same situation as a bankrupt under the second commission before the last statute, and may acquire property, or pass a title to a negotiable instrument, subject to the right of interference of the assignees. No doctrine of estoppel applies to such a case as this. If the bill had been in existence at the time when the second commission issued, Baker could not afterwards have indorsed it, having then no property in it, and the assignee might have recovered it in trover: *Young v. Rushworth* (8 Ad. & Ell. 470; 3 Nev. & P. 585). The principle of the case of *Barlow v. Bishop* is applicable here. In *Thomason v. Frere* (10 East, 418), it was held that the indorsement of a bill by two partners in a firm, [623] after acts of bankruptcy committed by them, to a creditor of the firm in part satisfaction of his debt, passed no interest, inasmuch as they had by relation ceased at the time of such indorsement to have any control over the joint stock as partners, and therefore could not bind the property either of their assignees or of their solvent partner. The doctrine of estoppel would equally have applied there as here. As soon as this bill was accepted and delivered to the bankrupt, it became the property of his assignee, and he only could indorse it. [Lord Abinger, C. B. How does the plea shew that it was the property of Baker?] When one party draws a bill on another, it is *prima facie* taken to be drawn on his own account, and their legal relation must be taken from the bill. But even if the bankrupt was a trustee of the bill in equity, he would be entitled to sue upon it at law. There is nothing to shew that it did not pass to his assignee. All the steps are pointed out which are sufficient to vest the property in him. And if it did so absolutely vest, it makes no difference that the indorsee took it without notice. In *Barlow v. Bishop* there was nothing on the face of the bill to shew that it was indorsed by a married woman, or that it was not taken *bonâ fide*. If Baker had ever had a title to indorse, which something afterwards occurred to defeat, then it might be necessary to aver notice; but here there was *ab origine* no title to indorse.

Secondly, the plea is sufficient in form, inasmuch as it follows the words of the act of Parliament; and it is for the other side to shew any matter which prevents its operation. The case of *Tully v. Sparks* applies only where the bankruptcy is technically to be insisted on as a defence. Here the statute makes it sufficient that the party shall have been a second time bankrupt, and obtained his certificate. [Lord Abinger, C. B. Unless where the act gives a short form of plea, the plea must set forth all the facts necessary to constitute the bankruptcy. The certi- [624]-ficate is no proof of the bankruptcy as against third persons.] Would it have been a good replication, that there was no sufficient act of bankruptcy? [Lord Abinger, C. B. Yes; because that would render the whole proceedings void. Where a party sets up the *jus tertii* to defeat his own contract, law and justice equally require that he should set forth all the facts.] With regard to the objection that there is no statement of the assignment, that is not made a ground of demurrer.

LORD ABINGER, C. B. I think, according to the precedents, the plea clearly ought to set forth all the proceedings, except where the statute gives a short form of plea. Before such a provision existed, it was necessary to do so in all cases. Here the defendant sets up the *jus tertii*, not a defence which would have been open to the bankrupt himself; he ought therefore to set forth all the circumstances of the bankruptcy. But I think also that Mr. Butt has not given any sufficient answer to the authorities cited by Mr. Byles upon the first point, in which, as it seems to me, there is great good sense. If the law were otherwise, what a convenience it would afford for parties, who were desirous to raise money upon bills on which they never meant to be liable, to get them drawn and indorsed by an uncertificated bankrupt, or one who had not paid 15s. in the pound under a second commission. I think the defendant is estopped from setting up such a defence. In *Barlow v. Bishop*, the plaintiff must be taken to have known the fact of the husband's property in the bill, and he, therefore, could not take an assignment of it from the wife. Upon the other point, however, I am clearly of opinion, that the defendant ought to have stated on the face of the plea all the facts shewing a valid bankruptcy. It is quite consistent with the plea as it stands, that the second commission was a fraudulent one, and all the creditors under it fraudulent creditors. The law now protects [625] all persons dealing with bankrupts without knowledge of the act of bankruptcy. What a singular contrast to that state of the law would it be if this plea were allowed; that is,

that a party, nine years after his bankruptcy and certificate, could not indorse a bill of exchange, so as to give a title to an innocent party dealing with him against the acceptor. I think that the defendant, who has undertaken to shew the invalidity of the plaintiff's title by reason of a better title in the assignee of his indorser, has not done so with the requisite degree of clearness, and therefore that the judgment must be for the plaintiff.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

KING v. BOWEN AND ANOTHER. Exch. of Pleas. June 4, 1841.—Declaration in assumpsit stated, that an action had been commenced by the plaintiff against T. C. for the recovery of 210l. 12s. 7d., alleged to be due from T. C. to the plaintiff on an account delivered to him by the plaintiff: and thereupon, in consideration that the plaintiff had consented to stay all proceedings in the said action, on security being given to him for the payment of such sum as might be found due from T. C. to the plaintiff on the said account, the plaintiff and T. C. having agreed that such account should be submitted to arbitration, the defendants agreed to pay the plaintiff such part of the said sum of 210l. 12s. 7d. as upon such arbitration should be found due from T. C. to the plaintiff. The declaration then alleged, that the action was submitted to the arbitration of two persons named, who accordingly certified that there was due from T. C. to the plaintiff the sum of £120; and that the costs amounted to a further sum of £93; but that neither T. C., nor the defendants, paid the same or any part thereof.—The plea set out the certificate of the arbitrators, in these terms:—"In pursuance of the within order, we make and publish our certificate, that there is now due from T. C. to the plaintiff, W. K., the sum of £120, which we order to be paid by the securities [the defendants] on the dates hereunder specified;" with a special traverse that the arbitrators made their certificate of and concerning the said matter in reference so submitted to them as aforesaid, modo et formâ.—Held, that the allegation in the declaration, that the subject-matter of the reference was the particular action against T. C., was not sustained by the production of the certificate, without evidence to shew that the arbitrators really adjudicated on the cause only; and that this objection was available under the traverse in the plea.

[S. C. 1 Dowl. (N. S.) 21; 10 L. J. Ex. 433.]

Assumpsit. The declaration stated, that heretofore, to wit, on &c., a certain action had been commenced in this Court by the plaintiff against one T. S. Cave for the recovery of the sum of 210l. 12s. 7d., alleged to be due [626] from the said T. S. Cave to the plaintiff upon an account before then delivered by the plaintiff to the said T. S. Cave, which action was then depending; and thereupon afterwards, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, had consented and agreed to stay all proceedings in the said action, on sufficient security being given to him for the payment of such sum of money as might be found to be due from the said T. S. Cave to the plaintiff on the said account, the plaintiff and the said T. S. Cave having agreed that such account should be submitted to arbitration, they the defendants agreed to pay to the plaintiff such part of the said sum of 210l. 12s. 7d., as upon such arbitration should be found to be due from the said T. S. Cave to the plaintiff. The declaration then alleged that, by a Judge's order, the said cause was submitted to the arbitration of H. B. and T. R. H., so as they should make and publish their certificate in writing on or before &c.; that they did make and publish their certificate within the time limited, and thereby certified that there was due from the said T. S. Cave to the plaintiff the sum of £120; that the costs of the cause and reference amounted to the further sum of 93l. 6s. 8d.; but that the said T. S. Cave did not pay to the plaintiff either of the said sums of £120 or 93l. 6s. 8d., amounting in the whole to the sum of 213l. 6s. 8d., or any part thereof; nor have the defendants, or either of them, paid the same or any part thereof, &c.

The plea set out the certificate of the arbitrators, which was in the following terms:—"In pursuance of the within order, we do hereby make and publish our certificate, that there is now due from the defendant T. S. Cave to the plaintiff W. King the sum of £120, which we direct and order to be paid by the securities, Mrs. Elizabeth Bowen

and Mr. M. H. Bellemois, on the dates hereunder specified," &c. [It then stated the days of payment, and the mode in which the costs were to be paid by the [627] parties; and the plea concluded thus: without this, that the said H. B. and T. R. H. did make their certificate in writing of and concerning the said matters in reference so submitted to them as aforesaid, in manner and form, &c.; concluding to the country. Issue thereon.

At the trial before Gurney, B., at the Middlesex Sittings in Easter Term, the plaintiff produced the order of reference, which corresponded with the statement of it in the declaration, and also the certificate of the arbitrators, in the terms set out in the plea: but he gave no evidence to shew that the account delivered by the plaintiff to T. S. Cave was the only matter adjudicated on by the arbitrators; and it was thereupon objected for the defendants, that the plaintiff must be nonsuited, the sum found to be due by the arbitrators not being shewn to be the sum for which the defendants had agreed to be bound, viz. the sum due on the account between T. S. Cave and the plaintiff. The learned Judge reserved the point, and the plaintiff had a verdict for 128l. 4s., leave being given to the defendants to move to enter a nonsuit, or a verdict for them.

E. V. Williams having obtained a rule accordingly.

Wordsworth now shewed cause, and contended that *prima facie* the certificate must be taken to apply to the matter which was alleged in the declaration to be the subject of the reference, viz. the account with Cave; but that at all events, there being no plea of non assumpsit on the record, the defendants were not at liberty to raise the objection.

E. V. Williams, *contra*. The defendants are entitled to enter a nonsuit. The plaintiff has declared on an alleged liability of the defendants to pay such sum as certain arbitrators should find to be due to the plaintiff, on the reference of a particular cause: and that declaration is not [628] supported by proof of a certificate which is not confined to the cause, but may have extended to other matters. The question is raised upon the special traverse in the plea, on which the plaintiff has joined issue.

LORD ABINGER, C. B. I think the rule must be absolute for entering a nonsuit. The declaration states that the plaintiff had consented and agreed to stay all proceedings in the action against Cave, on security being given him for the payment of such sum as should be found due by arbitrators upon a particular account between the plaintiff and Cave, which was to be submitted to arbitration; and it then alleges that the defendants agreed to pay the plaintiff such part of the account as should be found due on such arbitration. Then the plea sets out the certificate which has been made, and which is not confined to the particular account, but appears to be made on all matters in difference. Upon the production of the certificate, there appears to be a fatal variance; and as the plaintiff has not shewn by any extrinsic evidence that the arbitrators in reality only took the particular account into consideration, and that the certificate applies to that only, I think the defendants were entitled to succeed upon the traverse contained in their plea, and that the rule must be absolute to enter a nonsuit.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

[629] FRASER, Public Officer, &c. v. WELCH AND OTHERS. Exch. of Pleas. June 8, 1841.—To an action by the indorsee against the indorser of a bill of exchange, the defendant pleaded, that, after the indorsement to the plaintiff, and before the commencement of the suit, he, the plaintiff, indorsed and delivered the bill for value to certain persons, whose names are to the defendant unknown, and the defendant then became and now is liable to pay the sum in the said bill specified to the said persons to whom the said bill was so delivered, and who, from the time of such indorsement until and at and after the time when the same became due, and when this action was commenced, have been and are the holders thereof. Replication, that the said persons in the plea mentioned were not, when the action was commenced, the holders of the said bill, *modo et formâ*:—Held, on special demurrer, that the replication was good; although the more scientific mode of replying to such a plea would have been, "that, at the time of the commencement of the suit, the plaintiff was the holder of the bill, without this, that the persons mentioned in the plea were at that time the holders thereof."—Semble, that the plea would have been bad on special demurrer, as

being an argumentative denial that the plaintiff was the holder of the bill at the time the action was commenced.

[S. C. 9 Dowl. P. C. 754; 10 L. J. Ex. 378.]

Assumpsit on a bill of exchange drawn by the defendants upon and accepted by the Directors of the "Pentwyn and Golynos Iron and Coal Company," and indorsed by the defendants to the Monmouthshire and Glamorganshire Banking Company, who sued by the plaintiff, their registered public officer.

Plea, that, after the said bill of exchange was so indorsed to the said Banking Company, and before the same became due, and before the commencement of this suit, to wit, on &c., the said Banking Company indorsed and delivered the said bill of exchange, (the same being payable to order and transferable by indorsement), upon a good and sufficient consideration, to persons, to wit, certain customers of the said Banking Company, whose names are to the defendants unknown, and the defendants then became and were and now are liable to pay the said sum in the said bill specified to the said persons to whom the said bill was so indorsed and delivered as in this plea aforesaid, and who, it is said, are about to take proceedings on the same bill, and who, from the time of such indorsement, until and at and after the time when the same bill became due, and when this action was commenced, have been and are the holders of the same bill. Verification.

Replication, that the said persons in the plea mentioned were not, when this action was commenced, the holders of the said bill of exchange, in manner and form as the defendants have above alleged.

[630] Special demurrer, assigning for causes, that either the replication amounts to an argumentative denial of an indorsement over of the bill by the Banking Company, and is therefore bad in not putting the fact in issue by a direct traverse; or it admits the indorsement, and is therefore bad in not shewing a retransfer to the Banking Company of the bill before the commencement of the suit; and the replication is bad in form, for not distinctly and clearly shewing whether it is meant to operate by way of confession and avoidance of the alleged indorsement by the Banking Company, or by way of denial thereof; that it is perfectly consistent with the replication, that some person other than the said Banking Company was, at the time of the commencement of the suit, the holder of the bill as indorsee or transferee of the same, either from the plaintiff or from the persons in the plea mentioned as indorsees of the plaintiff; that the plaintiff ought either to have traversed the indorsement over of the bill by the said Banking Company, or, admitting the same, to have shewn a transfer to the Banking Company before the commencement of the action.

Joinder in demurrer.

W. H. Watson, in support of the demurrer. The replication is insufficient, as it raises an immaterial issue. The question which it involves is, whether the persons mentioned in the plea were or were not known to the defendants; and if it should turn out at the trial that the holders of the bill were persons known to the defendants, the plaintiffs would succeed, although they might be persons who had no right to sue upon the bill. In *Basan v. Arnold* (6 M. & W. 559), which was an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that, after the indorsement and before the commencement [631] of the suit, the plaintiff indorsed and delivered the bill to a person, whose name is to the defendant unknown, and the defendant then became and still is liable to pay the amount to the said person to whom it was so indorsed, and who, from the time of that indorsement hitherto, has been and is the holder thereof; to which the plaintiff replied, that, at the time of the commencement of the suit, the plaintiff was and still is the holder of the said bill; without this, that any other person is the holder thereof, in manner and form as in that plea alleged; and it was held that the replication was bad, as the traverse was too large, and put in issue the plaintiff's being the holder of the bill, not only at the time of the commencement of the suit, but also at the time of the plea pleaded, which was immaterial. The only material question here is, whether the plaintiff was the holder of the bill at the time of the action brought, which is not raised by this replication. It is perfectly consistent with the issue here raised that the bill is outstanding.

Erle, contrâ. This plea is framed for the purpose of rendering every replication that can be pleaded to it bad on demurrer. The declaration is founded on this, that the Banking Company were the holders of the bill at the time of the commencement

of the action, which sufficiently shews a right of action in them. Then, in order to defeat that right, the plea states, that, after the bill was indorsed to the Banking Company, they indorsed it to persons to the defendants unknown, who were the holders of it when it became due, and when the action was commenced. Perhaps the plea is good, and if so, this replication is the proper one. The essential fact in the plea is, that the unknown persons are the holders of the bill, and the defendants having chosen that question as the one by which the event of the cause is to be determined, the plaintiff was bound either to admit or traverse it. [Alderson, B. The [632] plaintiff might have demurred specially, on the ground that the plea is only an argumentative denial of the plaintiff's being the holder of the bill. It is however substantially a plea that the plaintiff was not the holder of the bill at the time of the action brought.] In *Phillips v. May*, which occurred in Easter Term, 1840, this Court were of opinion that this form of replication was good.^(a) [Alderson, B. Suppose the jury should find that the bill was not outstanding in the hands of persons unknown to the defendants, but that it was outstanding in the hands of a third person who was known, which way ought the verdict in that case to be entered?] It must be entered for the plaintiff. If the plea had alleged that the bill was in the hands of A., and it turns out to be in the hands of B., the defendant must suffer the consequences of having rested his defence upon an immaterial allegation which is false in fact. [Alderson, B. There is this difficulty in the case: the declaration states the drawing and accepting of the [633] bill, and the indorsement to the banking company, who are the last persons stated on the face of the declaration to be the indorsers, and it is thence inferred that they were the holders of the bill at the time of the action brought; but it appears on the face of the plea that there is a subsequent indorsement, which is not denied by the replication. Now, supposing that issue to be found for the plaintiff, how could he be entitled to judgment on the whole record, when it is admitted by the pleadings, that a subsequent indorsee was the holder of the bill at the time of the commencement of the suit?] The material fact upon which the defendants have chosen to rely is, that the bill was indorsed to persons unknown to the defendants, who were the holders thereof, and that being found against them, the whole plea fails. Where a plea alleges several facts, and issue is taken on any one of them, and it is found against the defendant, the rest become immaterial, and are as if they were struck out of the record. The material fact here is, that the unknown persons were the holders of the bill; that is denied by the replication in the only way in which it could be denied, for it would have been improper to have replied simply that the plaintiff was the holder.

Watson, in reply. The plea in substance is, that the bill was indorsed over and was outstanding at the time of the action brought. The replication should either have denied that fact, or confessed and admitted the indorsement as alleged, and avoided it by shewing that the bill was returned to the plaintiff before action brought. This replication involves an immaterial issue, because it is consistent with it that the bill is outstanding in the hands of a third person. The plaintiff might have replied

(a) That case was cited from the Monthly Law Magazine, vol. 8, Notes of Cases, p. 27, and is there reported as follows: "To a declaration by the drawer of a bill of exchange against the acceptor thereof, the defendant pleaded, that the bill was indorsed by the plaintiff, before the commencement of the suit, to a person to the defendant unknown, who, at the time of the commencement of the suit, was the holder of the said bill. Replication, that the bill was indorsed to one R. H., who presented it to the defendant, who refused to pay it, whereupon R. H. then returned it to the plaintiff as the drawer thereof, who paid it, and became the holder of it, and entitled to the money specified therein; absque hoc that a person unknown to the defendant, at the time of the commencement of the suit, was the holder of the bill modo et formâ, as in the plea alleged:—Held, on demurrer to this replication, that the special traverse was immaterial; that the proper replication to such a plea would have been, 'that the said person in the said plea mentioned was not the holder of the bill at the time of the commencement of the suit.' Humfrey, for the plaintiff; Bayley, for the defendant."

The case was not fully argued, the Court recommending an amendment, which was acceded to: they however threw out a suggestion whether a replication in the form above stated would not be good.

that he was the holder, which would have been good without the *absque hoc* that the person unknown was not the holder. [Alderson, B. The proper mode of replying to this plea would have been by a special inducement, that the Bank-[634]-ing Company were the holders of the bill at the time of the commencement of the action, concluding with a special traverse that the persons unknown were at that time the holders thereof.] *Burroughs v. Hodgson* (9 Ad. & E. 499; 1 Per. & D. 328), shews that a traverse must be so taken as to raise a material issue, and one which will be conclusive, whether found for the plaintiff or the defendant. The true way of replying would have been, that the plaintiff was the holder of the bill, without this, that the persons unknown mentioned in the plea were the holders thereof.

LORD ABINGER, C. B. By the ingenuity of special pleaders, the Courts are sometimes placed in a difficulty in coming to a correct conclusion in the administration of justice; and when such is the case, we can only dispose of the matter in the way which seems to us to be most in accordance with the established rules of pleading. Whoever really understands the important objects of pleading, will always appreciate it as a most valuable mode of furthering the administration of justice, though cases like the present are calculated to create in the minds of persons unacquainted with the science but a mean opinion of its value. In the present case, I am inclined to think that the replication is good. I consider the declaration as substantially stating that the plaintiff was the holder of the bill at the time of the commencement of the action. It does so in this way: it alleges the drawing and acceptance of the bill, that it came to the hands of the plaintiff by indorsement, and that it was afterwards dishonoured: that is, *primâ facie*, a statement that the plaintiff was the holder of the bill when the action was commenced, and that the promise of the defendant was to pay him the amount. That being the case, the plaintiff has a clear title to recover, unless it appears that at the time of the action brought some other [635] person was the holder. The bill may have changed hands several times after it was dishonoured; but if the plaintiff was the holder at the time of action brought, that is enough. Possibly the holder of the bill at the time it was dishonoured may have returned it to the person from whom he had it, and so it may have come back to the plaintiff. Now the defendant might have pleaded, that, at the time of the commencement of the suit, the plaintiff was not the holder of the bill; instead of which his plea is, that the plaintiff indorsed the bill to persons unknown, who at the commencement of the action were the holders thereof. Now, provided it appears that the bill was indorsed to some other person, who at the time of action brought was the holder of it, the fact of the name being unknown is immaterial. The material averment in the plea then is, that the persons described as unknown were the holders of the bill at the time of action brought. The plaintiff in his replication traverses that single fact, that the persons in the plea mentioned as customers of the Banking Company were the holders of the bill at the commencement of the suit. It was contended by Mr. Watson, that if it appeared at the trial that the bill was in the hands of another person whose name was known to the defendant, the plaintiff would be entitled to a verdict, though he had no right to recover on the bill. I do not think that would be so, because the substance of the issue is, not whether the bill was in the hands of persons unknown, but whether or not any other person than the plaintiff was the holder of it when the action was commenced. Whether or not the name was known to the defendant is an immaterial fact; and therefore, if it be shewn that any other person was the holder of the bill, the substance of the issue is proved. I think Mr. Erle's argument is correct, that if a plaintiff in his replication selects one of many facts in a plea for the purpose of trying the issue, and it is found for him, the other facts must be considered as expunged from the re-[636]-cord. The allegation in this plea is, that the bill was in the hands of a customer of the plaintiff, whose name was unknown to the defendant; and the plaintiff's reply in substance is, that the bill was not in the hands of any customer of his. Now the defendant, having put his defence upon that issue, has no right to take advantage of his own mode of tendering it. This case is not similar to that referred to, of an issue joined as to whether an award was made on the particular day alleged, because there the time of making the award was immaterial; but here the allegation that the bill was in the hands of another person at the time of action brought is material. If the plaintiff had replied that he was the holder of the bill at the time of action brought, without this, that the persons mentioned in the plea as unknown to the defendant, or any other person, were at that time the holders

thereof, I am disposed to think that, according to the strict rules of pleading, the replication would have been good.

ALDERSON, B. I think the replication is good. If the defendant chooses to state in his plea the fact that there has been an indorsement of the bill to a person unknown, who is the holder thereof, the plaintiff may traverse that fact in the terms in which it is alleged. I do not see that it can make any difference whether the person was known or not; because the material averment is, that the person stated to be unknown was the holder of the bill when the action was brought. If inconvenience results to the defendants from raising an issue as to the knowledge of the person holding the bill, that is their own fault. If the defendants had pleaded that A. B. was the holder of the bill, and the plaintiff had denied that A. B. was the holder, and it had turned out that A. B. was not the holder, but that some one else was, the defendants would have failed altogether. The more scientific mode of replying would undoubtedly have been that suggested by my Lord Chief [637] Baron, namely, by stating, as matter of inducement, that the plaintiff, at the time of action brought, was the holder of the bill, and concluding with a special traverse that the person mentioned in the plea was the holder thereof. If the replication had merely alleged that the plaintiff was the holder of the bill, that would have been bad, as being an argumentative denial that the person unknown was the holder; and it was to meet a difficulty of this description, that pleaders in former times adopted the form of a special traverse, in which they stated the affirmative matter by way of inducement, and added the negative in the words of the plea. Substantially this replication is the same, and the formal objection cannot be taken advantage of on this demurrer.

GURNEY, B., concurred.

ROLFE, B. The substantial averment in this plea is, that the plaintiff indorsed away the bill, and that it is outstanding in the hands of a third person; the plaintiff takes issue upon that; and the question therefore is, whether the bill was outstanding at the commencement of the suit. The plaintiff takes issue upon that which is a substantial part of the defence. I concur in the argument of Mr. Erle, that if one material fact is found against the defendants, the defence fails altogether.

Judgment for the plaintiff.

[638] HUTCHINSON v. HUMBERT. Exch. of Pleas. June 10, 1841.—A judge's order was drawn up by consent, that, upon payment of the debt and costs on a certain day, all further proceedings should be stayed; but in default of payment, the plaintiff should be at liberty to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriffs' poundage, officers' fees, and all other incidental expenses. Default having been made, and execution issued:—Held, that the sheriff could not levy, nor was the defendant liable to pay, as incidental expenses, the costs of a rule to return the writ.

[S. C. 1 Dowl. (N. S.) 78; 10 L. J. Ex. 418; 5 Jur. 732.]

A Judge's order had been drawn up by consent of the parties to this cause, that, upon payment of the debt and costs on the 30th of April, 1841, all further proceedings should be stayed, but in default of payment, that the plaintiff should be at liberty to sign judgment for the debt and costs, and to levy the same, together with the costs of execution, sheriffs' poundage, officers' fees, "and all other incidental expenses." Default having been made in the payment, judgment was signed, and a writ of fieri facias issued into Middlesex, which was returned nulla bona. A testatum fieri facias was then issued into London, under which a seizure was made; but the sheriffs returned that the goods remained in their hands for want of buyers, and a writ of venditioni exponas was thereupon issued. Each of these writs was made returnable "immediately after the execution thereof," and was indorsed to levy, in addition to the amount of the judgment, a certain sum for the costs of execution, besides sheriffs' poundage, officers' fees, and all other incidental expenses. A rule to return each of the above writs was taken out and served on the sheriffs. The plaintiff claimed, over and above the debt for which the judgment was signed and the costs of the several writs, the costs of the above rules to return the writs, which the sheriffs thought they were not authorized to levy.

Lush now moved for a rule, calling on the sheriffs of London, or the defendant, to

shew cause why those costs should not be paid to the plaintiff out of the monies levied. It is clear from the terms of the order, that the intention of the parties was to indemnify the plaintiff against all costs and expenses which he might properly and necessarily incur for the recovery of his debt. The writs being returnable immediately after execution, it was necessary to rule the [639] sheriff to return them, in order to compel him to execute them, and to fix the date of the return. That is the invariable practice, and the Courts have so far recognised it as to allow the sheriff a fee upon the lodging of such rule in the office.^(a) Those rules may therefore be considered as part of the execution, and the costs of them were therefore necessarily incurred. The expression "incidental expenses" can have no meaning, unless it be held to include such expenses as these. [Alderson, B. May it not mean the expenses which the sheriff is put to in keeping possession of the goods and selling?] Those the sheriff had already a right to levy by statute. The clause as to incidental expenses is clearly inserted for the benefit of the plaintiff, not of the sheriff. The latter is now in all cases entitled to his lawful expenses. [Gurney, B. How can the defendant be called upon to pay the costs of compelling the sheriff to do his duty?] By consenting to the terms of the order, the defendant has undertaken that those costs shall be levied in return for the indulgence granted him. [Alderson, B. I do not see how you can call upon the sheriff to levy a sum which is not indorsed upon the writ.] The amount could not be indorsed upon the writ, as it was not known when the writ issued that the rules would be required.

ALDERSON, B. Unless these expenses are incidental to the execution, the sheriff has no power to levy them. I do not see how they can be considered as incidental to the execution. If the sheriff had levied more than the amount of the debt and costs and the expenses of the execution, he would be liable to be called upon to pay back the surplus to the defendant. I do not see how the defendant can be made to pay them unless he enters into a specific undertaking to that effect; he is bound only to pay such expenses as the sheriff is authorized to levy.

[640] GURNEY, B. The Master informs us that the practice is not to require defendants to pay costs of this description.

Rule refused.

MONDEL v. STEELE. Exch. of Pleas. June 10, 1841.—The venue may be changed in an action on a written contract which is to be performed in a particular place, and for the breach of which the cause of action arises wholly in one county; and semble, that it may be so changed in all actions on contracts, though in writing, except on specialties, bills, and notes.

[S. C. 1 Dowl. (N. S.) 155; 11 L. J. Ex. 91. See p. 300, ante, and p. 858, post.]

This was an action of assumpsit upon a contract to build a ship for the plaintiff at Liverpool; and it appeared upon the face of the declaration, that the contract declared on was in writing. The venue was laid in London, and the defendant changed it to Liverpool upon the common affidavit. An order had been made by Patteson, J., at chambers, for setting aside the rule to change the venue, on the ground, that, the declaration being upon a contract in writing, the venue could not be changed on the common affidavit. A rule nisi having been obtained by Cresswell to set aside that order,

Cleasby shewed cause in Easter Term. The venue cannot be changed upon the common affidavit, where the action is upon a written instrument. It is true, that, in *Slade v. Trew* (1 C. & M. 384), it was changed in an action upon a written agreement to pay a sum of money on a day certain, and if not then paid, to secure the same by mortgage. But there the action could not be said to be brought upon the written instrument: the writing was more in the nature of an admission that the sum mentioned would be payable on the day named. It was like the case of an I O U, in which, though the instrument is in writing, it has always been usual to permit the venue to be changed: *Roberts v. Wright* (1 Tyr. 532; 1 Cr. & J. 547). In

(a) See the table of fees made pursuant to 1 Viet. c. 55.

neither of those cases does the declaration appear to have been framed upon the written [641] instrument: indeed, in the last named, it could not be so. In *Morrice v. Hurry* (7 Taunt. 306), the Court refused to change the venue in an action of assumption upon a charterparty; and in *Whitburn v. Staines* (2 Bos. & P. 355), they refused to change it in an action on an award, though the declaration contained the common counts. With respect to instruments under seal, the reason given for not changing the venue is, that they are bona notabilia where the deed is; but that cannot be the true ground, for the venue cannot be changed in actions upon bills of exchange, with respect to which a different rule prevails as to where they are bona notabilia. The dictum of Bayley, B., in *Roberts v. Wright*, "that the Court will not refuse to change the venue upon every written instrument not under seal, though it will not be changed in an action on a promissory note or bill of exchange, unless special ground be shewn on affidavit," must not be taken literally, for it would extend to charterparties and policies of insurance, in which it has been held that the venue cannot be changed. [Parke, B. The 6 Ric. 2, c. 2, abated the writ where it appeared that the contract was made in a different county than that laid in the declaration. After the passing of the 4 Hen. 4, c. 18, it appears to have been the practice to swear attornies as to the venue being laid in the county in which the contract was made (see *Att.-Gen. v. Lord Churchill*, 8 M. & W. 193). Then there was a rule of Court obliging parties so to lay the venue. According to Blackstone (3 Comm. 294), the practice of changing the venue first began in the reign of James the First.]

Cresswell, in support of the rule. It is difficult to reconcile the cases with any principle. A bond is a debt every where, and so also is a bill of exchange or promissory note: the person liable upon those instruments contracts [642] to pay in one place as well as another, and no locality can attach to them; therefore, the venue cannot be changed, because the defendant cannot properly say that the cause of action arose in one place more than another. Another class of cases is that of policies of assurance and charter-parties; but there, if the contract be made or is to be performed out of the kingdom, it cannot be said to belong to any particular county, and one can understand why the venue should not be carried by the defendant to any particular county. The present case is a contract to build a ship at Liverpool, and as the contract must be performed there, it is equally local in its nature with any case that can be put. The cases cited on the other side, in which the Court refused to allow the venue to be changed, are distinguishable, for in none of them was the contract to be performed in a particular place.

Cur. adv. vult.

The judgment of the Court was now delivered by

PAIKE, B. In this case my Brother Patteson made an order setting aside a rule to change the venue on the common affidavit, in an action on a written contract to build a ship for the plaintiff at Liverpool. It was stated that the learned Judge intimated his opinion, after looking through the cases, that the result of them appeared to be, that the venue could not be changed in any action on a contract appearing by the declaration to be in writing. A rule nisi was obtained to set aside this order, and in the course of the last term the case was fully argued, and the several authorities brought before us; and we are of opinion that in this case the venue may be changed, and that upon the common affidavit, and that this rule ought to be absolute.

The history of the practice of changing the venue is given by Blackstone, J., in 2 Bl. 1032. It began as early as the reign of James I., and was founded on the equity of the [643] statutes 6 Rich. 2, c. 2, and 4 Hen. 4, c. 18, which statutes were passed in order to confine actions of a transitory nature to their own counties. The first exception to the right which the defendant has to change the venue, was in the cases of specialties, which have their binding effect by virtue of the instrument alone, and are bona notabilia where they happen to be. Bills of exchange and promissory notes were afterwards put on the same footing; presumably, because they were considered as being in the nature of specialties, for in *Holcroft v. Collwest*, (1737), in the K. B. (Andr. 65), Chapple, J., assigned that as one ground for refusing to change the venue; and in *Pinkney v. Collins* (1 T. R. 571), Gibbs stated arguendo, that the reason of the exception as to bills and notes was, that they were bona notabilia where they happened to be. This was certainly a mistake (*Yeomans v. Bradshaw*, Carth. 373, 8 W. 3), though it may have been the reason for the practice; but on whatever ground it has been adopted, the practice has certainly been established for more than a century

in C. P., but for a less time (*d*) in K. B., not to allow the venue to be changed in actions on specialties, bills of exchange, or notes. But the instances of exempting plaintiffs in actions of assumpsit on other written instruments from the obligation of suing in the proper county, are comparatively few and recent. Only two have been cited. In one, *Whitburn v. Staines* (2 Bos. & P. 355), the Court seems to have considered that in an action of assumpsit on an award, the venue could not be changed; but the point was not decided, for the Court offered to grant a rule. In *Morrice v. Hurry* (7 Taunt. 306), the Court of Common Pleas, on the authority of the last-mentioned case, and apparently without much argument, held that the same rule must prevail in an action on a charter-party. But in the case of *Slade v. [644] Trew* (1 C. & M. 584), in this Court, in the year 1832, the venue was changed on a written instrument, containing a promise to pay to the plaintiff; and Lord Lyndhurst stated, "that the rule was, that the venue could not be changed in actions on instruments under seal, but that there were many instances in which the venue has been changed in actions on written contracts." In *Roberts v. Wright* (1 C. & J. 547; 1 Tyr. 532), the venue was changed on an I O U. Whether in both or either of these cases the declaration stated the instrument to be in writing, does not appear; probably not: but that circumstance appears to us to make no other difference than this—that an affidavit is thereby rendered necessary of the nature of the action, in order to discharge the rule to change the venue, which is not the case where the instrument appears on the face of the declaration to be in writing.

In this state of the authorities, we think that it cannot be laid down as a general proposition that the venue is not to be changed in actions on contracts appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to a general rule, which, in conformity with the statute law, is, that actions should be tried where the causes of action arise; and the exceptions to that rule should not be too readily extended. We think that in all actions on contracts, though in writing, except on specialties, bills, and notes, the venue may be changed upon the usual affidavit being made. At all events, it may be changed in an action on such a contract as this, which is to be performed, not any where, but in a particular place, and for the breach of which the cause of action arises wholly in one county. We are therefore of opinion that the rule must be absolute.

Rule absolute.

[645] *WEBB v. JAMES AND OTHERS.* Exch. of Pleas. June 11, 1841.—The stat. 8 & 9 Will. 3, c. 11, s. 8, does not authorize the assignment of breaches in a replication which traverses a material averment in the plea.—In debt on bond, the defendant, after setting out the condition of the bond on oyer, pleaded performance of part of the condition only, and matter of excuse for non-performance of the residue:—Held, that the replication, which commenced by assigning a breach which would have been a good answer to the plea at common law, and then, as a necessary introduction to the assignment of other breaches, proceeded to traverse the matter of excuse, was bad, on the ground that the statute does not authorize any double pleading, except the multiplication of such breaches as could have been properly assigned at common law:—Held, also, that a replication traversing the matter of excuse, though affirmative, properly concluded to the country, without assigning a breach.

[S. C. 1 Dowl. (N. S.) 36; 11 L. J. Ex. 38 For proceedings on demurrer, see 7 M. & W. 279; 151 E. R. 771 (with note).]

Debt on bond. The defendants craved oyer of the bond, which was set out, and was as follows:—"Know all men by these presents, that we, Henry James, of the county of the borough of Carmarthen, victualler, William Morgan, of the same place, currier, and John Lewis, of the same place, timber-merchant, are jointly and severally held and firmly bound to Thomas Taylor Webb, of &c., the treasurer appointed by the commissioners acting under and by virtue of an act made and passed in the 32nd year of the reign of his late Majesty King George the Third, intituled, &c., in the

penal sum of £250, to be paid to the said Thomas Taylor Webb, as such treasurer as aforesaid, and his successors for the time being; for which payment to be well and faithfully made, we bind ourselves jointly, and each of us bindeth himself severally, and our and each of our heirs, executors, and administrators, firmly, by these presents, sealed, &c." The defendants also craved oyer of the condition of the bond, which was as follows:—"Whereas, in and by the above-mentioned act, it was amongst other things enacted, that the commissioners therein mentioned, or any five or more of them, should and might from time to time nominate, constitute, and appoint one or more treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such collectors of the rates thereafter mentioned, and such other officers as they should find necessary for the execution of the said act, and might from time to time remove and displace all or any of them, and nominate and appoint such other person or persons in the room of him or them who should be so removed; and that the said commissioners should and might, and they were thereby authorized and required [646] to take such security from time to time, for the due execution of the said offices respectively, as the said commissioners should think proper: And whereas the said Henry James hath been duly elected and appointed a collector of the rates due and payable under and by virtue of the said act, and hath been called upon to give security for the due performance of the said office of collector of the rates: now the condition of the above-written obligation is such, that if the above-bounden Henry James shall from time to time and at all times during the continuance of the said appointment, or of any future appointment or appointments of him as collector as aforesaid, well and faithfully collect and get in all such rates as he may be directed to demand and obtain by virtue of his said office, and do and shall deliver to the said treasurer all books and papers, and a true and perfect account in writing of all matters and things committed to his charge by virtue of the hereinbefore recited act, and also of all monies which shall have been by him received by virtue and for the purposes of the said act, and shall and do pay all such monies as shall have been received by him to the said Thomas Taylor Webb, or his successors as treasurers for the time being, acting by virtue of the said act, relative to the collectorship of the said rates; then this obligation to be void, or otherwise to be and remain in full force and effect." The defendants then pleaded—

First, non est factum.

Secondly, that there was not any other or future appointment of him the said Henry James, as collector as aforesaid, except the appointment in the condition mentioned; and that he did from time to time and at all times during the continuance of the said appointment in the said condition mentioned, well and faithfully collect all such rates as he was directed to demand and obtain by virtue of his said office, and did deliver to the said treasurer all books and papers, and a true and perfect account in writing of all matters and things committed to his charge by [647] virtue of the act recited in the said condition, and also of all monies which were by him received by virtue and for the purposes of the said act, and did pay all such monies to the said T. T. Webb, according to the said condition. Verification.

Thirdly, the defendants say, that there was not any other or future appointment of him the said Henry James as collector as aforesaid, except the said appointment in the said condition mentioned; and that during the continuance of the said appointment, no rate was made or in any way existed, which he the said Henry James could legally, or according to law, collect and get in, or could legally, or according to law, demand or obtain by virtue of his said offices; and that he did not at any time during the continuance of his said appointment legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates; and that he did from time to time, during the continuance of the said appointment, deliver to the said treasurer all books and papers, and a true and perfect account in writing, of all matters and things committed to his charge by virtue of the act recited in the said condition. Verification.

Replication to the first plea, joinder in issue; and to the second plea, that the said Henry James did not, during the continuance of the said appointment, deliver to the said treasurer a true and perfect account in writing of all the monies which were by him received by virtue and for the purposes of the said act in the said writing obligatory mentioned, and in the said condition referred to; but on the contrary thereof, the plaintiff says, that the said Henry James continued to be and to act as

such collector as aforesaid, under and by virtue of his said appointment in the said condition mentioned, and at the time of making the said writing obligatory existing, for a long time, to wit, from the 18th of March, 1838, to the 7th of March, 1839; and divers sums of money, amounting in the whole to a certain large sum, to wit, the sum of £1000, were, during [648] the continuance of the said appointment of the said Henry James, and after the making of the said writing obligatory, to wit, on &c., and on divers other days and times between that day and the said 7th day of March 1839, received by the said Henry James, as such collector as aforesaid, and by virtue and for the purposes of the said act: yet the said Henry James did not deliver to the said plaintiff, who, during all the time aforesaid was, and thence hitherto hath been, such treasurer as aforesaid, any account of the said monies so by him the said Henry James received. The replication then assigned three other breaches. The second was, that there was a subsequent appointment after the expiration of the first, under which the said Henry James acted from the 7th of March, 1839, to the 1st of January, 1840, and received monies amounting to the sum of £1000; yet that he delivered no account of the same. The third was, that he did not pay over all monies received by him to the plaintiff according to the condition, but on the contrary, divers sums of money, amounting &c., were, during the continuance of the last-mentioned appointment, received by him, which he did not pay over. And the fourth was, that there was a subsequent appointment of James, during which he received money and did not pay it over; concluding with a verification.

Replication to the third plea, that there was another and future appointment of the said Henry James as collector as aforesaid, besides and subsequent to the said appointment in the said condition mentioned; that is to say, a certain appointment of the said Henry James as such collector as aforesaid, made, to wit, on the 7th day of March, 1839, by more than five, to wit, by seven of the said commissioners as in the said act mentioned; concluding to the country.

Special demurrer to the replication to the second plea, assigning the following causes: that the plaintiff has not only assigned or suggested several breaches of the con-[649]-dition by four distinct assignments, as though he were thereby pleading in pursuance of the statute 8 & 9 W. 3, but also, in course of the third and fourth of those assignments respectively, has severally pleaded a matter wholly different in its nature from such assignments, namely, that there was a future appointment besides the appointment in the condition mentioned, which is inconsistent with the averment in the second plea that there was no such future appointment, and is in effect a traverse of the same; whereas, by the proper rule of pleading, if the plaintiff in his replication denies the truth of this averment in the second plea, or pleads matters inconsistent therewith, he should have pleaded in denial or traversed it by his replication, and, after an issue joined on that matter, he should have proceeded to suggest breaches on the record pursuant to the statute. And that the plaintiff cannot by law incorporate such denial or traverse, and such suggestion or assignment of breaches, in one replication, as he has in effect attempted to do. And that if the replication is to be regarded as a denial or traverse at common law of the averment in the second plea, that there was no other or future appointment, such replication is double, by reason of also traversing the other material allegations in the said plea, namely, the delivery of true accounts and payments over of all monies according to the condition of the bond; and that if the said replication is to be regarded merely as a replication assigning several breaches under the statute, it is also double in this, that although the statute allows several breaches to be assigned by the plaintiff, it does not allow him to assign several breaches by his replication, and also in the same replication to deny a material allegation in the plea, or to plead a matter inconsistent therewith; and further, that the allegation in the second and fourth assignments of breaches of the other and future appointments of the said Henry James, being inconsistent with the material allegation [650] in the second plea, that there was no such appointment, the plaintiff was bound to traverse it, which if he has not done in this replication, it is therefore bad; but if he has in effect so done, then the replication is bad by reason of incorporating such traverse with the assignment or suggestion of breaches under the statute, and for concluding the same with a verification, and not to the country.

The defendant also demurred specially to the replication to the third plea, on the ground that it ought to have concluded with a verification, and not to the country.

Joinder in demurrer.

E. V. Williams, in support of the demurrer. The objection to the replication to the second plea is, that it traverses the averment in the plea, that there was no other or future appointment, and also assigns breaches, which are alleged to have occurred under a future appointment. The plaintiff should have traversed the averment in the plea, and if that were found for him, he might then have suggested breaches on the record. Before the passing of the stat. 8 & 9 Will. 3, c. 11, s. 8, in an action on a bond, subject to a condition, if the defendant pleaded a plea, and the plea and the answer to it were of such a nature that the plaintiff could reply by traversing some allegation in the plea, without assigning a breach of the condition, he did so; and if the traverse was found for him, he had judgment in the whole sum in which the defendant was bound; as, for instance, where there was a plea of *non est factum*, or a release, or that the performance had become impossible by the act of God, or of law, or of the obligee. But there were certain pleas which the plaintiff could not traverse without assigning a breach, as, for instance, the plea of *non damnificatus*. In such cases the plaintiff was compelled to assign a breach of the condition: he could, however, assign but one; if he assigned more, the pleading was bad for duplicity; because, if he proved but one [651] breach, he had damages for the whole sum. This being so, the stat. 8 & 9 Will. 3, c. 11, s. 8, was passed. But the rules of pleading remain the same, except so far as they were altered by the terms and effect of the statute. Now the effect of the statute is, that where the plea is such that, at common law, the plaintiff must have assigned a breach in his replication—for instance, in the case of a plea of general performance—he may now assign as many breaches as he pleases; and though he has judgment for the whole, he can only take out execution to the amount of the damages assessed on such breaches. But what is to be done when the plea contains an allegation which the plaintiff wishes to traverse, and which if he had traversed at common law he need not have assigned a breach, such as *non est factum*? The statute does not provide for such a case in express terms; for the cases contemplated are obviously confined to those where the plaintiff could have assigned breaches at common law, or where judgment is given for the plaintiff by default. This gave rise to doubts (see 1 Wms. Saund. 586) as to the proper course to be pursued; but those doubts were cleared up by the case of *Ethersey v. Jackson* (8 T. R. 255), which decided that the proper course is to traverse the plea, and suggest breaches on the roll by a separate suggestion. The condition of the bond was there set out on oyer. Suppose the defendant had there pleaded a release or an excuse for non-performance, the plaintiff must, on the principle of that decision, have traversed the matter of fact, and entered a separate suggestion of breaches: *Honfray v. Rigby* (5 M. & Selw. 60). He surely could not have denied the release by his replication, and in the same replication assigned breaches, and concluded the whole to the Court, instead of concluding with a traverse to the country. *De La Rue v. Stewart* (2 N. R. 362). This case is the same in principle [652]—for it can hardly make any difference what the particular traverse taken on the plea is, if it be of the kind of traverse which would have been taken at common law without assigning a breach. Had this case been as at common law, the plaintiff, by traversing that there was no future appointment, completely answers the plea, and, if he had succeeded on that plea, would have had judgment for the whole penalty. It does not lie in the plaintiff to deny this; but it is unimportant to the defendant whether he does or not; for if he does, the replication to the third plea would be bad on general demurrer, for not assigning a breach. Assuming, then, that the case does not fall within the class of cases in which no assignment of breaches was necessary at common law, the proper course was, not to mix up the traverse with the assignment of breaches, and conclude to the Court, but to have traversed the matter of fact, to have concluded to the country, and to have entered a distinct suggestion of breaches. It was not the intention of the statute that the plaintiff should reply double, in any other sense than that of assigning breaches for the purpose of ascertaining the actual damage sustained, which the plaintiff must do where the defendant pleads performance of the condition. The defendant, by this double replication, is driven to admit either the allegation of the future appointment, or else the assignment of breaches; whereas he is entitled to join issue on the matter of fact, without being obliged to plead to the suggestion at all. [Lord Abinger, C. B. It appears to me that the statute gives the plaintiff the power of setting forth as many breaches as he thinks fit, and the defendant the power of answering them.] It is admitted that that is so,

if the replication only assigns breaches, but if it contains a traverse, then he cannot also assign breaches in the same replication. The matter which is traversed here would be a complete answer at common law.

Then with respect to the replication to the 3rd plea. [653] If it be said that the replication to the 2nd plea would not be a complete replication by reason of assigning no breach, then the replication to the 3rd plea is bad for that reason. If there was a future appointment, it does not follow that any money was received, or any default made during the continuance in office under the second appointment. In *Meredith v. Alleyn* (1 Salk. 138), Lord Holt says, "If the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach, for then he has not a cause of action unless he shew one." The replication is bad on general demurrer for not concluding with an averment: *Cornwallis v. Savery* (2 Burr. 772). The defendant ought to have had an opportunity of rejoining, that there were not five commissioners: *Hayman v. Gerrard* (1 Saund. 101 & 103 a. (1)).

Platt, contrâ. The replication to the third plea properly tenders an issue on the fact of there being a future appointment, and concludes to the country. The defendant could not have rejoined new matter without a departure, and therefore it would have been improper to conclude with a verification. *Hayman v. Gerrard* (1 Saund. 99, n. (3) and (4)); *Wakeman v. Sutton* (2 Ad. & El. 78); *Low v. Burrows* (2 Ad. & El. 483). [Parke, B. There is no difficulty as to that replication. It traverses matter of excuse, and therefore properly concludes without assigning a breach.] Then as to the replication to the second plea. It is said that the plaintiff was bound to suggest breaches instead of assigning them; but according to the plain construction of the statute, the only case in which breaches are to be suggested, is where the plaintiff obtains judgment on demurrer, or by confession, or nil dicit: and although the construction of the statute has been extended in practice, so as to allow of suggestions being made in cases [654] where the plaintiff has omitted to assign breaches in his declaration, and is precluded from doing so in his replication by the circumstance of the plea concluding to the country; yet it has always been considered, that where the plaintiff does assign breaches, either in the declaration or replication, he is not only entitled but bound to go on, and assign all the breaches on which he relies: and there is no precedent of a pleading in which part of the breaches are suggested and part assigned, as, according to the argument for the defendants, they must be if the plaintiff seeks to recover damages for any thing beyond the first appointment of James, which he is clearly entitled to do. The proceeding under the statute is substituted for a bill in equity, and the legislature could not have meant to put the plaintiff in a worse position than he would have been in a court of equity, in which he would clearly be entitled to retain for all breaches of the condition. It could not have been intended, that, in the case of a plea consisting partly of matter of excuse and partly of an averment of performance, the plaintiff should be forced, either altogether to abandon the cause of action to which the excuse is pleaded, or to take issue on the excuse, for the purpose of suggesting all the breaches together in making up the issue. At common law, the plaintiff had his choice either to allege a breach, or to traverse the matter of excuse; and so he ought now, being at the same time at liberty to comply with the provisions of the statute, in the former case by assigning all the breaches in the replication, in the latter by suggesting them all in making up the issue. The objection of duplicity cannot apply to a case where the plaintiff is compelled by Act of Parliament to plead in some stage of the proceedings in a form which would clearly have been double at common law. The form of replication adopted here is the usual and proper one; *Barton v. Webb* (8 T. R. 459); [655] *Shum v. Farrington* (1 Bos. & P. 640); *Stollert v. Goodfellow* (1 Nev. & M. 202); *Roberts v. Mariett* (2 Saund. 189, and the notes).

E. V. Williams, in reply. If the replication to the third plea be good, the replication to the second plea should not have gone on to assign breaches. The same matter which is pleaded in the replication to the third plea, without assigning a breach and concluding to the country, is pleaded in the replication to the second plea with an assignment of breaches, and concluding with a verification. Both forms of replication cannot be correct [Lord Abinger, C. B. The replication to the third plea states the former appointment as a substantive answer to the plea as at common law, but the replication to the second plea answers it by first assigning a breach,

which would also have been a good answer at common law, and then goes on to allege the future appointment, as a necessary introduction to the assignment of further breaches, in compliance with the statute. Is not this course impliedly authorized by the statute, in order to enable the plaintiff to recover his damages during both appointments?] The plaintiff might have assigned all the breaches in the declaration, or he may now place them all on the record by way of suggestion. The statute was not intended to authorize double pleading. If there is any inconvenience, the plaintiff has brought it on himself by not assigning all the breaches in the first instance.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The question in this case is as to the pro-[656]-per form of proceeding under the 8th & 9th Will. 3, c. 11, s. 8, where the declaration does not assign breaches, and where the plea, after setting out the condition, does not plead performance only, but performance as to part of the condition, and a matter which admits and excuses a non-performance as to the residue. If the plea had been entirely of one character or the other, then, according to the construction put by the decided cases, there would have been no difficulty in saying what was the proper course. If we look at the statute, it seems that only two classes of cases are contemplated—one where the party pleads to issue, where the plaintiff must assign breaches, the other where he does not plead to issue, as after judgment by default, demurrer, or nil dicit, in which case he must suggest them. But the cases, the last being that of *Homfray v. Rigby* (5 M. & Selw. 60), have put a different construction on the statute, and the result of the cases appears to be correctly stated in a learned note to the 2nd vol. of Serjeant Williams's *Saunders*, 187 b. by the last editors. They say, "that some confusion appears to have arisen in the course of these cases, from a want of due attention to the difference between an assignment of breaches under the statute, and a suggestion of them. The result of the whole seems to be this:—The plaintiff may, if he pleases, state the condition of the bond in his declaration, and assign several breaches under the statute, whereas at common law he could only assign one; or the plaintiff may declare on the bond generally; in which case, if the defendant suffer judgment by confession or nil dicit, or the plaintiff have judgment on a demurrer, either to his declaration or to any plea thereto, the plaintiff enters a suggestion; if the defendant plead any plea, on which the plaintiff might at common law have taken an issue in his replication, without assigning a breach of the condition of the bond, the plaintiff may still [657] take such issue, and may enter a distinct and separate suggestion of breaches under the statute; but he cannot incorporate such issue and such suggestion in one and the same replication. If the defendant plead any plea, which made it necessary at common law for the plaintiff to assign a breach in his replication—as, for instance, general performance—the plaintiff must still assign the breach in his replication, with this difference, that he now may assign several breaches under the statute, whereas at common law he could only assign one." According to the construction, therefore, which the cases have put on the statute, a suggestion would have been the proper course if the plea had only contained an excuse for the non-performance of the condition; in which case, according to the well-known rule laid down by Lord Holt in *Meredith v. Alleyn* (1 Salk. 138), no assignment of a breach would have been necessary in the replication. But the difficulty arises in the present case from the pleas having two different characters. In the second plea, the defence for the year of the existing appointment is performance; for the year of every subsequent appointment, an excuse for non-performance; and the plaintiff, at common law, would have maintained his action, either by assigning a breach of the condition during the existing year, or denying any appointment for a subsequent year, without assigning any breach at all. But can he do both? or assign a breach on a matter on which, at common law, no breach ought to have been assigned in the replication, in addition to one or more which could? After much consideration, and some doubt whether the statute did not intend to give the power of assigning any breaches in the replication, though bad at common law, for the purpose of recovering all the damages sustained by the plaintiff, by way of compensation for the right which it took away of recovering at [658] law the entire penalty for one breach, we think it better to adhere to and follow up the construction which the cases, particularly those of *Ethersey v. Jackson* (8 T. R. 255), and *Homfray v. Rigby* (5 M. & Selw. 60), have put on the statute; and we must, therefore, hold the replication in this case to be bad, on the ground that the

statute does not authorize any other double pleading than the multiplication of such breaches as were properly assigned at common law. The plaintiff might have assigned breaches in his declaration for the then present year, and for a subsequent year, alleging that an appointment had been made for that year, and such assignment would have been good at common law, by way of anticipation of a plea of performance of the whole condition; but if the plaintiff omits to do so, and waits until after plea, then, as to the part of the condition as to which performance is pleaded, the plaintiff may assign one or more breaches; but as to the part of which performance is not pleaded, but is excused, there must be a suggestion; or if the matter of excuse is traversed, then there must be no assignment, but a suggestion of breaches, the truth of which, without any issue, must be tried with a view to ascertain the amount of damages, if the issue on the traverse is found for the plaintiff, otherwise not. The plaintiff may, however, amend on payment of costs.

Leave to amend on payment of costs; otherwise judgment for the defendants on the replication to the second plea, and for the plaintiff on the replication to the third plea.

[659] CRIPPS v. FIELD. Exch. of Pleas. June 11, 1841.—The directions to taxing officers, authorizing them in cases to which the rule of T. T., 1 Will. 4, for shortening declarations, is applicable, to allow 1l. 18s. for the declaration, do not extend to cases in which more than one action is brought on the same bill or note; but in such case the taxing officer is to allow according to the length of the declaration.

[S. C. 10 L. J. Ex. 422; 5 Jur. 634.]

In this case Jervis had obtained a rule calling on the plaintiff to shew cause why the Master should not review his taxation, and why the plaintiff should not refund so much as ought to have been disallowed, and why he should not pay the costs of the application. It was an action on a bill of exchange, and in taxing the costs the Master had allowed the sum of 1l. 18s. for the declaration. It appeared that the plaintiff had brought another action on the same bill; and it was contended that the rule of Trinity Term, 1 Will. 4, for shortening declarations, was inapplicable where more than one action was brought on the same bill; and therefore that the Master ought, in accordance with the former practice, to have allowed for the declaration according to its length, in which case the amount would have been only 14s. 8d.

E. V. Williams shewed cause. The practice contended for is rather strange; for, according to that, if the plaintiff had brought one action only, he would be entitled to 1l. 18s. for the declaration, whereas if he brings two he is only entitled to 14s. 8d. each, by which he would get 8s. 8d. less for two than one. [Parke, B. The rule is so laid down in Archbold's Practice, p. 1190, 6th edition, where it is said, "In actions to which the rule of T. T., 1 W. 4, for shortening declarations applies, if the debt amount to £20 and upwards, and the declaration is under twenty-four folios, the officer who taxes the costs is authorized to allow for the declaration, including instructions, copy, and delivery, 1l. 18s.; and for close copy in country causes according to length. But the above regulations are not to extend to cases in which several actions are brought on the same bill or note against several parties thereto."] No objection was made at the time of taxation, and the plain-[660]-tiff has never been asked to refund; and he ought not at least to pay the costs of this rule, as the defendant ought to have informed him of the overcharge, and asked him to refund.

PARKE, B. An attorney is presumed to know what the practice is. The Master certifies that it is correctly stated in Mr. Archbold's book; and it is well known that where there are more declarations than one on the same bill, the practice is to allow for the declaration according to its length. The rule will be absolute without costs; but in future it must be understood, that, if an attorney make improper charges in his bill, he must not expect that other parties are to point them out before they come to the Court. If he charge more than he is entitled to, he will be visited with the costs of the rule to refund.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule absolute, without costs.

WATSON v. FRASER. Exch. of Pleas. June 11, 1841.—Where an uncertificated bankrupt was procured to be appointed prochein amy for an infant plaintiff, the Court, on motion, removed him, and ordered another to be appointed.—The father, as being the natural guardian of the infant, ought in the first instance to be appointed prochein amy; and if his evidence is likely to be required at the trial, an application ought to be made to the Court to release him, by the appointment of a proper substitute.

[S. C. 9 Dowl. P. C. 741; 10 L. J. Ex. 420; 5 Jur. 682.]

The plaintiff, who was an infant, sued in this action by his next friend, and a rule had been obtained, calling on the prochein amy to shew cause why the proceedings should not be stayed until he should give security for costs, or why another prochein amy should not be appointed. It appeared that the person who sued as prochein amy was an uncertificated bankrupt; that the father of the plaintiff was living, but being a material witness on the trial, he had not applied to be admitted as prochein amy.

[661] Platt shewed cause. It is laid down generally in the books of practice, that the insolvency of a prochein amy is no ground for requiring security for costs (Tidd's Pr., 9th ed., p. 100). In an *Anonymous case* in Marshall's Reports (vol. i. p. 4), Sir James Mansfield, C. J., observed, "that the infant might have a good right of action, and was not to lose his cause because his prochein amy was not a man of responsibility." The doctrine laid down by Buller, J., in *Doe d. Selby v. Alston* (1 T. R. 491), that, "when an infant sues, the Court will oblige the prochein amy or guardian, or attorney, to give security for the costs," must be considered as overruled by that and subsequent cases. In an *Anonymous case* in 2 Chit. Rep. 359, the Court doubted whether such an application could be entertained; and in *Yarmouth v. Mitchell* (2 Dowl. & Ryl. 423), it was held that an infant need not give security for costs, though his prochein amy is sworn to be insolvent. A party ought not to be delayed his suit on this ground; if he were, it would in many cases be a denial of justice. The Court does not appoint a prochein amy for the benefit or protection of the defendant, but of the infant plaintiff, in order that he may have some person to direct him in the conduct of his suit. It does not appear that this infant has any property whatever; and why is the defendant to be placed in a better situation, by the appointment of a prochein amy, than if he were sued by a poor man, in which case no security could be required, as was held in an *Anonymous case* in 2 Taunt. 61 (see *Ross v. Jacques*, ante, p. 135). The rule, at all events, ought not to be in this alternative form.

Addison, contra. The case of *Turner v. Turner* (2 P. Wms. 297) affords a precedent for the rule being in the alternative. As to the main question, would the Court, in the exercise [662] of its discretion, have granted the order appointing the plaintiff as prochein amy, if they had known that he was an uncertificated bankrupt? The appointment must have been procured by fraud practised on the Court, which is quite a sufficient reason for revoking it. [Parke, B. The Court certainly has a discretion in the matter, and the question is, whether they have not been imposed upon.] What was said by Buller, J., in *Doe d. Selby v. Alston*, is an express authority in favour of the application; and in *Mann v. Bertram* (4 M. & P. 215), which is more recent than any of the cases which have been cited on the other side, it was held, that where an infant sues by guardian who is sworn to be in insolvent circumstances, the Court will require him to give security for costs. In the case of *Yarmouth v. Mitchell*, the prochein amy was the father of the infant, which distinguishes that case from the present, because the father is the natural guardian of an infant. Here, though the father is living, a stranger has been selected, and that stranger an uncertificated bankrupt. There are several cases that are analogous in principle. In *Heaford v. Knight* (2 B. & C. 579), where the plaintiff was discharged under the Insolvent Act, after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee or some creditor of the plaintiff should give security for costs. So, in *Webb v. Ward* (7 T. R. 296), which was an action brought by an uncertificated bankrupt, the plaintiff was required to give security for costs. He also cited *Weston v. Withers* (2 T. R. 511). An infant pays no costs, for it is the prochein amy who is liable for the costs of the action.

PARKE, B. This rule must be made absolute on some terms or other, for it is impossible for us to allow an uncertificated bankrupt to continue to be the prochein

any of [663] an infant suing before us. It is the duty of the Court, in its discretion, to appoint a proper person to act as the prochein amy of an infant, when he requires the aid of one. The object of appointing one at all is, to protect the rights of the infant, by the nomination of a person of mature years to act for him. I by no means wish to be understood as laying down the general position, that the poverty of a prochein amy is always a ground for removing him; but in the present case, it appears to me, that (whether intentionally or not it is unnecessary to inquire, and it is not intended to cast any imputation on the attorney in the cause) an imposition has in some way been practised on the Court, and that they have unknowingly appointed an improper person to act as prochein amy for this plaintiff. The natural and proper individual to be appointed as prochein amy is the father of the infant, instead of whom they have brought forward an uncertificated bankrupt, a person incapacitated by law from acquiring any property which he can call his own; a fact which, the moment it becomes exposed to the Court, will induce them, in the exercise of their discretion, to interpose and remove him. Even as regards the benefit of the infant himself, an uncertificated bankrupt is an improper person to be appointed, as all his property belongs to his assignees. The father is, as I have stated, the proper and natural guardian of every infant, and as such ought always, in the first instance, to be appointed to act as his prochein amy; and if, as appears to be the case here, his evidence is likely to become necessary in the course of the cause, a special application should be made to the Court to have him removed, and another prochein amy appointed. The Court would then have an opportunity of seeing who the person proposed to be substituted was, and would take care that he was a fit and proper individual for that purpose; they would, at least, take care to have some more respectable person than an uncertificated bankrupt. But the father of an infant can [664] not be allowed to do that *per saltum*, which ought to be done in a regular course. Without, therefore, laying down any general rule on that subject, it suffices to say, that, in this particular case, we consider a deception has been practised on the Court in appointing this person, who ought not to be allowed to continue as prochein amy to this infant any longer. This rule must, therefore, be made absolute to set aside the appointment.

The rest of the Court concurred.

Rule absolute.

FOSTER v. PRYME. Exch. of Pleas. June 11, 1841.—Whether an appearance be entered in term time or vacation, the plaintiff has the whole of the term next following to declare in; and therefore, where an appearance was entered in Easter Term, and judgment of nonpros signed in Trinity Term, it was held that the judgment was irregular.

[S. C. 9 Dowl. P. C. 749; 10 L. J. Ex. 419]

Cleasby had obtained a rule to shew cause why the judgment of nonpros signed in this cause should not be set aside for irregularity. It appeared that the writ of summons was served on the 13th of April, and on the 7th of May, the last day but one of Easter Term, an appearance was entered. A demand of declaration was served on the plaintiff on the 13th of May, and on the 2nd of June judgment of nonpros was signed.

Petersdorff now shewed cause. The plaintiff ought to have declared before the end of the term next after the service of the writ. Formerly, in actions by bill, if an appearance was entered of the term in which the writ was returnable, the plaintiff had the whole of the next term to declare in; but now, in actions commenced by writ of summons, inasmuch as an appearance may be entered by the defendant in vacation as well as in term time, the plaintiff ought to declare within the term next after the execution of the writ, otherwise a judgment of nonpros [665] may be signed. 1 Arch. Prac. 283 (6th edit.). The writ in this case was served in Hilary Vacation, and judgment was not signed until Trinity Term.

Cleasby, in support of the rule. The plaintiff has still the whole of the following term after the defendant has entered an appearance to declare in. The practice is correctly stated in Lush's Prac. 336 (and see Tidd's New Prac. 224), where it is said—“The plaintiff is not compellable to declare until the end of the term next after that in or of which the appearance is entered, it being enacted by 13 Car. 2, stat. 2, s. 3,

that upon appearance to be entered in the term wherein the process is returnable, with the respective officers in that behalf, for the said person or persons, by attorney or attornies, in the said respective Courts from whence the said process issued, unto such process, unless the plaintiff in such process named shall put in to the Court from whence such process did issue, his declaration against the person so arrested in some personal action or ejectione firmæ of lands or tenements, before the end of the term next following after appearance; that then a nonsuit, for want of a declaration, may be entered against the plaintiff in the said courts respectively. The judgment of nonpros given by this statute differs from the nonsuit upon an original at common law; though in terms confined to bailable actions, it has always been construed as applicable also to serviceable process. The defendant must appear by attorney at such a time that his appearance may have relation back to the return of the writ. Accordingly, the judgment states the appearance to have been made on the return day. As the appearance must now be dated of the day on which it is entered, and the doctrine of relation is abolished, it would seem that, in order to avail himself of the statute, the defendant must cause it to be entered on the eighth day inclusive after the service."

[666] ALDERSON, B. Whether the appearance be entered in term time or vacation, the same rule prevails, and the plaintiff has the whole of the term next after the appearance is entered to declare in. Here the appearance was entered on the 7th of May, which was in Easter Term, and, as the judgment of nonpros was signed before the expiration of Trinity Term, it is irregular, and the rule must therefore be absolute for setting it aside.

Rule absolute.

BENN v. BATEMAN.(a) Exch. of Pleas. June 12, 1841.—In an action of trespass qu. cl. fr., the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the close; thirdly and fourthly, special pleas of prescriptive rights. The plaintiff, after joining issue on the first two pleas, traversed the right in the last two pleas, and new assigned excess. The defendant paid 10s. into Court on the new assignment, and the plaintiff accepted that sum in satisfaction, and entered a nolle prosequi as to the other causes of action:—Held, that the defendants were not entitled to the general costs of the cause.

[S. C. 9 Dowl. P. C. 763; 10 L. J. Ex. 467.]

Trespass quare clausum fregit. The defendant pleaded,—first, not guilty; secondly, that the plaintiff was not possessed of the close; thirdly, a prescriptive right of common of pasture; fourthly, a similar right of common turbary. The plaintiff joined issue on the first and second pleas, traversed the right alleged in the third and fourth pleas, and new assigned excess. The defendant to the new assignment pleaded payment into Court of 10s., which the plaintiff accepted in satisfaction, and entered a nolle prosequi as to the residue of the causes of action. The Master, on taxation, allowed the plaintiff the costs of the writ, of part of the declaration, the fees to counsel, and Term fees, together with the costs of the new assignment. Hoggins had obtained a rule to shew cause why the Master should not review his taxation, and allow the defendant the general costs of the cause, and the plaintiff the costs of the new assignment only.

[667] Hugh Hill shewed cause. The Master has allowed the defendant the costs of his special pleas, of the replications thereto, and of the nolle prosequi, and he was not entitled to any more. The plaintiff had a good cause of action, and was therefore entitled to the costs of the writ, and to the other costs which the Master has allowed. However apparently conflicting some of the authorities may seem, the principle which regulates the plaintiff's title to costs in such cases is correctly stated in the editor's note to *Greene v. Jones* (1 Wms. Saund. 300 a.). He was then stopped by the Court.

Hoggins, in support of the rule. In *Griffiths v. Jones* (1 M. & W. 731), the defendant in an action on the case pleaded the general issue, and justified under a right, which the plaintiff traversed; the plaintiff afterwards obtained an order to

(a) This and the three following cases were decided by Parke, B., sitting alone, on the last day of term.

amend on payment of costs, and withdrew the traverse, and new assigned excess; the defendant confessed the new assignment, and, withdrawing so much of the general issue as applied to that part of the declaration, new assigned, and paid into Court 10*l.*, which the plaintiff took out. The Master allowed the plaintiff the costs of the writ, and of the new assignment and subsequent proceedings, but gave the defendant the other costs, and the general costs of the cause; and it was held that the Master was right. That decision is in point in the present case.

PARKE, B. It does not appear to me, on looking into that case, that it goes the length contended for by Mr. Hoggins. The marginal note is incorrect, and is not warranted by the judgment. The expression, "general costs," which fell from Lord Abinger in that case, and which probably led to the error, is ambiguous. My Brother Alderson, in his judgment, says nothing about general costs. The taxation is right, and therefore this rule must be discharged.

Rule discharged, with costs.

[668] BRAY v. MANSON. Exch. of Pleas. June 12, 1841.—Where time was given to a prior indorser, after judgment had been signed in an action on the same bill against a subsequent indorser:—Held, that the Court could not interfere to set aside the judgment on that ground, as the judgment could not be affected by such indulgence being given after it was signed.—An action having been brought, and issue joined, and notice of trial given, the defendant signed a consent for a Judge's order for a stay of proceedings, on payment of debt and costs by a certain day, with the usual condition, that, in default of payment, the plaintiff should be at liberty to sign final judgment, and issue execution. No attorney attended on behalf of the defendant when the consent was given; but both parties appeared before the Judge when the order was made:—Held, that the consent did not amount to a cognovit, and did not require a stamp, or the attendance of an attorney at the time of its execution, pursuant to the provisions of 1 & 2 Vict. c. 110, s. 9.

[S. C. 10 L. J. Ex. 468. Referred to, *Gowan v. Wright*, 1886, 18 Q. B. D. 208.]

Fish had obtained a rule, calling on the plaintiff to shew cause why an order of Gurney, B., and the judgment and execution founded thereon, should not be set aside, and why the defendant should not be discharged out of custody. It appeared that this was an action by the indorsee of a bill of exchange against the indorser, and that after issue joined, and notice of trial, the defendant had signed a consent to a judge's order for stay of proceedings, on payment of the debt and costs by a certain day, with the usual condition, that, in default thereof, the plaintiff should be at liberty to sign final judgment, and issue execution. The order was afterwards made by Gurney, B., in the usual way, both parties attending by their attorneys, and the money not having been paid according to the order, the plaintiff signed judgment, and took the defendant in execution under a *ca. sa.* It also appeared by the affidavits, that, subsequently to the judgment against the present defendant, the plaintiff had given time to a prior indorser. The rule was obtained on three grounds—first, that a consent to a judge's order like the present amounted to a cognovit, and ought to have been attested by an attorney acting on behalf of the defendant, in pursuance of the provisions of 1 & 2 Vict. c. 110, s. 9; secondly, that, being a cognovit, it required a stamp; thirdly, that the defendant was discharged on the ground, that, subsequently to the judgment obtained against him, the plaintiff had given time to a prior indorser.

Byles shewed cause. First, the consent cannot be considered to be in the nature of a cognovit, the act [669] of the judge being necessary to give it validity. As to the second point, in *Pole v. Ford* (2 Chit. Rep. 125), it was held, that withdrawing a *fi. fa.* against the acceptor of a bill of exchange did not discharge the drawer, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment.

Fish, *contra*. The rule that time given to the acceptor of a bill of exchange discharges those parties who are entitled to sue him, is laid down in *Chitty on Bills* (pp. 408, 411, 9th ed.), without any distinction as to the indulgence being given before or after judgment.

PARKE, B. It will not be requisite in this case to go into the question as to whether the prior parties to this bill were discharged or not, for the case which has been referred to by Mr. Byles, of *Pole v. Ford*, is an express authority, that when judgment has been signed against one of the parties to a bill or note, the Court will not interfere on affidavit to set aside the judgment, or stay proceedings in an action against another party. Here there is a regular judgment on record against the indorser. How can that be affected by the discharge of a prior indorser? There can be no relief, unless there be a remedy in a court of equity. Then with respect to the stamp, a cognovit, it is true, requires one, when it contains any special terms beyond a simple confession of the cause of action, which is not the case here. Then it is said there was no attorney present on behalf of the defendant when he signed the consent for the judge's order; but inasmuch as it appears that an attorney was present on his behalf when the judge's order on that consent was obtained, I think that objection cannot prevail, and that the case does not come within the statute.

Rule discharged.

[670] BAKER v. FLOWER. Exch. of Pleas. June 12, 1841.—Where a defendant, on being served with process in an action, went to the plaintiff's attorney, and without any attorney attending on his behalf, signed a consent for a Judge's order for the payment of the debt and costs on a particular day, and in default thereof, that the plaintiff should be at liberty to sign judgment and issue execution; in consequence of which a Judge's order was subsequently obtained by the plaintiff's attorney ex parte, and default having been made, judgment was signed, and execution issued:—Held, that the consent did not amount to a cognovit, or require to be attested according to the provisions of 1 & 2 Vict. c. 110, s. 9.

[S. C. 10 L. J. Ex. 468; 5 Jur. 635.]

Bayley moved for a rule calling on the plaintiff to shew cause why judgment and execution, together with the previous proceedings, should not be set aside for irregularity, with costs. It appeared from the affidavits, that the defendant, on being served with the writ, called alone, on the 4th of April, upon the plaintiff's attorney, and on being asked whether he wished to settle the action, stated that he wished to do so. The attorney thereupon prepared a consent for a Judge's order for staying the proceedings, with the usual condition, that final judgment might be signed, and execution issue, in the event of the debt and costs not being paid within a certain time. This consent the defendant signed, and on the 4th of June the plaintiff obtained the order thereon from the Judge, no one attending on behalf of the defendant. Default having been made in payment of the debt and costs within the time limited, judgment was signed and execution issued.

Bayley contended, that a consent of this description amounted to a cognovit within the meaning of 1 & 2 Vict. c. 110, s. 9, and was consequently void, not having been duly attested in pursuance of the provisions of that act, and no attorney for the defendant having attended the drawing up of the consent, or the making of the order before the Judge. The intention of the Legislature, to prevent frauds upon ignorant parties, would be frustrated, if proceedings like the present were sanctioned, for the judge by whom the order is made knows nothing of the circumstances of the case, or whether it is proper for the party to give such consent at all.

PARKE, B. My present impression certainly is, that this case does not come within the provisions of the sta-[671]-tute, or that a Judge's order obtained in this way is any evasion of it. You may however take your rule, but do not draw it up until I have had an opportunity of further considering the question. The statute says, that "no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed." That section applies to a warrant of attorney or cognovit given by a party out of Court; the present case is only one of a consent to an order if a Judge thinks proper to make one. It is true, such a consent much resembles a cognovit, but then it is not one, for nothing can be

done upon it of itself, until a Judge's order is made in pursuance of it. The present case certainly differs from the one before me this morning of *Bray v. Manson*, in this, that there an attorney acting on the part of the defendant appeared before the Judge to consent to the order being made; and I have no doubt at all of the validity of a Judge's order made under such circumstances; but whether the same can be said when there is no attorney acting on the part of the defendant, is the difficulty in the present case. It certainly, as it appears to me, would be much for the benefit of defendants, if cases like the present did not come within the ninth section of the statute, for it must be very beneficial for them to be allowed to settle actions without the expense of employing an attorney or going before a judge.

Cur. adv. vult.

The learned Baron, after conferring with the other Judges of the Court, directed that the rule should not be drawn up, on the ground that the case fell within the principle of *Bray v. Manson*.

Rule refused.

[672] *SLATTER v. PAINTER*. Exch. of Pleas. June 12, 1841.—Where a defendant obtained an order for time to plead, on the terms of taking short notice of trial for the sittings in or after Easter Term:—Held, that he was not thereby obliged to take short notice of trial for the sittings in or after any subsequent term, but the plaintiff must, in such case, give an ordinary notice.

[S. C. 1 Dowl. (N. S.) 35; 16 L. J. Ex. 476; 5 Jur. 636.]

The defendant, on the 27th of March, obtained a Judge's order for a week's time to plead, on the terms of "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, for the first or any sittings in or after next Easter Term." The plaintiff gave no notice of trial for any of these sittings, but gave short notice of trial for the sittings after Trinity Term. The defendant took no notice of it: and the cause having been taken as an undefended one, a verdict was found for the plaintiff. Jervis subsequently obtained a rule to set aside the verdict as irregular, on the ground that, by the terms of the order, the obligation of the defendant to take short notice of trial was restricted to the case of its being tried either in Easter Term or the sittings after it.

Humfrey shewed cause. The plaintiff was not restricted by the terms of the order to giving short notice of trial for the sittings in or after Easter Term, but, being empowered to do so for those sittings, might compel the defendant to take short notice of trial for any subsequent sittings.

Jervis, in support of the rule, was stopped by the Court.

PARKE, B. I think the defendant's construction of the order is the correct one, and that the verdict is irregular. The order for time to plead only imposes the term of taking short notice of trial at the sittings in or after Easter Term. If the plaintiff does not go to trial accordingly, then he is bound to give an ordinary notice. If the plaintiff wished to try the cause at any subsequent sittings, he might have inserted the words, "to take short notice of trial for the sittings in or after Easter Term, or any future sittings."

Rule absolute.

[673] *SCHILD v. KILPIN*. Exch. of Pleas. June 11, 1841.—To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the indorsement to the plaintiff, and before the commencement of the suit, to wit, on &c., the plaintiff, for a good and valuable consideration, indorsed the bill to J. W., who, from thence until and at and after the commencement of this suit, was, and still is and remains, the indorsee and holder thereof, and the defendant, from the time of such indorsement to the said J. W. continually hitherto hath been, and still is liable to pay the amount of the bill to the said J. W. Replication, *de injuriâ*:—Held, on special demurrer, that the plea was in denial, not in excuse, of the breach alleged in the declaration, viz. the non-payment of the bill according to

the tenor and effect of the acceptance, and therefore that the replication was improper.

[S. C. 9 Dowl. P. C. 803; 10 L. J. Ex. 422; 5 Jur. 874.]

Assumpsit by indorsee of a bill of exchange for £75, dated 10th of February, 1840, drawn by H. W. on and accepted by the defendant, payable twelve months after date to the order of the drawer, indorsed by H. W. to T. W., by him to a firm of Stones & Son, and by them to the plaintiff. The declaration was in the form given by the rules of T. T., 1 Will. 4, alleging that the defendant promised the plaintiff to pay the bill when due, according to the tenor and effect of the bill and of his acceptance, and that he hath not paid the said bill.

Plea, that, after the said indorsement to the plaintiff, and before the commencement of this suit, to wit, on &c., the plaintiff, for a good and valuable consideration in that behalf, indorsed the said bill to a certain person, to wit, one J. Wright, who from thence until and at and after the commencement of this suit was, and still is and remains, the indorser and holder thereof: and the defendant, from the time of such indorsement to the said J. Wright continually hitherto, hath been and still is liable to pay the amount of the said bill to the said J. Wright. Verification.

Replication, *de injuriâ*.

Special demurrer, and joinder in demurrer.

The case was argued in the present term, (June 7), by

Corrie, in support of the demurrer. The question is, whether this is a plea in excuse for the breach of the contract alleged in the declaration; if it be not, the replication *de injuriâ* is bad. Now the promise alleged in the declaration is a promise by the defendant to the plaintiff to pay the bill—i.e., to the legal holder—not a promise to pay the bill to the plaintiff; and the breach alleged is, that the defendant has not paid the bill. Now the plea, it is true, admits the promise alleged, viz. the promise to pay the bill; but the defendant does not excuse himself from the breach alleged, viz. the non-payment of the bill according to the tenor of his acceptance, but shews that, in respect of that breach, the plaintiff has no right of action, the right to sue on the bill being vested, at the time of the commencement of the suit, in another person. The plea, therefore, denies the existence of any cause of action in the plaintiff, and the replication *de injuriâ* is inapplicable. The case is within the authority of *Jones v. Senior* (4 M. & W. 123). [Lord Abinger, C. B. There the plea was not by way of excuse, but shewed that something had occurred which had extinguished the plaintiff's right, and had given the defendant a right to refuse always to pay the bill.] So this plea shews an extinguishment of the plaintiff's right *pro tempore*, and that the defendant had a right to refuse payment to him at the time of the commencement of the action.

Ogle, *contrâ*. The plea admits that the plaintiff was the holder of the bill at the time when it became due, and had then a cause of action, but seeks to get rid of it by alleging that he subsequently indorsed it to a party who was the holder at the time of action brought. That is no answer to the action. The plea ought to have averred that the plaintiff had no interest in the bill at the commencement of the suit. The case of *Stones v. Butt* (2 C. & M. 416) shews, that if the bill were in the hands of the plaintiff's bankers, as his agents, or in the hands of trustees for him, that would not prevent his suing upon it, inasmuch as the interest in the bill would still be vested in him. So, if a plaintiff have deposited a negotiable instrument on which he is suing, at the same time giving notice of the action, he does not thereby part with his right of action; *Marsh v. Newell* (1 Taunt. 109). But [675] at all events, the plea amounts to mere matter of excuse, and the replication *de injuriâ* is good.

Corrie, in reply. Wright, the plaintiff's indorsee, could sue the defendant on the bill, notwithstanding a verdict and judgment for the present plaintiff. That shews that the plea is not mere matter of excuse. There is no case in which the replication *de injuriâ* has been held good, where the circumstances set forth in the plea occurred after the bill became due. In *Isaac v. Farrar* (1 M. & W. 65), the facts pleaded all occurred before the bill was due. The case of *Stones v. Butt* is inapplicable. [Lord Abinger, C. B. I think, *primâ facie*, the plea must be taken to import an indorsement by the plaintiff after the bill became due; but then, when it was due, the plaintiff had a right of action vested. The plea, therefore, may be an answer as to the principal, but how does it answer the damages? The plea does not answer the

breach of contract admitted on the record, at the time when the bill became due.] By the custom of merchants, the plaintiff, by his indorsement, assigned away all right of action, both for the debt and damages. The previously accrued interest is assigned with the principal. There cannot be two co-existing rights of action on the same bill: *Johnson v. Kennion* (2 Wils. 262). In *Marsh v. Newell*, the action was brought before the plaintiff parted with the bill.

LORD ABINGER, C. B. The forms of declarations on bills of exchange, with which this is in accordance, are abridged from the old form, which alleged a promise to pay the plaintiff. I doubt, therefore, whether the promise alleged here must not be understood as a promise to pay the plaintiff, not merely as a promise to pay the holder of the bill; if so, then it would seem that the breach is not denied, but [676] the plea is only an excuse for not paying the plaintiff, not founded on any matter of discharge or release, or accord and satisfaction, which puts an end to the right of action on the bill altogether, but a mere reason assigned why the defendant should not pay the plaintiff.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. The question in this case is, whether the replication *de injuriâ* is good. We are of opinion that it is not. The replication *de injuriâ* is only good where the plea admits a breach of the promise stated in the declaration, and alleges circumstances whereby that breach is excused. That was clearly laid down in *Isaac v. Farrar*. To a plea whereby the breach is discharged, it is not a good replication: *Jones v. Senior*. Now what is the breach in this declaration? It is the non-payment of the bill according to its tenor and effect. Now the payment according to the tenor and effect of the bill is a payment to the holder of the bill, i.e. to a person to whom it was originally made payable, or to whom it has been transferred by a valid indorsement and delivery. The declaration avers the plaintiff to be such a person; for it avers that the bill was indorsed to him. The plea admits this; but adds, that it was indorsed afterwards by the plaintiff to Wright, and that Wright was and is the holder. If, therefore, the averment, that the bill has not been paid, be, as it probably is, an averment that it has not been paid to the plaintiff, the plea amounts to a denial that such non-payment is a breach of the promise of the defendant; for a non-payment to the plaintiff, he not being then the holder, is not a non-payment to the holder of the bill. Instead, therefore, of an excuse for a breach, it is a denial of the breach,—an argumentative one, perhaps, but that would only make it bad on special demurrer; and consequently, *de injuriâ* is not a proper replication. For these reasons, we are of opinion that the judgment must be for the defendant; but the plaintiff may have liberty to amend on the usual terms.

Leave to amend accordingly; otherwise

Judgment for the defendant.

PAGE v. PEARCE. Exch. of Pleas. June 12, 1841.—On the execution of a writ of inquiry in trespass, the jury having assessed the damages at one farthing, the under-sheriff was applied to to certify, under the stat. 3 & 4 Vict. c. 94, s. 2, that the trespass was wilful and malicious. He said that the trespass was wilful, but he would take time to consider whether he would certify that it was malicious. The Court then adjourned, and on the same day, at 5 p.m., met again to take an inquisition under an *elegit*:—Held, that a certificate given by the under-sheriff pursuant to the act, on the same day, but after the Court had so met again, was valid.

[S. C. 9 Dowl. P. C. 815; 10 L. J. Ex. 434.]

In this case Erle had obtained a rule, calling upon the plaintiff to shew cause why the Master's allocatur, allowing costs to the plaintiff, should not be set aside. This was an action of trespass, in which a writ of inquiry had been executed before the under-sheriff of Dorsetshire, when the jury assessed the damages at one farthing. The under-sheriff was immediately applied to, on the part of the plaintiff, to certify, under the 3 & 4 Vict. c. 94, s. 2, that the trespass was wilful and malicious. The affidavit on which this rule was obtained stated, that the under-sheriff thereupon said that he would certify that it was wilful, but would not certify that it was malicious.

The affidavit on the other side stated, that he only said (after an argument on the point by counsel), that he would take time to consider whether he would certify that the trespass was malicious. The Court then adjourned, and met again at 5 o'clock p.m. of the same day, for the purpose of taking an inquisition under an elegit; and the affidavit in support of the rule stated the belief of the deponents that the under-sheriff did not certify until after the Court had so met again. The plaintiff afterwards gave notice of taxation; and on the parties attending before the Master, the writ of inquiry was produced, with a certificate indorsed thereon, in the handwriting of the under-sheriff, that the trespass for [678] which the action was brought was wilful and malicious; whereupon the Master allowed the plaintiff his costs.

Cresswell and Barstow shewed cause against the rule, and relied on *Thompson v. Gibson* (ante, p. 281) as a decisive authority in favour of the plaintiff.

Erle and Bond, contra. [Alderson, B. The certificate must be given within a reasonable time after the verdict: how does your affidavit shew that it was not?] The deponents state their belief that it was not given until the Court re-assembled in the afternoon. The under-sheriff, after the adjournment, had no authority as Judge under the writ of inquiry. [Alderson, B. He had authority for a reasonable time for the purpose of certifying.] The Judges of the superior Courts have a continuing commission until the new commission for another assize is made out; but there is no such continuing authority under a writ of trial or inquiry. The ground of the decision in *Thompson v. Gibson* was that no new business had intervened to affect the impression made on the Judge's mind by the evidence. Here all the under-sheriff's authority under the writ had ceased, and he was sitting under a new authority. They referred to *Shuttleworth v. Cocker* (2 Scott, N. R. 47; 1 Man. & G. 829; 9 Dowl. P. C. 717).

LORD ABINGER, C. B. This rule must be discharged. It has already been decided, and necessarily so, that the words "immediately afterwards," in the statute, cannot be construed literally; and if you abandon the literal construction of the words, what can you substitute but "within a reasonable time?" especially as an indorsement of the certificate, eo instanti, can be of no necessity whatever. Here, when the writ was executed, the under-sheriff's authority under it is said to have expired: [679] it ended, therefore, with the verdict. In that view of the case, the word "immediately" is of no importance in this question, because, the instant after the delivery of the verdict, he was equally without authority. But we must construe the act of Parliament reasonably; and as it requires him also to consider the propriety of granting or refusing a certificate, he has a new commission for that purpose: and when the act says only that the Judge shall certify immediately after the trial, and does not more especially define the time, it must mean that it is sufficient if it be done within a reasonable time. There must surely be a reasonable interval for him to consider his judgment, especially when counsel have thought it a point fit to be argued. Can we then say that in this case he has taken an unreasonable time? It is said, that he cannot certify after the trial of another cause: if so, a Judge must postpone every other cause for that day. I do not limit the reasonable time to the interval before the trial of another cause, or even necessarily to the same day.

ALDERSON, B. I am of the same opinion. The question is, whether the under-sheriff has exceeded a reasonable time in giving his certificate. Upon these affidavits, I do not see what time he has in fact taken: and as it is to be assumed to be a reasonable and proper act *primâ facie*, it is for the party who complains of it to shew that he took an unreasonable time, which he has clearly failed in doing. Unless, therefore, we were satisfied that he was bound to certify before adjournment, it is not shewn that it was not done within a reasonable time. Then *Thompson v. Gibson* is an express authority that it need not be done before adjournment.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

[680] COLVIN AND OTHERS v. BUCKLE AND OTHERS. Exch. of Pleas. June 12, 1841.—In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods

or bills to B. & Co. in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in £850, the defendants and G. applied to B. and Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guarantie:—"Messrs. B. & Co.—You having expressed some doubts of the propriety of paying G.'s draft on you for £850 in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill for £850, drawn by G. on them in favour of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner, (G. having become bankrupt), gave notice to the East India Company, (in whose docks she lay), not to deliver any part of the cargo without his authority; they thereupon sold the cargo, and paid the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill, and paid the balance of the proceeds into Court. Proceedings at law and equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the £850 due by the guarantie, with interest, and their share of the expenses incurred in the law proceedings, and on their refusal to pay, brought an action against them on the guarantie:—Held, first, that the Statute of Limitations began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendants' legal liability depended, and therefore that it was a bar to the action; secondly, that the defendants could not be made liable, under the guarantie, for the expenses incurred by the plaintiffs in the law proceedings.

[S. C. 11 L. J. Ex. 33.]

This was an action of assumpsit, which was commenced on the 10th of April, 1838. It was tried before Lord Abinger, C. B., at the London Sittings after Hilary Term, 1839, when a verdict was found for the plaintiffs for the damages in the declaration, subject to the opinion of the Court on the following case:—

The declaration (as amended at the trial) stated, that the plaintiffs, and one Richard Campbell Bazett and John Farquhar, both since deceased, at the time of the promise of the defendants, carried on business as East India agents and merchants in London, under the firm of Bazett, Farquhar, Crawford & Co.; that they had been connected with the firm of Colvin & Co., who carried on business at Calcutta; that before the promise, one J. B. Gooch had consigned goods to the said firm of Colvin & Co., to be sold at Calcutta on his account, and that part of the said goods were consigned by a certain ship, called the "Hero," which had been chartered to Gooch by one John Champion, the managing owner thereof, for a voyage from London to Madras and Calcutta, and back to London, upon certain [681] terms as to the times of paying freight, &c., specified by the charter-party; that before and at the time of making the said consignments, Bazett & Co. had advanced monies to Gooch on credit of the said consignments so made to the said firm of Colvin & Co., which monies were due and owing at the time of the making of the said promise; that whilst the said monies were so due and owing from Gooch to Bazett & Co., the said Gooch was indebted to the defendants in £850, and that Gooch had requested Bazett & Co. to advance to him, upon the credit of the said Gooch, and of the aforesaid goods, a further sum of £850, for the purpose of discharging the said debt so due to the said defendants from the said Gooch, by honouring a draft or order for the sum of £850; that Bazett & Co. were unwilling to do so without further security: that, on the 22nd day of November, 1817, the defendants promised the plaintiffs and the said Bazett & Co., that, if they would pay the said draft of the said Gooch on them the plaintiffs, and the said Bazett & Co., in favour of the defendants for the sum of £850, they the defendants would reimburse the plaintiffs and their said partners the said amount of £850, with interest, in the event of the plaintiffs and the said Bazett & Co. finding it necessary to call upon them, the defendants, to do so, either from the state of the

pending accounts of the said Gooch with the said firm of Bazett & Co., or with the said firm of Colvin & Co., or from any other circumstances whatever. The declaration then averred, that the plaintiffs and the said Bazett & Co. paid to the defendants the amount of the said draft for the sum of £850; that certain goods had been consigned by Colvin & Co., by the "Hero," from Calcutta, to the plaintiffs and the said Bazett & Co., for and on account of the said goods, which goods, after the payment of the said sum of £850, arrived in London; that on their arrival, a large claim was made on them by John Campion, for freight alleged to be due under the said charter-party, [682] and that the plaintiffs, and the said firm respectively, at different times before the date of the demand thereafter mentioned, were respectively obliged to expend and pay large sums of money, in endeavouring to oppose the said claim, and establish their right to the said goods, in liquidation of so much of the said monies due to them from the said Gooch; that the accounts between Gooch and the plaintiffs and Bazett & Co., in the lifetime of Bazett & Farquhar, remained wholly unsettled until a certain day, much less than six years before the commencement of this suit, at which time monies to a large amount were due to the plaintiffs, as surviving partners of Bazett & Co., in respect of the advances made to Gooch, and the monies expended in opposing the said claim of the said Campion; that the plaintiffs, by reason of the premises, had sustained a loss to a large amount, in consequence whereof the plaintiffs found it necessary to call on the defendants to reimburse the plaintiffs the said sum of £850, with interest, so paid by the plaintiffs and the said Bazett & Co., and payment of such sums and interest was then demanded by the plaintiffs, but the defendants refused to pay the same.

The defendants pleaded non assumpserunt, and also several special pleas, of which the following only need be here stated:—

Fourth plea, as to the monies alleged to have been expended in opposing the claim of the said Campion, that the said sum was not, nor was any part thereof, expended on the account of or by the authority of the said Gooch, or with the privity or consent of the defendants; and that if the plaintiffs had sustained any loss, they had sustained the same of their own wrong; without this, that the said sum, or any part thereof, was necessarily expended by Bazett & Co., modo et formâ. On this plea issue was joined. Eighth plea, the Statute of Limitations; on which the plaintiffs took issue.

[683] The plaintiffs, and one Richard Campbell Bazett and John Farquhar, both since deceased, in 1816, carried on business in London as East India agents and merchants, under the firm of Bazett, Farquhar, Crawford & Co. The plaintiffs are the surviving partners of that house. In 1817, the defendants were, and still are, merchants and shipowners in London. The transactions out of which this action arises commenced in 1816 and 1817, at which period Colvin & Co. of Calcutta, of which house the plaintiffs Colvin and R. C. Bazett were partners, were the correspondents and agents of Bazett & Co. in London. In 1816 J. B. Gooch, among other consignments, shipped goods to Calcutta in a vessel named the "Hero," and Bazett & Co. made advances to him to enable him to do so. The arrangement agreed on by Gooch and Bazett & Co. was, that the goods should be transmitted, for the security of Bazett & Co., to Colvin & Co., at Calcutta, who were to dispose of the outward cargo in Calcutta, and send the proceeds, either in goods or bills, to Bazett & Co. in London; and the latter were to reimburse themselves the charges and expenses, and hold the balance at the disposal of Gooch; and by the bills of lading, the goods bought at Calcutta were to be made deliverable to Bazett & Co. in London. In November 1817, Gooch being in doubtful credit, and indebted to the defendants in £850, the latter and Gooch applied to Bazett & Co. to pay off this debt by means of a further advance to Gooch on the consignment. Other firms, to whom Gooch was also indebted, made similar applications to Bazett & Co., who refused, unless they received some indemnity. Accordingly the following guarantee was given by the defendants.

"London, November 22, 1817.

"Messrs. Bazett & Co.—You having expressed some doubts of the propriety of paying Mr. J. B. Gooch's draft on you for £850 in our favour, we hereby engage, if you [684] will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either

from the state of Mr. Gooch's pending accounts with your London or Bengal house or from any other circumstances. We are, gentlemen, your obedient servants,
 "BUCKLES, BAGSTER, & BUCHANAN."

Bazett & Co. accordingly accepted and paid a bill for £850, drawn upon them by Gooch. Bills drawn by Gooch in favour of his other debtors were also paid by Bazett & Co. In 1818 Gooch became a bankrupt. At this time the balance due from Gooch to Bazett & Co. amounted to 3398l. 12s., and in May, 1838, when the present action was commenced, the amount, including law charges, amounted to 7683l. 12s. 5d.

In 1816, Gooch chartered, on his separate account, the vessel called the "Hero" from one John Campion, covenanting to pay freight and primage, at certain specific times, by cash and bills. The vessel and cargo were consigned by Gooch, through the plaintiffs, to Colvin & Co. as his agents, and also as the general agents of the plaintiffs, and both the plaintiffs and Colvin & Co. were made acquainted with the charter-party. After disposing of part of the cargo, and retaining the remainder in their possession for a more favourable conjuncture, Colvin & Co. put up the "Hero" for her homeward voyage, having purchased 489 bales and 22 half-bales of cotton out of their own money, but at the risk and on the account of Gooch. In April 1818, the "Hero" entered the East India Docks, and discharged her cargo, whereupon Campion gave notice to the East India Company not to deliver any part of the cargo without his authority. The cotton was shipped under bills of lading by Colvin & Co., by which it was made deliverable to Bazett & Co., to be received by them in discharge of their advances to Gooch. The East India Com-[685]-pany, on receiving the notice from Campion, sold the cargo, the proceeds of which amounted to 5577l. 12s. 3d., and paid over to Bazett & Co. the sum of £2000 on account of their advances to Gooch. The assignees of Gooch brought an action of trover against Campion, to recover the value of the cargo of the "Hero." In this action judgment on demurrer was given for the defendant. The East India Company accordingly paid Campion's demand for freight, and having a balance still in their hands, filed an interpleader bill against the plaintiffs and Campion, and paid the balance into Court. In November 1819, Bazett & Co. put in their answer, requiring the assignees to be made defendants, which was accordingly done. In January 1824 Campion filed his answer, claiming the balance of freight with interest, and his costs at law and equity. In 1826 an issue at law was directed by the Court, to try whether Campion had a lien on the bales of cotton, which issue was found in favour of Campion. Proceedings, both at law and equity, were continued between Bazett & Co., Campion, and the East India Company, up to the year 1837, when the result was that the plaintiffs were obliged to pay Campion the sum of 1481l. 14s. 2d., the costs incurred in the said proceedings. Every step, both at law and equity, was defended, or commenced, or taken, under the advice of eminent counsel, employed on behalf of the plaintiffs and their late firms. In 1838 the plaintiffs demanded of the defendants the sum of £850, due by the guarantee, with interest, together with their share of the expenses incurred in the litigation.

The question for the opinion of the Court is, whether or not the defendants are entitled to a verdict on any of the issues: if so, a verdict is to be entered accordingly: if not, judgment is to be entered for the plaintiffs, for such sum as the Court shall direct: the Court to be at liberty to draw any inference in point of fact which the jury might have done: the plaintiffs or defend-[686]-ants to be at liberty to argue that the pleadings are not good.

The points stated for argument by the plaintiffs were, that the construction of the guarantee, with reference to the facts in the case, was in favour of the plaintiffs; and that the verdict should be entered for the plaintiffs on each issue.

The defendants' points were, that the plaintiffs were not entitled to bring into dispute the costs of disputing Campion's claim for freight, nor any advances made by them after the promise; that it did not become necessary to call upon the defendants for reimbursement; that the action was barred by the Statute of Limitations; and that the declaration did not shew any cause of action.

The case was argued in this term (May 31), by

The Attorney-General, for the plaintiffs. The plea of the Statute of Limitations is no answer to this action. The cause of action did not accrue until the accounts between Bazett & Co. and Gooch were finally adjusted, on the settlement of the disputes as to Campion's claim, in 1837. It was not until it was found that the

balance, as against Gooch, was in favour of the plaintiffs, that it could be found necessary to resort to the liability of the defendants on their guarantee. That question depended upon the result of the litigation as to Campion's claim of lien for freight, which could be settled by litigation alone; and it is expressly found in the case, that every step taken by the plaintiffs in the course of that litigation, was taken under the advice of eminent counsel. Under the peculiar circumstances of this case, therefore, the action was in time.

Secondly, Bazett & Co. were fully justified in resisting Campion's claim of lien, and the defendants are justly chargeable, upon their guarantee, with the expenses of that litigation, which was bona fide undertaken for their benefit. These expenses cannot, under the circumstances, be [687] considered to have been voluntarily incurred. If Gooch had remained solvent, he would, on trying the question of lien, have been liable to the payment of the expenses.

Cresswell, contra. The Statute of Limitations began to run as soon as the extent of Gooch's assets was known by the sale of the return cargo, and the winding up of the accounts between Gooch and Bazett & Co., in the year 1818. All the facts were then ascertained upon which a final adjustment of the pending accounts with Gooch might and ought to have taken place. The right of action against the defendants on their guarantee was then complete. It is argued, that, inasmuch as it was uncertain, until the result of the litigation with Campion, that his claim of lien was a valid one, the Statute of Limitations would not begin to run until the final determination of that question by the Courts. This argument is wholly fallacious. It must be assumed that the law as to Campion's right of lien was clear, and was known to all the parties, as soon as the facts upon which it depended were ascertained. The plaintiffs could not be entitled, because they entertained or expressed erroneous doubts as to the law, to protract litigation for many years, and to contend that, during all that period, the operation of the statute was suspended. All the authorities on the subject are clearly opposed to such a conclusion. Thus, upon a sale of goods on credit, the statute begins to run immediately upon the expiration of the credit, and not from the time only of a demand made on the buyer for the price: *Helps v. Winterbottom* (2 B. & Adol. 431). A cause of action arising out of a contract accrues immediately upon the actual breach of it, and therefore the Statute of Limitations begins then to run, although the breach of contract may not come to the plaintiff's knowledge until afterwards: *Battley v. Faulkner* (3 B. & Ald. 288). The same principle is [688] recognised, as to the liability of co-sureties, in *Davies v. Humphreys* (6 M. & W. 153). In this case, therefore, the cause of action accrued on the non-adjustment of Gooch's accounts in 1818, and this action is too late.

Secondly, the defendants cannot be charged with the costs of the protracted and ultimately unsuccessful litigation in which the plaintiffs chose to engage. They gave no authority whatever for that purpose; and they cannot be made liable without an express agreement to that effect: *Howes v. Martin* (1 Esp. 162), *Winckworth v. Mills* (2 Esp. 483), *Short v. Kalloway* (11 Ad. & Ell. 28).

The Attorney-General, in reply. The plaintiffs were not to resort to the defendants until it should be found necessary so to do; and it did not become so until their accounts with Gooch were finally adjusted in due course of law. The plaintiffs could not know, until then, whether such necessity would arise at all. If an action had been brought in 1818, it could not have been alleged or shewn that the plaintiffs were not in complete funds, as against all the parties. Here there was no breach of the contract, until it was found necessary by the plaintiffs to call upon the defendants. [Rolfe, B. None of these defendants were parties to the legal proceedings; what right have the plaintiffs to say they did not know the law? I should interpret the words, "in the event of your finding it necessary to call upon us," to mean, in the event of the plaintiffs having all the facts before them on which the necessity existed.] The determination of the Court was one of those facts. [Rolfe, B. Bazett & Co. had the right of action, though they did not know it. If they had brought the action in 1818, and these facts had appeared, they must have sustained it.] The parties contemplated all the circumstances which might prevent the plaintiffs from [689] having a fund out of which they could reimburse themselves; and they could not know whether they should find it necessary to resort to this security, until the final result of their transactions with Gooch.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B. In this case several questions were argued, and with much ability on both sides; but as we are of opinion that the claim of the plaintiffs is barred by the Statute of Limitations, it will not be necessary to deliver our judgment on the other points brought before the Court.

The facts of the case, so far as it is necessary to state them, are shortly these. Bazett & Co., now represented by the plaintiffs, were in advance to Gooch, who had sent out a cargo of goods to Calcutta for sale there on his account. The goods were consigned to Colvin & Co. of Calcutta, the agents of the plaintiffs, and were to be disposed of there by them; and the proceeds were to be applied in procuring for Gooch a return cargo to be consigned to the plaintiffs in London, so as to give them a security out of the proceeds for their advances to Gooch.

In this state of things, the defendants applied to Bazett & Co. to make what in fact must be considered as a further advance of £850 to Gooch. To this application Bazett & Co. acceded; but as it was then doubtful what, if anything, might ultimately be due to Gooch upon the realization of the proceeds of the cargo consigned to India, and of the cargo which might be shipped therefrom in return, the defendants, on the 22nd of November, 1817, signed a letter to the plaintiffs, on which the action is brought. The letter is in these words:—"You having expressed some doubt of the propriety of paying Mr. Gooch his draft on you for £850 in our favour, we hereby engage, if you will pay us the same, we will reimburse you [690] the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of Mr. Gooch's pending accounts with your London or Bengal house, or from any other circumstances." The present action is brought on the guarantee so entered into by the defendants; and the question is, when did the liability of the defendants first arise? for from that period, undoubtedly, the Statute of Limitations began to run.

On the part of the plaintiffs it is contended, that it did not arise until the accounts between Gooch and the plaintiffs had been in fact finally adjusted; and that, as such adjustment was delayed by disputes arising on the subject of a claim of lien for freight between Campion and the plaintiffs, it did not finally take place until within six years of the commencement of this suit, and thus the defence on the Statute of Limitations fails.

But we are not of that opinion. We think the cause of action arose as soon as, by the sale of the return cargo in this country, all the facts were ascertained on which the adjustment of the pending transactions might and ought to have taken place; and that the delay occasioned by the disputes between the plaintiffs and Campion does not in any manner affect the defendants. Every fact necessary to the adjustment of the accounts existed, and was fully ascertained, prior to the filing of the bill by the East India Company in 1818. Bazett & Co. were under no obligation to enter into the contest with Campion about the freight. They were not authorized to do so, either by Gooch or by the defendants, and they had at that time a clear right of action, both against Gooch upon the balance of his account as it then stood, and against the defendants in respect of their liability on the guarantee in question. From that time, at latest, we are of opinion that the statute began to run; and as that was much more than six years before the present action was commenced, we are of [691] opinion that the verdict must be entered for the defendants on their plea of the Statute of Limitations.

The verdict ought also to be entered for the defendants on the fourth issue.

Judgment for the defendants accordingly.

PECHELL AND OTHERS v. WATSON AND RODGERS. Exch. of Pleas. May 29, 1841.

—Declaration in case stated, that before and at the committing of the grievances by the defendants, an action of trespass had been commenced and was depending, wherein R. H. was plaintiff, and the now plaintiffs were defendants; in which action the now plaintiffs appeared by P. M., then being their attorney in that behalf, and the said action was defended by the now plaintiffs by and through the said P. M. as such attorney: and charged, that the defendants, contriving &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action on the part of the said R. H. against the now plaintiffs; by reason whereof

the now plaintiffs have been greatly injured, prejudiced and aggrieved in and about their defence in the said action, and have incurred and been obliged to pay divers large sums of money, amounting &c., in and about their defence of the said action so by them made through the said P. M., so being their attorney in that behalf. At the trial, the jury found a verdict for the plaintiffs for the amount only of the bill of costs paid by them to P. M. as their attorney in the former action, and the verdict was entered upon the *postea* accordingly:—Held, on motion in arrest of judgment, that the action was maintainable jointly by the plaintiffs; the expenses of the defence in the former action, to which the verdict was confined, being a joint and not a several damage.—A declaration in case for maintenance need not charge the maintenance to have been committed *contra formam statuti*; it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law, with additional penalties.—Nor need the declaration allege that the defendant was not interested in the action maintained; if he was, that is matter to be pleaded by him.—A count in case, charging that the defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit therein mentioned, instigated and stirred up A. B., a pauper, to commence and prosecute an action against the plaintiff, by reason whereof A. B. did commence and prosecute such action, &c.; whereby the plaintiff was put to great trouble and vexation, and obliged to lay out a large sum in the defence of such action; is good.

[S. C. 11 L. J. Ex. 225. Referred to, *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 1876, 2 A. C. 206; *Bradlaugh v. Newdigate*, 1883, 11 Q. B. D. 8; *Harris v. Brisco*, 1886, 17 Q. B. D. 511.]

Case. The first count of the declaration stated, that the defendant heretofore, to wit, on 1st January 1838, and on divers other days and times, &c., contriving and maliciously intending to injure, harass, and damnify the plaintiffs, and to put them to great vexation and expense, unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit next hereinafter mentioned, did advise, procure, instigate, and stir up one Richard Hearsey, then being a pauper and in indigent circumstances, to commence and prosecute an action of trespass in the Court of our Lady the Queen, before Her Majesty's Justices of the Bench at Westminster, against the plaintiffs together with certain other persons [naming them]; in which [692] said action the now plaintiffs did appear, plead, and defend the same by their lawful attorney in that behalf, to wit, by one P. M.; and the said other defendants therein did appear, plead, and defend the same by their certain other lawful attorney in that behalf, to wit, by one W. M. And the now plaintiffs further say, that by and through such advice, procurement, instigation, and stirring up as aforesaid, the said Richard Hearsey did in fact, without reasonable or probable cause, commence and prosecute the said action of trespass, and that such proceedings were thereupon had, that afterwards, to wit, on &c. [stating a judgment of nonsuit against the plaintiff Hearsey, and a suggestion for double costs to the defendants, as justices of the peace]. Whereby, and by reason of such last-mentioned action, and of such advice, procurement, instigation, and stirring up as aforesaid, the now plaintiffs were not only put to great trouble and vexation in and about the defence of the said action, but were also obliged to pay, and did in fact pay, a large sum, to wit, £600, in and about the defence of the said action, and the costs thereof and in relation thereto; and the said now plaintiffs, by reason of the poverty and indigence of the said Richard Hearsey, were and have hitherto been unable to obtain satisfaction from him for or in respect of the said costs so adjudged to the said plaintiffs in the said suit, &c., and the same remain wholly unpaid and unsatisfied to the said now plaintiffs.

The second count stated, that, before the time of the committing of the grievances by the defendants as thereinafter next mentioned, a certain other action of trespass had been commenced in the Court of our Lady the Queen, &c., wherein one R. Hearsey was plaintiff, and the now plaintiffs together with certain other persons [naming them] were defendants; and in which said last-mentioned action the now plaintiffs appeared by the said P. M., then being their attorney in that behalf, and the said last-mentioned action was defended by the now plaintiffs by and [693] through the said P. M., as such attorney; and in which said last-mentioned action the said other defendants therein appeared by W. M., then being their attorney in that behalf, and the same

was defended by the said other defendants therein by and through the said W. M. as such attorney: that at the time of the committing the said grievancees &c., the said last-mentioned action was depending in the said Court; yet the now defendants, wrongfully, unjustly, and maliciously continuing and intending to injure, prejudice, and aggrrieve the now plaintiffs, and to vex, harass, and impoverish them, and to subject them to great and heavy costs, charges, and expenses, heretofore, to wit, on &c., and on divers other days and times &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said last-mentioned action on the part and behalf of the said Richard Hearsey, the plaintiff therein, against the now plaintiffs, so being defendants therein as aforesaid, and the said other defendants therein; by reason of the committing of which said last-mentioned grievances, the now plaintiffs have been greatly injured, prejudiced, and aggrieved in and about their said defence in the said last-mentioned action; and also by reason thereof have been put to, and have incurred and been obliged to pay divers large sums of money, amounting &c., in or about their defence of the said action so by them made by and through the said P. M., so being their said attorney in that behalf; and which said monies have become and are wholly lost to the plaintiffs.

The 3rd and 4th counts were respectively identical with the 1st and 2nd, except that they referred to another action of trespass brought against the plaintiffs by one Sarah Osborne.

The 5th count was for maliciously causing to be prosecuted against the plaintiffs the action of trespass in the name of Sarah Osborne, without her license or authority, and without having any interest in the suit; the same special damage being alleged as in the first count.

[694] Plea, not guilty.

The cause was tried at the Winchester Summer Assizes, 1840, before Coleridge, J., when the jury found a general verdict for the defendant Rodgers, but found the defendant Watson guilty on all the counts of the declaration except the last, and upon the last count not guilty; and assessed the damages on the first and third counts at 40s., for the costs and expenses of the plaintiffs incurred in their defence of themselves in the actions mentioned in those counts; and on the second and fourth counts at 46l. 8s., for the costs and expenses of the plaintiffs incurred in their defence of themselves in the actions mentioned in those counts. (a)

In Michaelmas Term, Bompas, Serjt., for the defendant Watson, moved for a rule to shew cause why the judgment on the verdict found for the plaintiffs should not be arrested. The first and third counts of the declaration are bad in substance. A. has no right of action against B., because B. has sued A. without reasonable and probable cause; therefore also A. has no right of action against a party who has instigated and stirred up B. so to sue A. The maintenance of another, where no suit is actually pending, has been held not to be actionable, although it may be indictable: Vin. Abr., Maintenance (T. 3). Neither does the count allege that the defendants knew that Hearsey was a pauper. It is, indeed, alleged that they maliciously instigated him to commence the action; but the word "maliciously" means only from indirect and improper motives, and does not imply personal malice to the plaintiffs. But, inasmuch as the pauper himself would not be liable to an action, so neither can the party who [695] advised or instigated him, unless, indeed, where the circumstances amount to a conspiracy.

Secondly, the second and fourth counts are bad, because they contain no averment that the defendants were not interested in the suits therein mentioned. The only allegation is, that they wrongfully and maliciously upheld and maintained the actions on the part of Hearsey and Osborne against the now plaintiffs. That is not sufficient to render them liable, without shewing also that they had no interest. Nor do those counts shew that the maintenance was not of charity only.

Thirdly (and this objection applies to all the counts), such an action as the present

(a) The verdict, as it was originally entered on the *postea*, was general in its terms, and not confined to the costs and expenses of the defence: but after the case had been argued on the part of the plaintiffs, by direction of the Court, an application was made on the part of the plaintiffs to the learned Judge to amend the entry of the verdict on the *postea* by his notes, which was accordingly done; and it is stated above as it was so amended. See post, p. 700.

cannot be jointly maintained by several plaintiffs; the injury is altogether several. How can it be said that one man can recover damages for the vexation and annoyance suffered by another in the prosecution of an action against him?

Fourthly, according to all the precedents and forms, the action for maintenance must be founded upon some statute, and the declaration ought to lay the grievance as being committed against the form of a statute. It is doubtful, indeed, whether any but a *qui tam* action can be brought for maintenance; almost all the precedents are of actions so brought.

The Court expressed their opinion that the first count was good, but granted a rule on the other points.

Erle, Crowder, and Smirke shewed cause at the sittings after last Hilary Term (Feb. 11). The main question for discussion in this case is, whether more than one plaintiff can maintain the action. The four counts in the declaration, upon which the verdict has been found for the plaintiff, may for the purpose of the argument be treated as two only, the third being, *mutatis mutandis*, the same as the first, and the fourth as the second. On the first count, which sets forth fully and minutely the cause of action, [696] nominal damages only have been entered; the substantial damages being taken upon the second count, which states the cause of action in shorter and more general terms: and if the latter count can be supported, this rule cannot succeed. Now, the second count, after setting forth that an action of trespass had been commenced in the Court of Common Pleas, in which Harsey was the plaintiff, and the now plaintiffs with others were the defendants, and that they appeared and pleaded by their respective attorneys, proceeds to state, that, at the time of committing the grievances thereafter mentioned, "the said action was depending in the said Court; yet the now defendants, wrongfully, unjustly, and maliciously contriving and intending to injure the now plaintiffs, and to subject them to heavy costs and expenses, wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action on the part of Harsey, the plaintiff therein, against the now plaintiffs and the other defendants therein;" and then follows this allegation of special damage:—"By reason of the committing of which said last-mentioned grievances, the now plaintiffs have been greatly injured and prejudiced in and about their defence in the said action; and also by reason thereof have been put to and incurred and obliged to pay divers large sums of money, amounting &c., in and about their defence of the said action by and through their attorney; and which monies have become and are wholly lost to the plaintiffs." The complaint in this count, therefore, is the vexation and prejudice the plaintiffs were put to in their defence to the former action, in this, that they were obliged to employ an attorney, and so were put to great costs and expense. And the damages are applied entirely to the costs incurred in the defence of the former action. That being so, the case of *Barratt v. Collins* (10 Moore, 446) is an express authority to shew that this verdict may be sus-[697]-tained. There an action was brought and a verdict obtained by two plaintiffs for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses jointly incurred by them in procuring their liberty; and the jury having by their verdict confined the damages to the expenses, the Court directed an amendment of the *postea* in conformity with the verdict, and held that, in respect of such joint expenses, the joint action was maintainable, although not in respect of the imprisonment. In *Ward v. Brampton* (3 Lev. 362), two churchwardens joined in an action for a false return to a mandamus; and after verdict for the plaintiffs, upon motion in arrest of judgment, on the ground that they ought not to have joined in the action, as the wrong or damage to one was not a wrong or damage to the other, and the office of one was not the office of the other; judgment was given for the plaintiffs, on the ground that the mandamus, and the prosecution and charge thereof, were joint. That decision was confirmed in *Green v. Pope* (1 Ld. Raym. 125; Salk. 428), where Powell, J., cited a case from 8 Assis. pl. 30,^(c) in support of the proposition that all who joined in suing a prohibition upon a suit in the Ecclesiastical Court for defama-

(c) There the question was, whether one of several disseisors might bring attain against his co-disseisor. But the reporter adds, *Ibi* dicitur, that if a plaintiff in assize recover against several tenants, they may join in a writ of error, and each re-have his own land.

tion, may join in an attachment thereon, and it is no objection to say that the defamation was several. The principle of these decisions is, that where several parties have jointly suffered or been harassed by legal proceedings, they may sue jointly for the expenses incurred therein. In *Cook v. Batchellor* (3 Bos. & P. 151), it was even held that two partners in trade might maintain a joint action for slander spoken of them in their trade, averring special damage; and the Court referred to a pre-[698]-vious case of *January v. Spires*, in which the same point had been before the Court, when the action was held to be maintainable. So in *Forster v. Lawson* (3 Bing. 452; 11 Moore, 360), it was held that persons in partnership as bankers might join in an action for libel against them in respect of their business: although in such action no damages can be given for any injury to the private feelings of the individuals, but only for the injury they sustained in their joint trade; *Haythorn v. Lawson* (3 C. & P. 196). In the Year Book, 14 Hen. 6, fol. 13, pl. 44, there is a case of an action brought by two persons, for the maintenance of a defendant in an action of trespass at their suit. It was objected, that there were three plaintiffs in the action of trespass, who ought therefore all to have joined in the action for maintenance, the cause of action being common to all of them: and the opinion of the majority of the judges was, that the writ should abate on that ground. Now if three were bound to join, it follows that two might join. Nor is there any reason, in the nature of the injury inflicted, why a joint action should not be maintainable. It is not founded on any personal injury, either mental or corporeal; it is a common law wrong committed by improperly bringing an action against several persons; and the remedy for it would seem properly to follow the nature of that act to which it is an accessory, viz. the former action wrongfully maintained against all the plaintiffs. The case in the Year Book is cited in Theloa's Digest of Original Writs, fol. 59, title "Joynder en Action," pl. 5, as an authority that all the three plaintiffs might join. The older books of entries contain many precedents of declarations in actions for maintenance, which invariably pursue the same form, viz. that the defendant upheld and maintained the former action, without going on to allege any special damage: and although the declaration, in the case in 14 Hen. 6, is not given, it may be assumed that [699] it was a writ in the same general form; and that case is, therefore, an authority to shew, that *primâ facie* the injury is a joint one, done to all those against whom the maintenance was. Perhaps the defendant might even compel all to join by plea in abatement. [Parke, B. In that case, the plaintiffs were also plaintiffs in the former action; that stands, therefore, on a different principle, inasmuch as joint plaintiffs have a joint interest in the action, which is defeated by the interloper.] The reason rather is, because they were joint parties to the record in the former action. In 2 Inst. 563, it is said, that "if two be impleaded in a real action, and one doth maintain the demandant to have part, the tenants bring a writ of champerty, the nonsuit of one is not the nonsuit of the other, because the action of champerty being but accessory, doth follow the nature of the principal action." In Rastall's Entries, 428, there are precedents of declarations for maintenance by husband and wife, and by two executors. The plaintiffs obtain no advantage by joining in the action, but the defendant does, because he is thereby subjected to one action only, the recovery in which, for all the joint damage, will be a bar against each of the plaintiffs to any subsequent action.

Secondly, it is no objection to the second and fourth counts, that they contain no allegation that the defendants were not interested in the former action. There is no precedent containing such a negative allegation: if the fact be so, it ought to come by way of answer from the defendants. The plaintiff might as reasonably be called upon to allege, that the defendant was not a relation, a pleader, &c., of the party in the former action. The distinction is, that maintenance is *primâ facie* intended to be unlawful; Savile, 43; and here it is alleged that the defendants unlawfully maintained the former action. [The Court intimated that they were satisfied as to this point.]

Thirdly, the counts are good without concluding against [700] the form of the statute, maintenance being an offence at common law, and the statutes on this subject being all merely declaratory of the common law, only enacting additional penalties. [On this point the following statutes and authorities were referred to; but the objection was afterwards abandoned by the defendants' counsel:—Stat. Westm. 1, ce. 25, 28, 33; 13 Edw. 1, st. 1 (Westm. 2), c. 49; 28 Edw. 1, st. 3, c. 11; 1 Edw. 3,

st. 2, c. 14; 4 Edw. 3, c. 11; 20 Edw. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9; Y. B. 11 Hen. 6, fol. 11, 34 Hen. 6, fol. 30; 2 Inst. 208; Com. Dig., Maintenance, (A. 1); Co. Litt. 368 a., 369 b.]

Bompas, Serjt., in support of the rule, contended, that the action was not jointly maintainable by the plaintiffs; the original action, in which the maintenance was alleged to have been committed, being an action of trespass, in which, therefore, the then defendants had no joint interest; whereas, in order to entitle parties to bring a joint action, it must be brought in respect of some joint interest or property existing in all the plaintiffs.

The learned Serjeant was then proceeding to argue, that inasmuch as the verdict (as it then stood on the *postea*) was not limited to the joint expenses of the defence, but included also all other injury sustained by the plaintiffs by reason of the maintenance, the damages appeared to be given in respect of what was clearly a several interest; whereupon the Court directed the application for an amendment to be made to Coleridge, J., as before stated (*ante*, p. 694, note). And now, that amendment having been made,

Butt, W. H. Watson, and Carrow, were further heard in support of the rule. The cause of action in this case is several and not joint, and the second count, which is relied on by the other side, does not contain any allegation [701] of joint damage to the plaintiffs. [Parke, B. As the verdict is now entered, *Barratt v. Collins* is expressly in point.] The only allegation of damage in this count is, that, by means of the committing of the grievances, the plaintiffs have been greatly injured, &c., in and about their defence in the former action, and have been put to and incurred and been obliged to pay divers large sums of money in and about their defence, and through the said P. M. so being their attorney in that behalf. That is not an allegation of any joint damage. For all that appears on this record, the causes of action are altogether several. [Parke, B. It is alleged that they jointly appeared and defended by one attorney.] The action was trespass, and therefore they would be separately liable. There is nothing to shew that the attorney had a joint demand against them all. If there were a joint retainer, that ought to have appeared on the record. [Parke, B. The allegation of joint damage was much less strong in *Barratt v. Collins* than here—it was there merely alleged that the plaintiffs were forced and obliged to expend divers large sums of money in and about the obtaining their release from the arrest; but the Court held that a sufficient allegation of joint damage, if it had not been mixed up with the special damage by the imprisonment.] There the action out of which the complaint arose was an action of contract. Besides, the judgment of the whole Court there was, that the judgment must be arrested; and although Gaselee, J., afterwards ordered the *postea* to be amended, by confining the verdict to the damage by the joint expense, that appears to have been done without argument. The point now under discussion can hardly be said to have been brought before the Court in that case. The case of partners in trade is different, because they would pay out of the partnership funds. So, in *Ward v. Brampton*, the churchwardens would pay the charge of the proceedings out of a common fund.

[702] PARKE, B. It is impossible to distinguish this case from that of *Barratt v. Collins*: and it is perfectly clear that the Court of Common Pleas there pronounced their judgment, that upon the record as amended there was a sufficient allegation of a joint damage to the plaintiffs. This case is indeed stronger than that, inasmuch as the declaration here alleges, that the now plaintiffs appeared in the former action, in which they incurred the expenses to which the damages are now confined, by one attorney, and that it was defended by them through that attorney. Without, therefore, pronouncing any definite opinion whether the case of *Barratt v. Collins* was rightly decided or not, it is sufficient to say that it is expressly in point, and therefore this rule must be discharged. If the defendants are dissatisfied with the judgment of this Court, they may sue out a writ of error.

ALDERSON, B. I do not assent to the statement that this point was not considered in *Barratt v. Collins*; for it is pointedly adverted to in the judgment of the Court, especially by Gaselee, J., who refers to the case of *Smith v. Hickson*, as having established the principle, that in actions on torts it is sufficient for the plaintiff to prove any one charge in his declaration, and therefore as the plaintiffs proved, as they had alleged by way of special damage, that they had incurred a joint expense,

and the jury confined their verdict to that part only, it must be entered accordingly. If that decision was wrong, it must be questioned in a Court of Error.

GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

[703] VACATION SITTINGS AFTER TRINITY TERM.

HAWKEN v. BOURNE. Exch. of Pleas. June 17, 1841.—A joint-stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus issued on the formation of the company stated, that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the scrip certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns:—Held, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificate, unless it were shewn that the agent had in fact no authority from the defendant, and that the plaintiff had notice thereof.

[S. C. 10 L. J. Ex. 361. See 6 M. & W. 461; 7 M. & W. 595; 151 E. R. 905 (with note).]

Debt for work and labour and materials, for the carriage and conveyance of goods, for goods sold and delivered, and on an account stated. Plea, *nunquam indebtedatus*. At the trial before Maule, J., at the Summer Assizes for Cornwall, 1840, it appeared that the action was brought against the defendant as a shareholder in the Trewolvas Mine, in the parish of St. Columb Major, Cornwall, for goods supplied by the plaintiff for the necessary working of the mine, on the order of the purser or agent of the directors, which was shewn to be the customary course in such concerns. It was proved that the defendant had become a shareholder at the time of the establishment of the concern, in 1836, that he had paid several sums of money towards the working of the mine, that he had been in Cornwall during the period of its working, and that he had attended a meeting of shareholders in Liverpool, and had taken part in the removal and appointment of directors. For the defendant, the prospectus issued on the formation of the company was put in, which stated, that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred. The scrip certificates issued to the shareholders also bore an indorsement to the same effect. There was no evidence that the plaintiff had any knowledge of the defendant's being a shareholder. The learned Judge, in summing up, told the jury that he thought that, the mine being worked with [704] the knowledge and for the benefit of the defendant, he was liable on contracts entered into for articles ordered in the usual way of conducting such concerns on behalf of the owners, unless the party ordering them was in fact not authorized by the defendant, and the plaintiff had notice of that fact. The jury found a verdict for the plaintiff, damages £37.

In the following Michaelmas Term, Crowder obtained a rule nisi for a new trial, on the ground of misdirection: against which

Cockburn and Butt shewed cause at the sittings after Hilary Term, (Feb. 11 and 13). This case is substantially the same as that of *Tredwen v. Bourne* (6 M. & W. 461), except that here the evidence was somewhat stronger to shew the defendant's interference in the undertaking. It will be said, however, that the evidence given for the defendant in the present case, inasmuch as it shewed a limited authority given to the defendants to deal for ready money only, takes it out of the authority of *Tredwen v. Bourne*. But that evidence makes no difference in the legal view of the case. The mine was worked with the defendant's knowledge and for his benefit, and he was a complete partner in the concern; and however the prospectus might affect the mutual rights and liabilities of the partners inter se, he is liable, as a partner, to third persons, for supplies made in the ordinary course and conduct of the concern. [Parke, B. That is so, where credit is given to the party; but where it is not, although he *prima facie* gives such an authority to his co-partners, is he not at liberty to shew, *è contra*, that he did not in fact give any such authority? Alderson, B. The rule you have stated no doubt applies to known partners.] And, it is submitted,

to unknown partners also. In *Wintle v. Crowther* (1 C. & J. 316), Bayley, B., says—"Where the partnership firm is pledged, the partnership, [705] consist it of whom it may, and whether the parties are named in the firm or not, and whether they are sleeping or secret partners, will be bound, unless the conduct of the person who seeks to charge the partnership can be impeached." Whom are the parties, in such a case as this, supposed to trust? Clearly not the agents, who are carrying on the daily business of the mine, but the partnership, of whomsoever consisting; and if they were bound first to inquire of whom it consisted, before making the supplies, the whole proceedings of the mine would be stopped. But this is not properly the case of a secret or dormant partner, although the defendant was unknown by name to the plaintiff: the credit is given to the whole association, on the ground that, when the time for payment comes, the tradesman will be able to find out of the mass somebody who shall be responsible to him. A dormant partner is one who withholds his name from the world, and does no act but privately: this defendant was an avowed and active partner. A joint-stock company, unless it exist by statute or charter, is equally a partnership with a private firm. [Parke, B. It was not left to the jury to say, whether the defendant acted so publicly as that he must have been known by the plaintiff to be a shareholder, and the plaintiff acted on the faith of his being so. If that had been the case, undoubtedly the defendant must be taken to have given an authority to carry on the mine according to the course of such concerns; but that was a question for the jury. But if the defendant was utterly unknown to the plaintiff, the question is, whether he can be made liable, unless he be shewn to have authorized the directors, expressly or impliedly, to deal on credit. The evidence given for the defendant was held by the learned Judge to be immaterial.] This question was much considered in *Fox v. Clifton* (6 Bing. 776; 4 M. & P. 676; 9 Bing. 115; 2 M. & Scott, 146). In that case the defendant was [706] held not to be liable, on the ground that the partnership was inchoate only, and that he had no right to a participation in the profits, which Tindal, C. J., considers to be the test of a partnership: here the defendant clearly was a complete partner. *Ellis v. Schmeck* (5 Bing. 521; 3 M. & P. 220) must be taken to have been virtually overruled by *Fox v. Clifton*. *Dickinson v. Falpy* (10 B. & Cr. 128; 5 Man. & R. 126), and *Bourne v. Freeth* (9 B. & Cr. 632; 4 Man. & R. 512), were decided on the ground that the contracts entered into in those cases were not in the ordinary course of such concerns. It was for the defendant in this case to prove that he was not a known, but a secret partner: it is not enough that he has restrained his partners by a subordinate arrangement inter se, which cannot affect their liability to third parties. In *The South Carolina Bank v. Case* (8 B. & Cr. 427; 2 Man. & R. 459), it was held that a partnership was liable on a bill drawn by one of the partners in his own name only, though in so doing he had expressly violated his private instructions. So here, the agreement that the directors should not deal on credit was a mere private arrangement, which could not affect the liability of the defendant, as one of the partners, to pay for necessary things supplied for the carrying on of their joint undertaking.

Crowder, (with whom was Erle), contra. This case has already been in effect decided in favour of the defendant, by what fell from the Court in the case of *Tredwen v. Bourne*. The marginal note of that case is—"The members of a mining company have authority by law, in the absence of any proof of a more limited authority, to bind each other by dealings on credit for the purpose of working the mines," &c.: and in giving judgment, Parke, B., says—"If the defendant had shewn, that by this particular [707] contract the directors were only to deal with the actual fund put into their hands, and that they had no power to pledge the credit of the shareholders, that would have been a defence, because the plaintiff has not trusted to any representation of the defendant, or bargained personally with him." Now, in the present case, evidence was given that the authority of the directors was so limited, and that they were expressly prohibited from dealing on credit. The principle is, that a party who binds another as agent, can do so only so far as in fact he is an agent; and in this case the agency was limited to ready money transactions. *Dickinson v. Falpy* goes beyond what it is necessary to contend for here. In that case there was no express limitation of the authority: yet Lord Tenterden says—"Assuming that the defendant was proved to be a partner, it was not shewn that he or the others members of the company had given any authority to a certain part of that company, to bind the rest by drawing or accepting bills of exchange. In order to

shew that, the plaintiffs should have gone further, and proved some express authority for that purpose, or facts from which the law would imply such authority." And Bayley, J., says—"The directors of such a company ought to take care to have ready money to answer all demands upon them." Dealings on credit in mining transactions are not so necessary or usual as in ordinary commercial partnerships. In principle there is no difference between this case and that of clubs, where the members are liable only to the extent of their subscriptions: *Fleming v. Hector* (2 M. & W. 172). The only difference is, that in the latter case there are no profits; but in both cases it is only an authority to the managing parties to deal with ready money. Every body knows that a shareholder in a joint-stock company is a person who pays calls, and thereby limits the amount of his liability. In *Pitchford v. Davis* (5 M. & W. 2), Parke, B., says—"A shareholder [708] who does not interfere with the management of the concern is not liable." [Parke, B. That was the case of an incomplete partnership. Here the defendant has become a complete partner, and the question is, whether he can limit the authority given to his copartners to dealings not upon credit.] He has become a partner so as to have a right to the profits; but the authority he gives is not therefore the less a limited one. It is not like a case of general partnership and general authority. All partnerships are but a form of the relation of principal and agent, and the question must always be as to the extent of the agency. [Alderson, B. There are certain usual and ordinary modes of dealing belonging to trading concerns, among which is dealing on credit. Is it not, then, a reasonable inference of law, that a party who becomes a partner in such a concern, shall be held to deal on the usual terms, until he informs the other party that he is not dealing on those terms, but has limited his responsibility, and is dealing on unusual terms?] It is not a reasonable inference, because all mankind believe the contrary: nobody supposes a shareholder to be trusting the directors to that extent, although in ordinary partnerships it is so assumed. *Primâ facie* the tradesman looks to the party who gives the order; if he looks further, he must inquire for the principals. It is perfectly consistent with reason and convenience, that, the shareholders furnishing the funds by means of the calls, the directors shall administer those funds, either paying ready money or dealing on credit, as in clubs: they taking that responsibility on themselves. The only argument derivable from evidence as to the usual mode of conducting the concern is, that the plaintiff must have taken the defendant to have held himself out as giving authority in such a case; whereas the real inference is in fact made the other way, it being notorious that shareholders are merely parties, who by the payment of calls supply a fund, which the directors alone administer.

Cur. adv. vult.

[709] The judgment of the Court was now delivered by

PARKE, B. In this case, which was argued before my Brothers Alderson, Gurney, and myself, at the sittings after Hilary Term last, the only point was, whether my Brother Maule's direction to the jury was right. It was an action against the defendant as a shareholder, in what is termed a scrip mine in Cornwall, carried on for the benefit of several persons, by directors, and the claims were for necessary goods supplied for the working of the mine, pursuant to the order of the purser, which, there was evidence, was a customary course in such concerns. It appeared that the defendant had taken shares in the undertaking at or about the time of its establishment, and paid sums of money towards working the mine, and interfered in the appointment of directors; and in short, that he was really a partner in the working of it: but there was evidence that he had become such under an agreement, of which the prospectus was offered as proof, that the directors were not to deal upon credit; and the plaintiff was entirely ignorant that the defendant had any thing to do with the concern. In summing up the case, the learned Judge told the jury, that he thought that, the mine being worked for and with the knowledge of the defendant, he was liable on such contracts as, according to the usual way of conducting such a concern, are made on behalf of the mine-owners, unless the person actually ordering supplies had, in fact, no authority from the defendant, and the plaintiff had notice of this: and there being evidence that the contract in question was made in the usual way of conducting such a concern, and no proof that the plaintiff knew of the limitation of the directors' authority, and of the agent appointed by them, the plaintiff had a verdict.

We have felt some doubt, in considering this case, whether the defendant was liable, assuming, as we must for the purpose of the argument, that there was an agree-[710]-ment that the directors were not to deal upon credit. We are, however, now satisfied that the learned Judge's direction was right, and that the jury were warranted in finding the defendant liable to this demand. There was evidence that he was a complete partner with the directors, in working the mines in the manner they were worked; and one partner, by virtue of that relation, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged. Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves; and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. In the present case, therefore, the acting directors had power to bind the defendant by contracts made by themselves, if made in the usual way of conducting such a concern, as well as by those made by a purser, if it was the usual mode to act by the intervention of such an agent. We think, therefore, that the learned Judge's direction was correct, and that the rule must be discharged.

Rule discharged.

[711] *NEWTON v. WILMOT*, BART. Exch. of Pleas. June 17, 1841.—The defendant demised to the plaintiff, for 21 years, a mansion-house and land, with the sole licence of shooting and sporting over all other the lands, plantations, and coverts of the defendant, subject to the liberty for each tenant on his farm to kill rabbits, with ferrets only. The defendant covenanted for quiet enjoyment, and that if, at any time during the term, any of the tenants of the defendant of any such lands, plantations, coverts, &c., should obstruct the plaintiff in the enjoyment of the said licence, or should destroy the game, rabbits, &c., then the defendant would, upon the requisition of the plaintiff, give notice to quit to such tenants, and enforce the notice by such legal measures as should be necessary. Breach, that, after the demise to the plaintiff, the defendant demised to T. R. for the term of twelve years, one hundred acres of the plantations on which the exclusive right of killing rabbits had been granted to the plaintiff, without any clause in the demise to prevent the said T. R. from obstructing the plaintiff in the enjoyment of the said licence, or from destroying rabbits, and without reserving to the defendant the power of giving T. R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the said plantations not being at the time of the demise to the plaintiff parcel of any farm; and that the said T. R. did afterwards kill and destroy divers rabbits. The defendant in his plea set out the lease on oyer, which contained, amongst other things, the demise of certain lands and pools, "for the better description whereof a plan is indorsed on the second skin of these presents:"—the plan was not set out on the oyer. The defendant then pleaded, that the said rabbits so killed by T. R. were killed by him on his own farm, with ferrets only:—Held, on demurrer to the plea, that the exception as to killing rabbits extended, not only to farms existing at the time of the demise to the plaintiff, but also to farms subsequently created.—Held, also, that the declaration was bad, as not containing any breach, the demise to T. R. not constituting any breach of the defendant's covenant.—Semble, that it was not necessary to set out on oyer the plan referred to in the indenture.

[S. C. 10 L. J. Ex. 476.]

Covenant. The declaration stated, that the defendant, by indenture dated the 28th of August, 1840, made between the defendant of the one part, and the plaintiff of the other part, did grant and demise to the plaintiff the manor of Berkeswell, in the county of Warwick, and the capital mansion-house called Berkeswell Hall, with the appurtenances, &c.; and also the sole and exclusive licence, privilege, and authority to and for the plaintiff, his executors, administrators, and assigns, and his and their gamekeepers, and all and every person and persons, by his and their appointment or

permission, of hunting, coursing, shooting, fowling, sporting, and fishing in the river Blythe, and upon and over all other the lands, plantations, coverts, and waters of the defendant, extending over upwards of two thousand acres of land, within the county of Warwick aforesaid, or otherwise, for the purpose of killing or taking game, rabbits, fish, wild ducks, teal, widgeon, snipes, woodcocks, and other wild fowl, the plaintiff, his executors, administrators, or assigns making good any damage occasioned to such lands, plantations, or coverts [712] by all or any of the means or ways aforesaid, and paying to the defendant or his assigns, or such other person or persons as aforesaid, a reasonable compensation for the same, subject to the liberty for each tenant, on his farm, to kill rabbits thereon, with ferrets only; except as therein excepted: to hold the same unto the plaintiff, his executors, administrators, and assigns, from the date of the indenture for the term of twenty-one years thence next ensuing. The declaration then stated a covenant by the defendant, his heirs, &c., for quiet enjoyment of the manor, mansion-house, lands, and premises thereby demised and granted, and also a covenant with the plaintiff, that if, at any time during the said term, any of the tenants of the defendant, his heirs or assigns, of any such lands, plantations, or coverts in which the sole and exclusive right of killing or taking game and other things as aforesaid was thereby granted, should hinder or obstruct the plaintiff, his executors, administrators, or assigns, in the enjoyment of the said licences and privileges, or should wilfully destroy, or permit or suffer to be destroyed, the game, rabbits, fish, or wild fowl, on any of such lands or waters, or the nests or eggs of any game, rabbits, or wild fowl, then and as often as the same should happen, the defendant, his heirs or assigns, would, upon the requisition of the plaintiff, his executors, administrators, or assigns, give such tenant or tenants notice to quit the premises in his or their occupation, and should and would enforce such notice to quit by such legal measures as should be necessary:—as by the said indenture, reference being thereunto had, will more fully appear. And the plaintiff further says, that afterwards, and after the 28th day of August in the year aforesaid, to wit, on the 29th day of the said month of August in the year aforesaid, he the plaintiff entered into and upon the premises so to him granted, demised, and leased as aforesaid, and became and was possessed thereof for the said term so to him therein granted as afore-[713]:—said: yet the defendant afterwards, and during the continuance of the said term, to wit, on the 28th of September in the year aforesaid, demised unto one Thomas Rotherham, among other things, divers, to wit, one hundred acres of the plantations, on which respectively the sole and exclusive right of killing or taking rabbits, as in the said indenture above mentioned, was by the same indenture granted to the plaintiff, to hold, amongst other things, the said last-mentioned plantations to the said Thomas Rotherham, for a certain number of years, to wit, the term of twelve years and a half from the 29th of September then instant, without any restriction to or upon the said Thomas Rotherham as to the killing or taking rabbits in such plantations as last aforesaid, and without any clause or provision in the said demise so made to the said Thomas Rotherham as aforesaid, to prevent the said Thomas Rotherham, being such lessee as last aforesaid, from hindering or obstructing the plaintiff, his executors, administrators, or assigns, in the enjoyment of the said licences and privileges, or from destroying or permitting or suffering to be destroyed the rabbits on such plantations as last aforesaid, and without reserving to the defendant, or his heirs or assigns, any power or authority to act upon the requisition of the plaintiff, his executors, administrators, or assigns, to give to the said Thomas Rotherham, so being such tenant as aforesaid, notice to quit the premises in his occupation, or to enforce any such notice to quit by such legal measures as should be necessary, if at any time during the said term first above mentioned he should hinder or obstruct the plaintiff, his executors, administrators, or assigns, in the enjoyment of the said licences and privileges, or should wilfully destroy, or permit or suffer to be destroyed, the rabbits on any of the said last-mentioned plantations; neither of the said last-mentioned plantations nor any part thereof being, at the time of making of the [714] said grant, demise, and lease first above mentioned, nor having before that time been, within or parcel of any farm, according to the true intent and meaning of the said indenture; and the plaintiff further saith, that the said Thomas Rotherham did afterwards, and during the continuance of the said first-mentioned demise, to wit, on &c., and on divers other days and times, &c., kill and destroy divers, to wit, 100 rabbits on the said last-mentioned plantations, of great value, to wit, of the value of £5. Wherefore the plaintiff saith that the defen-

dant hath broken the covenant so made by the defendant with the plaintiff in and by the said indenture.

The defendant craved oyer of the indenture, which was set out, and the terms of which were substantially the same as those stated in the declaration; and in which was further contained a demise of certain pools, ponds, stews, &c., and then proceeded thus:—"for the better description whereof, a plan is indorsed on the second skin of these presents:"—this plan was not set out in the plea. The defendant then pleaded, that the said rabbits killed and destroyed by the said Thomas Rotherham, as in the declaration mentioned, were killed and destroyed by the said Thomas Rotherham, so being such tenant as aforesaid, on his own farm, with ferrets only. Verification.

General demurrer, and joinder in demurrer.

The grounds of demurrer stated in the margin of the paper book by the plaintiff, were, first, that it was not alleged in the plea, that the plantation demised to Rotherham was part of a farm at the time of the demise to the plaintiff; secondly, that the plea was no answer to the breach of covenant committed by the defendant, in making such a demise to Rotherham as disabled the defendant from performing his covenant with the plaintiff.

The points of argument on the part of the defendant were, first, that the declaration did not shew any breach of any of the covenants in the lease on which the plaintiff [715] had declared; secondly, that the killing of the rabbits by Rotherham, as alleged on the record, did not constitute a breach of covenant; thirdly, that the demise by the defendant to Rotherham, as alleged in the declaration, did not constitute a breach of covenant.

Manning, Serjt., in support of the demurrer. The plea is bad, first, on the ground that it does not allege that the plantation demised to Rotherham was part of a farm at the time of the demise to the plaintiff. One of the things demised was the right of sporting over all the lands, plantations, and coverts of the defendant, subject, however, to liberty for each tenant to kill rabbits on his farm with ferrets; and the declaration alleges as a breach, that the defendant demised to Rotherham 100 acres of the plantations on which the sole right of taking rabbits was granted to the plaintiff, without any restriction as to the killing of rabbits in such plantations, such plantations at the time of the demise not being parcel of any farm according to the indenture, and avers that Rotherham did kill rabbits in those plantations, contrary to the defendant's covenant. The plea is, that the rabbits were killed by Rotherham, so being such tenant as aforesaid, on his own farm, with ferrets only. It does not shew that the plantation was part of a farm at the time of the demise to the plaintiff, as it ought to have done; for the liberty for the tenants to kill rabbits extended only to such lands as were farms at the time of the lease to the plaintiff. The lease did not give liberty to the defendant to convert into farms those lands which had never been farms, or parts of any farms, before, or enable him to defeat, to any extent he pleased, the main object of the demise, namely, the exclusive right of sporting over the defendant's Warwickshire estate. The defendant could not create new farms out of the lands which then were plantations and coverts, and thereby confer on the tenants the right of killing rabbits on them. The plea, [716] therefore, ought to have shewn that this plantation was part of a farm at the time of the demise to the plaintiff. The second point is, that the defendant having disabled himself from performing his covenant to give notice to quit to the tenants, in case they should hinder or obstruct the plaintiff in the enjoyment of the licences or privileges granted, or should destroy the game, rabbits, &c., that amounts to a breach of the covenant for quiet enjoyment, to which the plea is no sufficient answer. The covenant is a general one, not qualified in any way whatsoever. It means that the defendant will always be in a condition to give an effectual notice to the tenants who obstruct the plaintiff. In *Pomfret v. Ryecroft* (1 Saund. 321, 2), it was held, that if a lease be made of a house and estovers, and the lessor destroy all the wood, the lessee shall have an action of covenant. [Alderson, B. The only point is, whether this covenant is confined to those which were farms at the time of the demise to the plaintiff, or whether it extends to farms which were afterwards created.] Letting the plantations to farm does not make them farms. The word "farm" is not a legal, but a popular term. [Alderson, B. If Sir E. Wilmot had let the plantations to farm, it might be important to the tenant to destroy the rabbits, in order to prevent them from injuring the young trees. The words are, "subject to the liberty for each tenant on his farm to kill rabbits thereon

with ferrets only:" why should not that extend to the plantations as well as the land? It is not at all unusual to let the plantations with the farms adjoining. Suppose the defendant had held in his own hands land in corn, and he afterwards let that land, would that be within the exception?] Clearly not; because, if it was intended that the defendant or any other person should have a right to kill rabbits in lands not then forming part of any farm, there would have been an express reservation of a right [717] to Sir E. Wilmot to kill rabbits on those parts in his own hands. As there is no such reservation, it was not intended to reserve the right to kill rabbits there. [Parke, B. You have by your demurrer admitted that the rabbits were killed by Rotherham on his farm with ferrets only. I cannot see how you can get rid of that admission. Alderson, B. Unless you can establish that the exception extends only to such lands as were farms at the time of the demise, there is no breach of covenant.] The defendant had no power to create anything into a farm which was not a farm at the time of the demise. [Parke, B. You say that the lease to Rotherham was a breach of the covenant that the defendant will give notice to quit to the tenants who obstruct the plaintiff in the enjoyment of the privileges granted.] Yes: by granting a lease to Rotherham for a period of twelve years, without any restriction as to taking rabbits, and without reserving power to himself to act upon the requisition of the plaintiff to give notice, he has disabled himself from doing so. This is precisely *Sir Anthony Main's case* (5 Rep. 21). There Sir A. Main leased certain lands to one Scot for twenty-one years by indenture, and covenanted that, at any time during the life of Scot, upon surrender of his lease, he would make a new lease during the residue of the years, and bound himself to perform the covenants. In debt brought upon the obligation by Scot against Sir A. Main he pleaded, that Scot did not surrender, &c.; to which Scot replied, that after the lease Sir Anthony had accepted a fine sur consance &c., and by the same fine granted and rendered the land to the consuee for eighty years; and upon demurrer, it was adjudged for the plaintiff. So here, the covenant is broken by granting a lease to Rotherham, not reserving a right to restrain him from obstructing the lessee, and, in respect of this breach, it is immaterial whether Rotherham has [718] killed rabbits or not. The plea, therefore, relies upon matter which is irrelevant to this breach. The same principle was established in *Beswick v. Swindells* (5 Nev. & M. 378; 3 Ad. & Ell. 868), *The Earl of Shrewsbury v. Gould* (2 B. & Ald. 487), and *Warburton v. Storr* (4 B. & Cr. 103; 6 D. & R. 213). [Alderson, B. If Rotherham had killed rabbits on his farm otherwise than by ferrets, and the plaintiff had brought an action against the defendant for breach of covenant, to which the defendant had pleaded that the plaintiff had not required him to give notice to Rotherham, and the plaintiff had replied that the defendant had demised to Rotherham, so as to disable himself from giving notice to Rotherham, then he would have brought himself within *Sir A. Main's case*. There must be a breach. In *Sir Anthony Main's case* there was no request by Scot that Sir Anthony Main would make a new lease, nor was Scot evicted or otherwise actually damaged. Parke, B. In *Warburton v. Storr*, the parties entered into an agreement to refer a dispute to arbitration, and bound themselves mutually in a penalty for the true and faithful observance and performance of the award; and it was held that the penalty was incurred by a revocation of the submission. There there was a clear breach; but here non constat that Rotherham ever will kill any rabbits except with ferrets; there may never be a breach; it is contingent whether the right to require the defendant to give notice would ever be exercised or not. Would it be a breach of the covenant, if you left out the fact of the killing of the rabbits? *Warburton v. Storr* has no application to such a case as that.] The plea takes an issue which is wholly immaterial. All that Rotherham has done only goes to the amount of damage. [Parke, B. The case of *Beswick v. Swindells* is the other way. There, upon the marriage of A. with B., the widow and successor of C. a trader, A., in consideration of the stock in trade which he received with B., gave a bond to D., conditioned to pay to the children of B. by C., within twelve months after her death, 300*l.*, if, upon an account taken, the stock in trade and effects of the business, if then carried on by A., should amount to 400*l.* A., during the lifetime of B., discontinued the trade, and ceased to have any stock; and it was held that the obligation was discharged. There the circumstances had never arisen to which the condition applied, and the Court held that there was no breach of the condition, there being no implied condition that the obligor should carry on the trade during the life of A. So here, there is no implied condition that

the defendant should always be in a situation to give an effectual notice to quit to all or any of his tenants.] According to *Sir A. Main's case*, such a condition would be implied. [Rolfe, B. Suppose the tenant was holding under a lease for a term of years at the time of the demise to the plaintiff, what would be the meaning of the covenant, as to giving notice to quit, in that case?] The defendant might answer, that at the time of the demise, the premises were let for a term of years, and that the lease contained a power to give such notice to quit. This clause, it is submitted, amounts to a covenant that the defendant was, and should continue to be, in a situation to give notice to quit to his tenants. There is no violence in supposing that the land was let from year to year. [Rolfe, B. There is an absolute covenant for quiet enjoyment, which meets every thing; but the defendant says further, that he will give notice to quit; if he is not able to do so, then the plaintiff may resort to the other branch of the covenant.] If he covenants to do that which he has no power to do, or which he has disabled himself from doing, he is liable. [Alderson, B. All the cases cited in the note to *Beswick v. Swindells* are cases where there was an actual breach. If there is no breach, and the defendant is ready to do all that he is required to do when there [720] is a breach, is not that sufficient? If Rotherham never commits any breach, why should the defendant be liable?] Because he covenants to do a particular act, which he has disabled himself from performing. If a vendor covenant, that he is seised in fee, the vendee may sue upon that covenant before eviction. [Alderson, B. The lease may cease to exist before it becomes necessary to give notice to Rotherham. The right to require the defendant to turn him out depends on the tenant committing a breach. It does not follow that he will commit a breach within the twelve years.] If A., after covenanting with me that he will not place B. in such a situation as will enable B. to do me a specific injury, does put B. in such situation, it is no defence that B. has not injured me, especially if the power of injuring continues down to the time of bringing the action. Another ground of objection is the not setting out the plan which is indorsed on the lease on oyer. [Parke, B. An indenture set out on oyer is supposed to be read by the clerk of the Court: I do not see how the lines and marks in a plan could be read. But, admitting it to be important, the declaration does not contain a breach relating to it.] The defendant is bound to set out the whole of the deed, and cannot omit such parts as are irrelevant to the breach assigned; *Wallace v. The Duchess of Cumberland* (4 T. R. 370); although in 1 Wms. Saund. 317, n. (2), it is supposed that this very case of *Wallace v. The Duchess of Cumberland* was an authority for the contrary position (and see 3 Mann. & Ryl. 86, n.). In the case of an omission to set out the whole of the deed upon oyer, the plaintiff may pray that the deed may be inrolled, and may then demur generally for the variance between the deed as inrolled, and the deed as appearing upon oyer. Here, it was unnecessary to pray an inrolment of the deed as set out upon oyer, shewing that there was a plan indorsed, though that plan is not set out.

[721] Whateley, who was to have argued for the defendant, was stopped by the Court.

PARKE, B. As to the objection arising on oyer, it is unnecessary to enter into that question, as we think there is no sufficient breach, and that the declaration is bad on general demurrer. [His Lordship here read the covenant, as stated in the declaration, and the breach.] It is admitted, that if Sir E. Wilmot, or any of his tenants, had killed rabbits, otherwise than with ferrets, on lands demised to them subsequently to the plaintiff's lease, it would have been a breach of that covenant. But the question is, to what does the exception extend? Does it extend to such lands as were then farms, or to such as from time to time should be let to tenants who may occupy them as farms? It appears to me that it extends to all farms, not only to those which existed at the time of the demise, but to any lands which the defendant afterwards chose to demise to future tenants. If he chooses to demise what is a plantation as a farm, the tenant of that new farm has a right to kill rabbits on it. It seems to me, therefore, that there is no breach of the first covenant. Then, is there any breach of the next covenant, which is by way of addition to the covenant for quiet enjoyment? That is, that if at any time during the said term, any of the tenants of the defendant of any lands, plantations, &c. on which the sole right of killing game was thereby granted, should hinder or obstruct the plaintiff in the enjoyment of the said licences and privileges, or should wilfully destroy the game, rabbits, &c. (that is, subject to the exception as to killing rabbits with ferrets), the defendant would, upon the requisition

of the plaintiff, give the tenant notice to quit the premises in his occupation. There may be a question whether that covenant extends to any tenants, but such tenants over whom he had a power to give notice to quit, viz. tenants from year to year : [722] but I clearly think that it does not hinder the defendant from letting his lands in any way he thinks fit. The demise by him of his lands for a term of years is no breach of this condition. He covenants, that when a breach takes place, he will be in a condition to give his tenant notice to quit ; therefore that covenant is not broken, until the event happens on which the notice to quit is to be given. *Sir Anthony Main's case*, which has been cited, may go the length of deciding, that, if there is a breach of covenant committed, the personal requisition to the defendant would be unnecessary, as he has it not in his power to comply with it. But there is no breach of covenant till the event happens ; and on my construction of the covenant for quiet enjoyment, it has not arisen, for the tenants have not killed rabbits contrary to the covenant. I think there is no implied covenant that the defendant will always be in a condition to give notice to his tenants, but only to such tenants as he could give notice to. There has been no breach, and non constat that there ever will be. The tenant Rotherham may go through the whole term of his lease without killing any rabbits. I think, therefore, that the declaration is bad, as containing no breach of the covenants, and that our judgment must be for the defendant.

ALDERSON, B., and GURNEY, B., concurred.

ROLFE, B. If the right to kill rabbits were to be confined to farms existing at the time of the demise, for the same reason it could only apply to the existing tenants, and the executors of the existing tenants, or the future tenants, would have no right to kill rabbits in the manner mentioned in the exception.

Judgment for the defendant.

[723] SMART v. HYDE. Exch. of Pleas. June 17, 1841.—Assumpsit. The declaration stated, that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised that she was sound, and averred as a breach that she was not sound. The defendant pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were that “a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the mean time a notice and certificate of unsoundness were given :” that the sale took place subject to the rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited :—Held, that the plea was good, and that it did not amount to the general issue.

[S. C. 1 Dowl. (N. S.) 60 ; 10 L. J. Ex. 479. Considered, *McCance v. London and North Western Railway*, 1861, 7 H. & N. 488 : affirmed, 1864, 3 H. & C. 343. Referred to, *Moore v. Harris*, 1876, 1 A. C. 329.]

Assumpsit. The declaration stated that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised the plaintiff that the mare was sound, and averred as a breach that the mare was not sound.

The defendant pleaded, amongst other pleas, thirdly, that, before the promise, he the defendant sent the mare to a certain place for the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following :—“Terms of private sale. A warranty of soundness, when given at this repository, will remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the mean time a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas ; such certificate to set forth the cause, nature, or description of any alleged unsoundness ;” of all which the plaintiff, before and at the time of making the said promise, had notice. The plea then averred, that the sale was a private sale, and that the promise, and the buying from the defendant, took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the parties ; and although the time limited by the said rules for the delivery of the notice and certificate had

elapsed before the commencement of this suit, yet no such notice or certificate had been delivered by or for the plaintiff, at the office of the said R. Lucas. Verification.

Special demurrer, assigning for causes, that the plea amounted to the general issue: that whereas the plaintiff [724] had declared on an absolute and unqualified undertaking that the mare was sound, the defendant had not confessed and avoided the same, nor had directly denied such promise, but had stated matters for the purpose of qualifying such promise, and of shewing that the warranty remained in force only until twelve at noon of the day after the sale, and was a warranty against such unsoundness only as the plaintiff might discover within such period.

Crompton, in support of the demurrer. The plea attempts to shew that there was a qualification of the warranty, and that the contract was different from that declared upon, and it therefore amounts to the general issue. [Parke, B. The warranty, as set out in the declaration, is an absolute one. The plea admits the statement in the declaration, but sets out new facts, for the purpose of shewing that there was no breach of contract; it does not deny a sale of the horse, or the warranty that the horse was sound.] On the warranty stated in the plea, there is to be no responsibility at all in certain cases, and that is a qualification which might have been given in evidence under the general issue. In *Bywater v. Richardson* (1 Ad. & Ell. 508; 3 Nev. & M. 748), where there was a similar condition, Littledale, J., treats it as a qualified warranty. [Parke, B. You say that the contract which would have to be proved would vary from that stated in the declaration, and therefore might be given in evidence under the general issue.] Yes. In *Latham v. Rutley* (2 B. & Cr. 20; 3 D. & R. 211), the declaration stated a contract to carry goods from London, and deliver them safely at Dover; the contract proved was to carry and deliver safely, fire and robbery excepted; and it was held to be a variance. Here the contract stated in the declaration is, that the defendant will be generally answerable for the unsoundness of the mare; but the contract stated in the plea is, that he will [725] not be answerable at all, if the act be not done within a given time. In *Latham v. Rutley*, Abbott, C. J., says, "the result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated." [Parke, B. The contract there stated was a contract to carry the goods safely, not a limited contract, if the goods were not affected by fire or robbery. Here the contract alleged is, that the defendant undertook that the mare was sound: that he is to be responsible if unsound is merely an inference from that.] Where a condition merely limits the amount of damages, it is true that it need not be stated in the declaration; *Clarke v. Gray* (6 East, 564); but where the contract, as in this case, is qualified by conditions, it is a variance to state it as absolute in its terms. In *Howell v. Richards* (11 East, 633), it was held, that, if a covenant for quiet enjoyment be restrained by any qualifying context, it must be stated, and if not, that the defendant might take advantage of it under the plea of the general issue, as being an untrue statement of the deed in substance and effect. *Tempamy v. Burnaud* (4 Campb. 20), and *Browne v. Knill* (2 Brod. & B. 395), are authorities to the same effect. In *Whittaker v. Mason* (2 Bing. N. C. 359; 2 Scott, 567), the plaintiff declared upon a contract of sale of certain books; the defendant pleaded that the books were sold subject and according to the usage and course of dealing observed among booksellers in London; to which the plaintiffs replied *de injuriâ*; and on demurrer to the replication, it was held that the plea in effect amounted to the general issue. [Parke, B. There the plea set up a different contract; here the plea does not alter the consideration or the promise.] The omission to state the qualification entirely alters the legal effect of the contract. The [726] case is distinguishable from *Syms v. Chaplin* (5 Adol. & Ell. 634; 1 Nev. & P. 129), which was an action against a coach proprietor for the loss of a parcel above the value of £10; for the omission to declare the value of the parcel did not qualify the nature of the contract, but was a matter which avoided it, and therefore required to be specially pleaded. The general rule is, that contracts are entire, and it is only an exception to that rule, that where a part of the contract does not affect the rest which is declared upon, such part need not be stated.

J. Henderson, contra. The plea is good. The truth of the facts stated in it is consistent with the contract alleged in the declaration. The defendant says, True it is I promised that the horse was sound, and it turned out to be unsound, but there were collateral circumstances which prevented your right to sue from arising. Where,

indeed, the plea discloses a contract different from that alleged in the declaration, it is bad, as amounting to the general issue. The cases which have arisen since the New Rules on indebitatus assumpsit, shew that where, if the plea be true, the declaration is not, in that case the plea is open to demurrer, as amounting to the general issue. In *Latham v. Rutley*, the promise alleged was absolute, but the contract proved was a qualified one, and therefore did not support the promise declared on. But where there is an absolute promise, and the defence is that its efficacy has been destroyed by matters occurring subsequently, those matters must be specially pleaded. In *Hotham v. The East India Company* (1 T. R. 638), where there was a covenant in a charter-party, that no claim for short tonnage should be allowed, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights; it was held, that this not being a condition precedent to the plaintiff's right to recover for short [727] tonnage, but a matter of defence to be taken advantage of by the defendants, the not averring performance was no ground for arresting the judgment. That case resembles the present. It was not necessary for the plaintiff to aver performance of the condition annexed to this warranty; it is sufficient for him to allege the contract and breach. The fact on which the defendant relies is collateral to the original contract, and therefore ought to be pleaded specially.

Crompton, in reply. The contract as set out in the plea affects the consideration stated in the declaration, for the plaintiff is bound to give notice of the unsoundness before a specified time, in order to render it an absolute warranty. *Hotham v. The East India Company* turns on the distinction between covenant and assumpsit, and on the rule which is peculiar to the former, that a party need not set out more covenants than those of the breach of which he complains; but that is not applicable to assumpsit. The condition which it is not requisite to state, is such a one as does not qualify the original promise. The narrow point is—does this plea affect the liability which the defendant is under, upon the contract alleged in the declaration? It is submitted that it does; it shews that he is not absolutely bound; whereas on the contract as stated in the declaration he is so. *Latham v. Rutley* is in point. [Parke, B. In that case there was no promise to carry safely at all events; here there was an absolute warranty of soundness.]

PARKE, B. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The declaration states, that, in consideration that the plaintiff would buy a mare of the defendant, the defendant promised that she was sound. Then there is a special plea, which states, that the mare was sent to a repository for the sale of [728] horses, to be sold according to certain rules, which provided that the warranty of soundness was to remain in force up to a certain time only, unless notice of the unsoundness was in the mean time given; and it goes on to aver, that the sale took place subject to those rules, and that no notice was delivered within the time specified. It appears to me that such plea is not bad as amounting to the general issue. It admits the contract and the promise, but shews it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration; but upon that point I give no opinion. It is enough to say, that every word of this plea is consistent with the contract stated in the declaration.

ALDERSON, B. The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract, as alleged in the declaration.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.

[729] BRIGGS AND ANOTHER, Assignees of Cornforth, a Bankrupt, v. SOWRY. Exch. of Pleas. June 23, 1841.—Goods seized by a messenger under a fiat in bankruptcy are not, while in his custody, privileged from distress for rent due from the bankrupt to his landlord.—The 74th section of the Bankrupt Act, 6 Geo. 4, c. 16, applies only to rent accrued due before the bankruptcy.—Where the assignees of a bankrupt, under the 6 Geo. 4, c. 16, s. 75, have declined a lease to which the bankrupt was entitled, but the bankrupt has not delivered up the lease to the lessor, the property in the demised premises, in the mean time, continues vested in the bankrupt, and the lessor retains, until such delivery up to him, his right of distress for the rent.—Semble, that the effect of that section is only to exempt the bankrupt from personal liability, and not to affect the landlord's right of distress.—Semble, also, that it applies only to cases where covenants are broken or rent becomes due after the delivery up of the lease by the bankrupt.—Quære, whether it applies to the case of a demise not in writing.

[S. C. 11 L. J. Ex. 193. Referred to, *In re Neil Mackenzie*; *Ex parte Sheriff of Hertfordshire*, [1899] 2 Q. B. 566.]

This was an action brought by the plaintiffs, as assignees of one William Cornforth, a bankrupt, against the defendant, to recover from the defendant the sum of £95, 10s. paid to him by the plaintiffs.

The declaration was in assumpsit, and contained two indebitatus counts, one for money received by the defendant for the use of the plaintiffs as assignees, and the other on an account stated.

The defendant pleaded non-assumpsit, and issue having been joined thereon, by consent, and by the order of Alderson, B., the following case was stated for the opinion of the Court, according to the form of the statute 3 & 4 Will. 4, c. 42, s. 25.

A fiat in bankruptcy, bearing date the 20th day of February, 1840, was on that day duly issued against the said William Cornforth. On the 22nd day of the same month, the said William Cornforth was duly declared a bankrupt under the said fiat, on an act of bankruptcy committed by him (by a general assignment for the benefit of his creditors) on the 17th of the same month; and on the 17th day of March following the plaintiffs were duly appointed assignees of his estate and effects under the said fiat.

Previous to and at the time of his bankruptcy, the said William Cornforth had been and was tenant from year to year to the defendant of a certain dwelling-house, flax mill, and other premises, at the yearly rent of £382, payable quarterly, on the 6th day of March, the 6th day of [730] June, the 6th day of September, and the 6th day of December, in every year. At the time of the distress hereinafter mentioned, no notice to determine the said tenancy had been given, except the one hereinafter set out; and such tenancy was then still continuing, unless the same had become determined by virtue of the notice and circumstances hereinafter stated. At the time of the issuing of the fiat, and thence until and at the time of the making of the distress hereinafter mentioned, the sum of 22l. 9s. 2d. remained due to the defendant from the said William Cornforth, for arrears of the said rent which had accrued due on the 6th day of December, 1839, and no part of the rent for the next quarter (ending on the 6th day of March, 1840) was paid or tendered to the defendant before the time of making of the said distress, the plaintiffs contending that they were not liable to such quarter's rent. A few days before opening the fiat, the bankrupt discontinued the business before then carried on by him in the said demised premises, and did not afterwards renew the same; nor did the plaintiffs, after they were appointed assignees as aforesaid, continue to carry on the said business of the bankrupt for the benefit of his creditors, or in any way, either before that time or afterwards, interfere with or take possession of the said demised premises, except as hereinafter mentioned.

The machinery and effects of the bankrupt, which were on the said demised premises, were, on the 22nd of February 1840, taken possession of by the messenger under the fiat, by direction of the commissioners; and by such direction as aforesaid, he remained on the demised premises, and in possession of the said machinery and effects, till they were distrained upon by the defendant as hereinafter mentioned. On the 28th of March, being eleven days after the plaintiffs were appointed assignees, they advertised the said machinery and effects for sale by auction, to take place on

the said demised premises, on the 15th day [731] of April then next; and on the 9th day of the said month of April, their attornies gave the following notice in writing to the defendant:—

“Cornforth’s Bankruptcy.

“Leeds, 9th April, 1840.

“Sir,—We beg to repeat in writing what you have before been told, that the assignees do not intend to continue the tenancy of the premises occupied by the bankrupt under you. And they will consent to your immediately entering on them, and will give up the possession of the mill, &c., as soon as the machinery is sold on Wednesday next.—We are, Sir, yours very respectfully,

“PAYNE, EDDISON, & FORD,

“Solicitors to the Assignees.

“Mr. Francis Sowry, Wortley.”

Before the said sale took place, namely, on the 9th day of April, 1840, the defendant sent in a claim to the plaintiffs for the sum of 117l. 19s. 2d., on account of rent due to him for the said demised premises, viz. 22l. 9s. 2d. for the said arrears of rent due on the 6th day of December, 1839, and 95l. 10s. for one quarter’s rent accruing due on the 6th day of March, 1840. The plaintiffs admitted the defendant’s claim as to the sum of 22l. 9s. 2d. for arrears of rent due on the 6th day of December, 1839, and duly tendered that sum, but disputed his claim with respect to the quarter’s rent alleged to have become due on the 6th day of March, 1840; whereupon the defendant, upon the 15th day of April, 1840, (after the sale had begun, and after some small part of the said machinery and effects had been sold) distrained upon the said machinery and effects, which were on the said demised premises, for the whole of the said sum of 117l. 19s. 2d.; and the plaintiffs, in order that they might sell the said machinery and [732] effects for the benefit of the bankrupt’s estate, according to their advertisement, and to prevent the loss and injury which the estate of the bankrupt would have sustained in case they had sold the said machinery and effects whilst the defendant’s distress was upon them, paid the defendant the whole of the said sum of 117l. 19s. 2d., protesting in writing, however, against his right to the sum of 95l. 10s., parcel thereof, claimed by the defendant as the quarter’s rent alleged to have become due on the said 6th day of March, 1840. The machinery and effects of the bankrupt were, on the same 15th of April, sold by the plaintiffs by auction, according to their advertisement; and immediately after the said sale, the demised premises were altogether abandoned by the plaintiffs (who have not since that time in any manner interfered with the same), and the defendant, immediately after the sale, resumed the possession thereof.

The plaintiffs contend that, under these circumstances, the defendant had no right to distrain on the said machinery and effects for the quarter’s rent alleged to have become due on the said 6th day of March; and the defendant, on the contrary, contends that he had such right. The question for the opinion of the Court is, whether the defendant, under the circumstances mentioned in this case, had a right to distrain on the said machinery and effects of the bankrupt’s estate for the said last-mentioned quarter’s rent, which became due in the manner hereinbefore mentioned; and the Court is to be at liberty to draw any inference from the facts stated above which a jury might do. If the Court shall be of opinion that the defendant had no right to distrain on the said machinery and effects for the said last-mentioned quarter’s rent, or any part thereof, then the defendant agrees that a judgment shall be entered against him by confession for 95l. 10s. damages, or so much thereof as the plaintiffs ought to recover, and costs, immediately after the decision of this case; but [733] if the Court shall be of opinion that the defendant had a right to distrain on the said machinery and effects for the said last-mentioned quarter’s rent, then the plaintiffs agree that a judgment shall and may be entered against them according to the form of the statute aforesaid, immediately after the decision of this case, and that the plaintiffs shall pay the defendant his costs.

Manning, Serjt., for the plaintiff. Three propositions will be contended for on behalf of the plaintiffs. First, that these goods, having been seized by the messenger under the fiat, were privileged from distress while in his possession, as being in custodia

legis. The doctrine of the common law on this subject is stated in Co. Litt. 47 a., and Gilb. Distr. 38. In an *Anonymous case* (1 Atk. 102), it is laid down, that "a landlord may distrain for his rent upon a bankrupt's goods, either before or after the assignment under the commission; but if he neglects to do it, and suffers them to be sold by the assignees, he can only come in upon an average with the rest of the creditors." [Alderson, B. Suppose the assignees accept the goods, are they less in the custody of the law? Parke, B. Was it ever held that goods are in *custodiâ legis* when in the hands of the messenger?] He takes possession under the order of the commissioners, whose authority should be regarded more favourably by the law than that of the sheriff, inasmuch as they act for the benefit of the general body of creditors. In *Ex parte Plummer* (1 Atk. 103), the question was, "whether, after a commission of bankrupt taken out, and the messenger in possession, the landlord should distrain the goods upon the premises, and so be satisfied with his entire debt, or whether he should come in *pro rata* with the rest of the creditors under the commission?" and Lord Hardwicke held, that "if any goods remain on the [734] premises, they are liable to the distress of the landlord, and he may distrain them for his entire debt, even after assignment, or sale by the assignees, if the goods are not removed; and this is the reason, because no provision is made in the case of bankruptcy, in the statute which gives the landlord a year's rent on executions." The Court will hardly be disposed to agree in the reason given for the decision. [Rolfe, B. If instead of "because" you read "that," it is plain enough. Parke, B. We cannot decide, in the teeth of those cases, that the goods are in the custody of the law.]

Secondly, the case is within the limitation imposed by the 74th section of the Bankrupt Act, 6 Geo. 4, c. 16, which enacts, "that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, (whether before or after the issuing of the commission), shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission, for the overplus of the rent due, and for which the distress shall not be available." The effect of this section therefore is, to limit the landlord's right of distress to one year's rent, and to confine it altogether to rent accrued due before the bankruptcy: see 1 Deacon's Bankrupt Law, 275. The defendant had consequently no right to distrain for the quarter's rent ending on the 6th of March, which became due after the suing out of the fiat. In *Cook v. Cook* (Andr. 218), which was decided on the stat. 8 Anne, c. 14, Probyn, J., said, that "the statute must be understood of the year's rent immediately due before the execution." In *Wray v. Earl of Egremont* (4 B. & Adol. 122; 1 Nev. & M. 188), it was held, on the corresponding words of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 31, that a distress taken before, but not sold till after, the arrest of [735] the insolvent, was not "made and levied after the arrest," and therefore was available for more than a year's rent. [Alderson, B. This is either rent due after the bankruptcy, or not due at all. The 74th section means no more than that the landlord shall distrain for one year's rent, and prove for the rest.]

Thirdly, the goods were at all events protected by the 75th section of the statute. That section enacts, "that any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay rent accruing due after the date of the commission, &c.: and, if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid," &c. In *Slack v. Sharp* (8 Ad. & Ell. 366; 3 Nev. & P. 390), a lessee under an unwritten contract, whereby the rent was payable on the 6th of April and the 6th of October, became bankrupt, and a fiat issued against him in March, the rent due in the previous October having been paid. The assignees refusing to accept the premises, the bankrupt, within fourteen days after his receiving notice of their refusal, and one day before the 6th of April, offered to deliver up possession to the lessor. It was held, that the 75th section applied as well to cases where the bankrupt holds under an unwritten as under a written demise; that in such cases, the offering possession is a delivery up of the lease within the statute; and therefore that the bankrupt was not liable in an action for use and occupation, for any part of the rent in respect of the half-year ending on the 6th of April. That case is a direct authority for the present plaintiffs. The right of distress

for the rent, which was in the course of accrual at the time of the issuing of the fiat, [736] was destroyed ab initio by the events which have subsequently happened.

Robinson, for the defendant. There is no reason why the landlord should not be allowed to distrain for the rent which accrued due after the bankruptcy. [Parke, B. You need not trouble yourself on the first and second points, but confine yourself to the question, whether this is a case within the 75th section.] With respect to that, it appears to be assumed for the plaintiffs, that if it be made out that the case falls within the 75th section, it cannot be within the 74th. But even supposing that the rent could not be recovered by action, either from the assignees or the bankrupt, the remedy by distress may nevertheless remain. Suppose rent to have accrued due before the issuing of a fiat in bankruptcy, and the 74th section not to have existed, there neither the assignees nor the bankrupt would be liable, yet the landlord would have a right to distrain after the fiat. [Parke, B. Would he retain that right after the certificate?] It does not appear why he should thereby lose the remedy by distress, which is in the nature of a remedy against the land itself, being a pledge of the goods so long as they remain upon the premises. But, at all events, this case is quite distinguishable from that of *Slack v. Sharp*; even if that case be law; for it is undoubtedly a strong proposition to say, that the giving up of possession is the same thing as the delivery up of a lease under which the possession had been given. There, however, it was found as a fact that the bankrupt had delivered up possession; here all that can be said is, that at the time of the distress it was probable that the tenant would thereafter deliver up possession. The situation of a bankrupt tenant is clearly explained in the case of *Copeland v. Stephens* (1 B. & Ald. 593). Lord Ellenborough there says,—“We [737] are of opinion that the general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate. . . . The acceptance of a term which, instead of furnishing the means of payment, would diminish the fund arising from other sources, cannot be within the scope of their trust or duty. . . . We think the whole estate remains in the bankrupt until acceptance by the assignees, subject to their right to have the land by their acceptance of the assignment, and thereby to give effect to the deed, and vest the estate in themselves.” In the present case, it appears by no means clear that the assignees have not become liable for the rent. They have undoubtedly a right to remain in possession for a reasonable time, in order to ascertain whether the term will be beneficial to them; but if they keep the possession longer, they adopt the lease, and no subsequent act of theirs can qualify that possession. Here they kept possession, after electing to give up the premises, for a purpose quite independent of the landlord, that of selling the stock, which they had no right to do. The case appears to resemble those of *Turner v. Richardson* (7 East, 335), and *Ansell v. Robson* (2 C. & J. 610), in which the assignees were held liable. But, at all events, what is there to prevent the bankrupt from remaining liable? He had made no election, and done no act to exonerate himself. In *Tuck v. Fyson* (6 Bing. 321; 3 M. & P. 715), the defendant had joined in a lease as surety for the performance of the covenants by the lessee, who became bankrupt, and delivered up the lease to the lessor, under the 75th section of the Bankrupt Act; and it was held, that although the lessee was thereby personally discharged of his liability to the performance of the covenants, from the date of the commission, the term was not absolutely extinguished from [738] that period, but the surety remained liable for breaches occurring prior to the actual delivery up of the lease by the bankrupt. There is no authority whatever for saying that the subsequent act of the bankrupt, even in delivering up possession, can relieve him from liability for rent previously due. [Alderson, B. There is nothing in the case to shew that the bankrupt has received any notice whatever.] No; there is nothing to shew that he has made his election, except the assignees had made theirs; and it is not stated that they did so within the fourteen days. In *Ex parte Grove* (1 Atk. 104), it was not doubted that the landlord retained, notwithstanding the bankruptcy, his right of distress for rent due before the bankruptcy, if he had not waived it by proving the amount under the commission, and permitting the assignees to sell the premises. It is for the other side to shew clearly that the statute takes away the vested common law right of the landlord to distrain for his rent: here there is nothing to shew that the tenant ever made an election, so as to come within the terms of the statute, or that by any act of

his he precluded himself from still keeping the lease. But even if the case be within s. 75, the defendant has a right to fall back on s. 74, and to make this distress available for the rent which accrued due in March.

Manning, in reply. The assignees cannot be made liable, not having actually occupied, even though the term be vested in them by the assignment: *How v. Kennett* (3 Ad. & Ell. 659; 5 Nev. & M. 1). The Court will infer that everything has been done on the part of the tenant which was necessary to put an end to the tenancy. [Alderson, B. Why may not the landlord have entered by licence of the bankrupt, without his intending to give up the tenancy?] Because the case states that the landlord has resumed the possession.

[739] PARKE, B. This is an action brought by the plaintiffs, as assignees of a bankrupt, against the defendant, the landlord of certain premises occupied by the bankrupt under a parol demise, to recover the sum of 95l. 10s. paid to him by the plaintiffs, under the circumstances stated in the case. [His Lordship stated the material facts of the case, and continued.] The question for our consideration is, whether the defendant, under these circumstances, had a right to distrain upon the machinery and effects of the bankrupt's estate for the quarter's rent which became due on the 6th March 1840. As to the rent which became due before the bankruptcy, there is no question, unless the objection, that the goods were in *custodiâ legis*, could prevail. Two other objections have also been taken on the part of the plaintiffs, one founded on the 74th, the other on the 75th section of the Bankrupt Act.

With regard to the first point, there can be no doubt, since the decisions of Lord Hardwicke, reported in 1 Atkyns, 103 and 104, that goods in the custody of a messenger under a fiat in bankruptcy, are not in *custodiâ legis*, so as to prevent their being distrained. Neither does the Court entertain any doubt as to the operation of the 74th section, which, we think, applies only to a year's rent due before the bankruptcy. Then we come to the question arising on the 75th section, as to which several points have been made in the course of the argument. [His Lordship read that section.] In the first place it is suggested, that this case does not fall within that section at all, inasmuch as it is the case of an occupation under a parol demise. I should certainly have been of that opinion, but for the case of *Slack v. Sharp*; but after the decision of the Court of Queen's Bench in that case, I should be unwilling so to decide, without taking more time to consider the point. I shall therefore assume, for the purpose of the present case, that the 75th section applies equally to the case of a parol demise as to that of a demise in writing, or an [740] agreement for a lease. I strongly incline to think, however, that it applies only to one class of cases, namely, where the covenants are broken, or the rent becomes due, after the giving up of the lease by the bankrupt, and not where it has accrued due immediately after the fiat, but before the delivery up of the lease. It is unnecessary, however, to decide that point, because there is another ground upon which the defendant is clearly entitled to retain the money paid to him; namely, that in the intermediate time between the fiat and the election of the assignees to decline the lease, or the bankrupt's giving it up, it is clear that the property in the demised premises continues vested in the bankrupt, and if he does not repudiate the lease, and the assignees do not elect to take it, there is nothing in the statute which divests the right of the lessor to distrain for the rent. Now here the assignees had, before the 17th of April, refused to take the lease, but the bankrupt had not elected to give it up; the lease, therefore, remained in him, and, consequently, the right of distress subsisted—it could not be in abeyance. There is nothing stated in this case from which we can infer that the bankrupt ever gave up the lease; and although the defendant entered and took possession, when the assignees abandoned the intention to take it, there is nothing to shew that the bankrupt might not sue the defendant as a trespasser, and still elect to take the lease. The legal interest, therefore, not having been taken out of the bankrupt, the assignees are not entitled to recover in this action: this was a legal distress at the time when it was made, although possibly it might have been defeated by the bankrupt afterwards giving up the lease.

On the other points which have been argued, it is unnecessary to give any opinion: but I am strongly inclined to think, that the only effect of the statute is to exempt the bankrupt from personal liability, and not to affect the right of distress; to protect him from being sued on the cove-[741]-nants, on which he would otherwise be liable, notwithstanding the acceptance of the lease by the assignees, for subsequent

non-performance. It is unnecessary, however, to give any decided opinion on that point, because on the ground which I have already stated, I think the defendant is entitled to the judgment of the Court.

ALDERSON, B. I am of the same opinion, that the plaintiffs are not entitled to recover. The plaintiffs allege that they have paid this money to the defendant without consideration; and that depends on the question, whether the defendant had a right to distrain for it. If he had a right to distrain at the time,—subject perhaps to be divested afterwards by the act of the bankrupt,—the money was not paid without consideration, because the defendant gave up his intermediate right of possession of the goods, in consideration of the payment of the money by the assignees. Here it is clear that the bankrupt never has subsequently done any such act as to divest the right of the landlord; for it does not appear that he has even yet given up the possession of the premises. On the present occasion, I feel myself bound by the authority of the case of *Slack v. Sharp*, although I do not entirely concur in the reasons assigned by the Court for their judgment.

GURNEY, B. I am of the same opinion. I think it is perfectly clear that the landlord had not lost his right to distrain, and therefore that the plaintiffs cannot recover in this action.

ROLFE, B. I also agree that the judgment ought to be for the defendant. It is not found that the bankrupt ever did agree to renounce the lease, and that is a safe ground upon which to decide this case. But I do not think, independently of that consideration, that this case is within the statute. I assume for the present that it applies to [742] parol demises: but does it apply to rent accruing due before the acts are done which the statute requires to be done? I think clearly not. The 75th section says, that “any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing due after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein mentioned.” That must mean a non-performance after he has given up the lease; if it were otherwise, this monstrous injustice would follow, that it would deprive the landlord perhaps of one or two half years’ rent, without any equivalent or compensation at all. I strongly concur also in the suggestion, that the statute applies only to protect the bankrupt from being liable to an action. That is the view taken of this section in Messrs. Montague & Ayrton’s book on the Law and Practice of Bankruptcy (vol. 1, pp. 358 & 491); and it is in accordance with what was thrown out by Lord Hardwicke, when he says the right of distress is a kind of security. Suppose the bankrupt had mortgaged his estate, could it be said that after the certificate the mortgagee would have no right upon this security, although the bankrupt would no longer be personally liable? So also, the landlord may retain his right of distress unaffected by the statute. It is unnecessary, however, to decide that point, because here it does not appear that the bankrupt has ever done that, the doing of which was a condition precedent to his being absolved from liability.

Judgment for the defendant.

[743] PARNHAM AND WIFE v. HURST. Exch. of Pleas. June, 17, 1841.—Assumpsit by husband and wife for money lent to the defendant by the wife whilst she was sole and unmarried. Plea, that B., the husband, became bankrupt, and that his assignees were duly appointed, and accepted the appointment before the commencement of the suit, by reason whereof the assignees became entitled to the supposed debts and causes of action in the declaration mentioned. Replication, that before the intermarriage of the plaintiffs, and whilst C., the wife, was sole and unmarried, to wit, on &c., by an indenture then made between the said B. of the first part, the said C. of the second part, and T. H. and R. T. J. of the third part, (being a settlement entered into before the intermarriage of the plaintiffs), the sums of money in the declaration mentioned were assigned to the said T. H. and R. T. J., to have, receive, and recover, and to hold the same to them, upon certain trusts in the indenture mentioned, in favour of the said C., and for her sole and separate use during her life, and for the child or children of the intended marriage. The replication then stated, that the plaintiffs appointed T. H. and R. T. J. as their attornies to recover the said sums from the defendant,

for the purpose of holding the same upon the trusts aforesaid, and that the action was commenced and prosecuted in the names of the plaintiffs at the instance and by direction of the said T. H. and R. T. J., by virtue of the power given to them, and for the purpose of recovering, receiving, and holding the said sums of money as the trustees named in the said indenture, and upon the trusts in favour of the said C., and of the children of the said marriage, and not for the use or benefit of the plaintiff B., or of his creditors under the fiat:—Held, on demurrer, that the replication was good, and that the debt did not pass to the assignees under the bankruptcy of the husband, but might be sued for by the husband and wife.

[S. C. 10 L. J. Ex. 435.]

Assumpsit for money lent to the defendant by the plaintiff Catherine whilst she was sole and unmarried, and for money due and owing on an account then stated between them.

Plea, that before and at the time of the intermarriage of the plaintiff, and until and at and after the time of issuing the fiat in bankruptcy thereafter mentioned, the plaintiff Benjamin Parnham was a chapman and dealer subject to the bankrupt laws; that he became a bankrupt; that his assignees were duly appointed and accepted the appointment, before the commencement of this suit, by reason whereof the said assignees, after the accrual of the said causes of action, and before the commencement of this suit, became entitled to the said supposed debts, sums of money, and causes of action in the said declaration mentioned.

Replication, that before the making of the promises in the declaration mentioned, and before the intermarriage of the plaintiffs, and whilst the said Catherine was sole and unmarried, to wit, on &c., by a certain indenture then made between the said plaintiff Benjamin of the first part, the said Catherine, by her maiden name of Catherine Hurst, of the second part, and one Thomas Hunter and R. T. Jarman of the third part, being a [744] settlement entered into before the intermarriage of the plaintiffs, the said sums of money in the said declaration mentioned, in consideration of the said intended marriage, and for other considerations, were by the said plaintiff Benjamin and the said plaintiff Catherine assigned to the said T. Hunter and R. T. Jarman, to have, receive, and recover the said sums of money, and to hold the same to them the said T. Hunter and R. T. Jarman, upon certain trusts in the said indenture mentioned, in favour of the said plaintiff Catherine and for her sole and separate use during her life, and for the child or children of the said intended marriage. The replication further stated, that the plaintiffs appointed the said T. Hunter and R. T. Jarman, as their attorneys, to recover the said sums from the defendant, for the purpose of holding the same upon the trusts aforesaid, of all of which the defendant afterwards, and before the said plaintiff Benjamin became bankrupt, and before the issuing of the said fiat, to wit, on &c., had notice: and that the aforesaid action of the plaintiffs was commenced and is prosecuted in the names of the plaintiffs, at the instance and by the direction of the said T. Hunter and R. T. Jarman, and by virtue of the power given to them by the said indenture, and for the purpose of recovering, receiving, and holding the said sums of money, as the trustees named and appointed in the said indenture, and upon the trusts in favour of the plaintiff Catherine and of the children of the said marriage, and not for the use or benefit of the said plaintiff Benjamin, or of his creditors under the said fiat. Verification.

Special demurrer, assigning the following amongst other causes: that it did not appear that the said sums of money in the declaration mentioned were assigned over to the said Thomas Hunter and R. T. Jarman before the issuing of the fiat in bankruptcy: that the replication contained a departure from the declaration, in this, that it appeared from the declaration, that the plaintiff Benjamin, [745] at the time of the intermarriage of the plaintiffs, became and still was interested in the sums of money in the declaration mentioned, by reason of the intermarriage; whereas it appears from the replication, that he never was at any time interested in the same.

Joinder in demurrer.

Crompton, in support of the demurrer. The replication is bad. The rule is, that an allegation is to be taken as strongly as it can be against the party pleading it. The interest here might by possibility pass to the bankrupt, and if so, it vested in the assignees. The assignees may claim all that the bankrupt was legally or equitably

entitled to. Here he had an interest which passed to them. In *Carvalho v. Burn* (4 B. & Ad. 382; 1 Nev. & M. 700), Littledale, J., in delivering the judgment of the Court, says, "But if, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest from which a benefit to his creditors might result; if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment." There the property was held to pass, because at one time there was a possibility of interest. And in *Carpenter v. Marnell* (3 Bos. & Pul. 40), Lord Alvanley, C. J., expresses himself thus:—"If indeed they (the assignees) had possessed the most remote possibility of interest, or if they could state any thing from which a benefit to the creditors would result, I should hold that the action might be maintained." To apply that doctrine to the present case, the bankrupt had some legal or equitable interest, or at least a contingent interest in this money after the death of his wife. That interest therefore passed to his assignees.

Peacock, contra. The debt in this case did not pass to [746] the assignees, for the bankrupt did not, at the time of the bankruptcy, possess a possibility of interest from which a benefit to his creditors might result. In *Garry v. Sharratt* (10 B. & C. 716), it was held that an assignment of the real and personal estate and effects of an insolvent debtor, under 7 Geo. 4, c. 57, passes to the assignee only what the insolvent was entitled to in law and in equity; and the insolvent having deposited with a creditor the title-deeds of an estate as security for a debt, it was held that the assignee of the insolvent debtor could not recover from such creditor the rent of such estate, received by the latter subsequently to the discharge of the insolvent debtor. In *Carvalho v. Burn*, it was held that the bargain between the bankrupt and the defendant did not operate as a legal or equitable assignment of the property in the bankrupt's goods, but that they remained the property of the bankrupt at the time of his bankruptcy, and passed to his assignees. That case is, therefore, inapplicable to the present. Dangerous consequences would result, if a mere possibility of an interest were held to pass to the assignees of a bankrupt. If this debt were to pass to the assignees, the wife would have new trustees thrust upon her, instead of those which had been selected to act as trustees under the settlement: and there would be the anomaly of the assignees being trustees for the wife and also for the creditors. [Rolfe, B. Suppose a stronger case against you—that of a trust for the wife for her separate use for life, and afterwards to the husband for his life, would the assignees take in that case?] No interest in it could pass to the assignees. In *Carvalho v. Burn*, Littledale, J., says, "Until certain contingencies happen, and until something more is ascertained and done, the equitable as well as the legal interest must be in the bankrupt, and if so, it must pass to his assignees." Here the property is absolutely vested in [747] the trustees, and there is a mere possibility of interest in the bankrupt; and if he died in the lifetime of his wife, the property would go to her administrator. In *Dangerfield v. Thomas* (9 Ad. & Ell 292; 1 Per. & D. 287), it was held that a money bond signed by the obligee to creditors, to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be for further security, and contains a proviso to defeat it on payment of the debt. [He was then stopped by the Court.]

Crompton, in reply. In the case last cited, of *Dangerfield v. Thomas*, the general principle is assented to, that if the legal right is in the bankrupt, and he has any possibility of interest, the debt passes to his assignees. The fallacy of the argument on the other side is, that the legal estate was in the trustees:—the legal estate was in the husband. The question is, whether the names of the trustees or of the assignees shall be used. There is no hardship that the wife should not have the selection of the persons who are to be the trustees. There is a clear possibility of an interest in this debt, and if so, it passes to the assignees. [Parke, B., referred to *Winch v. Keely* (1 T. R. 619).]

PARKE, B. It seems to me that the demurrer ought not to prevail, and that the replication is good. With respect to the objection, that the sums of money were assigned before the bankruptcy, it is averred that the assignment took place before the intermarriage of the plaintiffs. It was an assignment by the wife to a trustee in trust for herself, afterwards for her children; and as that intermarriage took place after the assignment, nothing at all passed to the husband—it passed to the trustee; that is, in equity. Then the question is, whether, when a wife assigns to a trustee

a chose in action for the benefit of herself, afterwards for her children, the right to sue on that chose in ac-[748]-tion can pass to the assignees of her bankrupt husband; and I think it cannot, for that the effect of this assignment is to transfer the entire equitable interest in that debt to the trustee; that is, the equitable interest in the recovery of the debt; and that if the assignees have any interest at all for the benefit of the creditors, it is an interest which does not exist at present, and will not exist until those events shall have happened in which they may become entitled to receive some portion of the fund that is recovered. According to the contract made between the wife and the trustees, the trustees, and they alone, are the persons who are to sue for this debt; the assignees have no present interest in the money to be recovered. All they can be entitled to would be hereafter to call on the trustees who recover this debt, in the event happening of there being any part of that fund unappropriated to the use of the wife or children. But it is said, that inasmuch as the assignees have a chance of obtaining some portion of the fund, the law is, that the legal interest is transferred to the husband, and transferred from the husband to the assignees—that they have, in respect of the possibility of a future interest, a right to sue for the debt itself. I think that proposition cannot be maintained, on the authorities that have been cited on the present occasion.

The principal authority which has been relied on is that of *Carvalho v. Burn*, in which the former authorities are considered, (*Scott v. Surman* (Willes, 400), *Winch v. Keely* (1 T. R. 619), *Carpenter v. Marnell* (3 Bos. & P. 40), and *Gladstone v. Hudwen* (1 M. & Selw. 517)); and Mr. Crompton relies on the expression of Mr. Justice Little-dale in delivering the judgment of the Court, who has adopted something which fell from Lord Alvanley (although it was unnecessary to the decision of the case) in the case of *Carpenter v. Marnell*. But if the whole of what that learned [749] Judge said be taken together, it will be found that that case is utterly inapplicable to the present. What he says is:—"The object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts; it is equally clear, that nothing passed by it which the bankrupt then held in trust for others, or in which he had only a mere legal interest:"—that is the general proposition; "but if at the time of the act of bankruptcy the bankrupt possessed a possibility of interest from which a benefit to his creditors might result,"—then there is a reference to the dictum of Lord Alvanley, which is meant to explain this—"if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or, if any, what part, as a trustee for others, the whole would pass by the assignment; it could not remain in the bankrupt, subject to be transferred on a future contingency, and if it did pass to the assignees, it could not be divested out of them, in whole or in part, by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole or some specific part as trustees merely." That proposition is perfectly correct; there, at the time of the bankruptcy, the legal interest in the goods belonged to the bankrupt; and it was transferred by operation of law to the assignees. It was utterly uncertain at that time whether any portion of that fund would belong to any body else; it was uncertain whether the defendant Burn would, by virtue of the agreement that he had made with the bankrupt, acquire any interest in any specific part of that fund; then, with perfect propriety, the Court in that case say, the legal interest, and the present beneficial interest, is in the bankrupt, the property passes to the assignees, and it is no objection that, at some future period, somebody else may acquire an interest in some part of those goods. That was the whole case of *Carvalho v. Burn*. It has no application to the present case, because here the present right [750] to sue for the debt is in the husband, as trustee for the trustees under his wife's settlement. He has a right to sue for it, and is the person to recover it. At the moment the action is brought, nobody else has any interest in the recovery of that debt. If there should be hereafter any beneficial interest in the fund, unappropriated by the marriage settlement, the assignees may have the means of acquiring that fund by filing their bill in equity against the trustee. The right of suing upon this instrument remained in the husband as a trustee for the purpose of his wife's settlement, and I think it did not pass to the assignees at all.

ALDERSON, B. I am of the same opinion. What passes to the assignees of a bankrupt is the property in which the bankrupt has an equitable as well as a legal interest. Here he had a legal interest in this debt; and therefore so far the assignees have a right and would be the proper persons to sue for it; but it appears that the

whole present equitable interest in this debt is in the trustees of the wife, and the assignees, therefore, do not take the whole interest in the thing to be recovered at the time.

ROLFE, B. I am entirely of the same opinion. I very much doubt whether the authorities ever meant to lay down, that because by possibility the husband, becoming bankrupt, might have an equitable interest, under some remote contingency, in the fund recovered, his assignees are to have a right of suit. What is meant by those cases, I think, is, that if anything remain in the bankrupt, any right in the thing itself to be recovered, then his assignees have all the rights he has to sue; not that the assignees have a right to sue, because possibly, under the construction of the trust when recovered, he may have some remote interest. It would lead to monstrous inconvenience [751] if that were so; and such does not appear to me to be the meaning of the authorities. They do not go further than this, that if the assignees can shew the whole legal interest, and an immediate equitable interest in the bankrupt, they may sue.

Judgment for the plaintiff.

BAIN, Public Officer, v. COOPER. Exch. of Pleas. June 17, 1841.—Where a defendant, a surety, by deed poll guaranteed to the plaintiff the payment of a sum of money:—Held, in an action on the guarantee, that the defendant might plead an indenture of release from the plaintiff to his principal without making profert of the indenture.

[S. C. 1 Dowl. (N. S.) 11; 10 L. J. Ex. 471; 5 Jur. 873.]

Covenant on a deed poll, whereby the defendant guaranteed to the banking Company of which the plaintiff was public officer, the payment by one Mayer of the sum of £1500. Breach, that neither Mayer nor the defendant had paid the same. The defendant pleaded, (amongst other pleas), that after the making of the said deed-poll, and after the said sum of money became due and owing by Mayer, to wit, on &c., by a certain indenture made between Mayer of the first part, one Haywood and others of the second part, and certain persons, creditors of Mayer, of the third part, Haywood, being authorized by the said banking copartnership, released Mayer from all manner of debts owing from him to the said banking copartnership, as well as from all claims, actions, demands, &c.

Special demurrer, assigning for causes, that the defendant had not brought into Court the said supposed indenture in the said plea mentioned, nor had made any profert of it, nor had given any excuse for not producing or making profert of it. Joinder in demurrer.

Crompton, in support of the demurrer. The defendant ought either to have made profert of the indenture, or to have stated some excuse for not doing so. [Parke, B. A party is not bound to make profert of an instrument, except where the instrument ought properly to be in the possession [752] of the party pleading it. You will find that rule laid down in *Dangerfield v. Thomas* (1 P. & D. 287; 9 Ad. & Ell. 292).] That case proceeded on the ground that the party omitting to make profert was not identified in interest with the parties entitled to the possession of the deed. In *Dr. Leyfield's case* (10 Rep. 92 a.), it is stated to be a maxim in law, "that if he who is party or privy in estate or interest, or he who justifies in right of him who is party or privy, pleads a deed, although he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court." And many cases are there put of parties, who, though not entitled to the possession of deeds, must nevertheless, in pleading, make profert of them. In Co. Litt. sec. 452, the rule is stated to be, "that every release made to him which hath a reversion or remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand to plead;" and, Lord Coke adds (10 Rep. 93 b.), "the reason of it is, because there is a privity of estate betwixt him in reversion or remainder and the tenant for life; and yet the deed doth not belong to him, but to him in reversion or remainder. In the same manner Littleton saith (sect. 453), where a release is made to tenant for life or tenant in tail, this shall enure to them in the reversion or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of it, if they can shew

it; but in respect of the privity of estate, if they cannot shew it, they shall not take advantage of it. And therewith agreeth 35 Hen. 6, Monstrans de fait, 118, where Prisot, Chief Justice of the Common Pleas, holdeth that in many cases a man shall not plead a release or deed which doth not belong to him, nor can have an action to recover, without shewing it; as if the disseisor makes a lease for life to one who is impleaded in a pre-[753]-cipe, and makes default after default, and the disseisor is received, he shall not plead a release made by the disseisee to the tenant for life, without shewing it. So the lord by escheat shall not plead a release made to the disseisor by the disseisee, without shewing the deed, and yet it doth not belong to him, nor hath he any remedy for to come by it." It is also laid down in Co. Litt. s. 376, "If two men do a trespass to another, who releases to one of them, by his deed, all actions personal, and notwithstanding sueth an action of trespass against the other, the defendant may well shew that the trespass was done by him and by another his fellow, and that the plaintiff by his deed, (which he sheweth forth), released to his fellow all actions personal, and demands the judgment, &c., and yet such deed belongeth to his fellow, and not to him; but because he may have advantage by the deed, if he will shew the deed to the Court, he may well plead this." And Lord Coke observes upon that, "And seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deed appertain to the other." If a profert be necessary in that case, it surely must be in a case like the present, where there is much more privity between the parties than in the case of joint tort feorsors. In the case of *Dangerfield v. Thomas*, the Court put it on the ground of the parties having an adverse interest to that of the plaintiff.

Montague Smith, contrà, was stopped by the Court.

PARKE, B. I am of opinion that the defendant is entitled to judgment. The general rule on the subject of profert is that laid down in *Dangerfield v. Thomas*, viz. that a party is not required to make profert of an instrument to the possession of which he is not entitled. The only exceptions to that general rule are, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a [754] reversioner, of which the tenant for life may avail himself if he can get hold of it. So also in the case of an heir or executor, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several tort feorsors; for in all these cases there is a privity between the parties, which constitutes an identity of person. But that is not so in the present case, where the parties are only in the relation of principal and surety, and there is no privity of interest between them, since the surety contracts with the creditor: they are not one person in law, and are not jointly liable to the plaintiff. Under the circumstances of the case, however, the plaintiff may amend, by replying and denying the release.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Leave to amend accordingly, otherwise

Judgment for the defendant.

[755] DAVIDSON, Public Registered Officer of the Commercial Bank of England, v. ALEXANDER M'GREGOR. Exch. of Pleas. June 23, 1841.—Covenant. The declaration alleged, that the defendant, by certain articles of agreement under seal, (which recited that one R. M'G. had opened an account with the plaintiffs, a banking company,) covenanted and agreed to guarantee and be accountable for the due payment of all sums of money which then were or thereafter should become due to the plaintiffs from R. M'G., by reason of any money, &c., then advanced or owing, or thereafter to be advanced or owing on the banking account from the said R. M'G., stating that such guarantee was limited to £500, and was to be a continuing guarantee. and providing that in case of bankruptcy or insolvency, not only the £500 should be paid to the plaintiffs by the defendant, but that the plaintiffs should be at liberty to apply the whole of the dividends receivable on their whole debt in discharge of the part not guaranteed; that the sum of 599l. 13s. 4d. became and was and still is due upon the advance of monies by the plaintiffs to R. M'G., yet that R. M'G. did not pay the same, and thereby the defendant became liable to pay the sum of £500, the amount of his guarantee. To this the defendant pleaded, secondly, that no part of the sum of 599l. 13s. 4d.

was due or owing from the said R. M'G. to the plaintiffs on the said banking account, *modo et forma*. Another plea was, that, after the accruing of the debt of R. M'G. to the plaintiffs, he was indebted to them in £1100, of which the sum of 599l. 13s. 4d. was parcel, and was also indebted to other persons in large sums of money, and was in bad and insolvent circumstances, and unable to pay the plaintiffs and his other creditors their debts in full, and that thereupon he agreed with the plaintiffs and his other creditors to pay, and the plaintiffs and the other creditors mutually agreed with each other and with the said R. M'G. to accept from him, a composition of 10s. 6d. in the pound, as a composition in full discharge of the said respective debts; and the plea then stated the payment by R. M'G. of the composition to the plaintiffs. Replication, that the plaintiffs entered into the composition with the knowledge of the defendant, and upon the agreement that it should not discharge the defendant from his liability upon the guarantie: which was denied by the rejoinder.—At the trial, the facts stated in the replication were found by the jury, and the learned judge told them that under those circumstances they ought also to find the second issue for the plaintiffs, which they accordingly did.—Held, that the second plea amounted to a denial that there was any originally existing debt, and not of a debt being due at the commencement of the suit.—Held, also, on a rule to arrest the judgment, that the replication to the fourth plea was good, inasmuch as it did not appear that the reservation of the plaintiffs' rights against the defendant was unknown to the other creditors.

[S. C. 11 L. J. Ex. 164.]

Covenant on certain articles of agreement, dated the 10th of March, 1838, sealed with the seals of the defendant and one Robert M'Gregor, (profert), whereby (after reciting that the said Robert M'Gregor had then recently opened, or was about to open, a current account with the said banking company, and that the said R. M'Gregor might from time to time have occasion for advances from the said banking company, and for the purpose of inducing the said banking company to render such accommodation, and for affording security to the persons who should from time to time constitute the same company, the defendant had agreed to guarantee the said company from loss or damage by reason of any sums of money then due or thereafter to become due to them from the said Robert M'Gre-[756]-gor), the defendant, in consideration of the premises, did thereby covenant and agree to and with the said banking company, that he the defendant should and would guarantee and be accountable to the said company, of whomsoever the same might from time to time consist, for the due payment of all and every sum and sums of money which then was and were, or from time to time thereafter should become and be, due and owing from, or be chargeable to, the said Robert M'Gregor, his executors or administrators, to or on account of the said banking company, for or by reason or means of any monies, bank notes, bank post bills, bills of exchange, promissory notes, or other instruments then advanced or owing, or discounted or negotiated, or thereafter to be advanced or owing, or discounted or negotiated on the said banking account or otherwise, or which the said banking company then were or thereafter might become liable to pay for or on account of the said Robert M'Gregor, his executors or administrators, with interest, commission, and other usual banking charges and allowances for or in respect of all such monies and advances respectively, and also for all costs, charges, damages, and expenses, which the said banking company or firm should sustain or become liable to by reason of any actions at law or suits in equity, accounts, claims, demands, transactions, or dealings, between the said Robert M'Gregor, his executors or administrators, and the said banking company, or between the said banking company and any other person or persons for or on account of the said Robert M'Gregor, his executors or administrators, or on any other account whatsoever, which should make the said Robert M'Gregor debtor or liable to become debtor to the said banking company: but so nevertheless, that the liability of or amount of monies to be recoverable under or by virtue of that guarantie should not at any one time exceed the sum of £500; and the defendant did, for the considerations aforesaid, finally agree with the said [757] banking company, that that guarantie should be considered and be a continuing guarantie, and in full force, until the defendant should have given one month's notice in writing under his hand, to the manager of the said banking company for the time

being, of his intention to withdraw or determine the same. And it was thereby provided, that in case the said R. M'Gregor should become bankrupt or insolvent, the said banking company should be at liberty to elect and choose what item or items in the account between the said banking company and the said R. M'Gregor should be considered as secured by that guarantie, and should and might apply the monies to be received under or by virtue thereof in or towards the liquidation of such item or items accordingly. And in case the defendant, his executors, &c., should actually pay and discharge the said sum of £500, or any other sum or sums of money under or by virtue of the aforesaid guarantie, and there should be any further monies, over and above the said sum of £500, due or owing from the said R. M'Gregor, his executors &c., to the said banking company, then and in such case all such dividends and monies as should have been or should be received by the said banking company, on the whole monies for the time being due and owing to them from the said R. M'Gregor or his estate, or from any other person or persons, should be applied in the first place in or towards satisfaction of such further monies so due and owing as aforesaid, and the defendant, his heirs, executors, &c., should not be entitled to receive any such dividend or dividends, or sum or sums of money, or any part thereof, until such further monies so due and owing to the said banking company should be fully paid and satisfied. The declaration then averred, that the banking company, confiding &c., did render such accommodation to the said Robert M'Gregor, and continued to give him credit in his banking account; and that afterwards, and whilst the guarantie continued in full force, to wit, on [758] &c., a large sum of money, to wit, 599l. 13s. 4d. had become and was then due, &c. for and by reason of divers large sums of money, amounting &c., having been advanced by the said banking company to the said R. M'Gregor on his said banking account: Yet the said R. M'Gregor did not pay the same, although he was, to wit, on &c., requested by the said banking company so to do, but made default; of all which premises the defendant, on &c., had notice, and was then requested by the said banking company to pay them £500, parcel &c., according to the defendant's said covenant and agreement in that behalf; yet that he had not paid the same, &c.

Plea, 1st, as to £25, parcel of the sum of 599l. 13s. 4d. in the declaration mentioned, and also parcel of the sum of £500, payment into Court of that sum: secondly, except as to the said sum of £25, parcel of the said sum of £500 in the declaration mentioned, and the causes of action in respect thereof, that the plaintiff ought not further to maintain his action, because the defendant says, that except the said sum of £25, no part of the said sum of 599l. 13s. 4d. was due or owing from the said R. M'Gregor to the said banking company on the said banking account, in manner and form as in the declaration alleged: thirdly, except as aforesaid, payment by Robert M'Gregor of £600 in full satisfaction and discharge of the said sum of money so due and owing from the said R. M'Gregor to the said company except as aforesaid, and of all damages in respect thereof: 4thly, except as aforesaid, actionem non, because after the accruing of the said debt of the said R. M'Gregor, except as aforesaid, and before the commencement of this suit, to wit, on &c., the said R. M'Gregor was indebted to the said banking company in a certain large sum of money, to wit, £1100, whereof the said sum of 599l. 13s. 4d., except the said sum of £25, parcel &c., was parcel, and to divers other persons respectively, in divers large sums of money, and was in bad and embarrassed circumstances, [759] and unable to pay the said banking company, and the said other creditors of the said R. M'Gregor respectively, their said debts in full, whereof the said banking company and the said other creditors then had notice, and thereupon the said R. M'Gregor then offered and agreed to and with the said banking company, and his the said R. M'Gregor's other creditors, to pay, and the said banking company, and the said other creditors of the said R. M'Gregor, mutually agreed with each other, and with the said R. M'Gregor, to accept of and from him a certain composition, to wit, at the rate of 10s. 6d. in the pound, as a composition for, upon, and in full discharge and satisfaction of the said respective debts in full. And the defendant further saith, that the said composition or sum of 10s. 6d. in the pound on the said sum of money so owing from the said R. M'Gregor to the said banking company, amounts to the sum of 577l. 10s., parcel thereof, and that he the said R. M'Gregor, before the commencement of this suit, to wit, on &c., paid to the said banking company, and the said banking company then accepted and received of and from the said R. M'Gregor, the said sum of 577l. 10s.,

as and for such composition upon the said sum of £1100, in pursuance of the said agreement. Verification.

Replication, as to so much of the last plea as relates to the sum of £20, parcel of the sum of £500 claimed in and by the said declaration, and parcel of the said sum of 599l. 13s. 4d. in the last plea mentioned, being other part thereof than the said sum of £25, precludi non, because the plaintiff says, that the said sum of £20, parcel &c., was not parcel of the said sum of £1100 in that plea mentioned, in manner and form as the defendant hath in the last plea alleged; concluding to the country: and issue thereon. And as to the sum of £455, other part of the said sum of £500 in the declaration claimed, and other part of the said sum of 599l. 13s. 4d. in the said last plea mentioned, and being other parcel thereof than, and not including, [760] the said sums of £20 or £25, or any part thereof, precludi non, because the plaintiff says, that the said banking company entered into the said agreement in the last plea mentioned, and accepted and received the said sum therein mentioned, as in that plea mentioned, at the request and with the full knowledge, privity, and consent of the defendant, and upon the express agreement and understanding between the said banking company and the defendant that the said banking company should not thereby discharge the defendant from his said liability upon the guarantie in the said declaration mentioned, but that the same was to remain and be in full force and effect against the defendant, and that the rights of the said banking company against the defendant in respect of the said sum of £1100 should be reserved to the said banking company, and not at all altered, varied, or affected by reason of the said arrangement, or of the said banking company accepting and receiving the same. Verification.

Rejoinder, as to the replication of the plaintiff to so much of the last plea as related to the sum of £455, that the said banking company did not enter into the said agreement in the last plea mentioned, and accept and receive the said sum therein mentioned, upon the agreement between the said banking company and the defendant that the rights of the said banking company against the defendant in respect of the said sum of £1100 should be reserved to the said banking company, and not at all altered, varied, or affected by reason of the said arrangement, or of the said banking company accepting and receiving the same, in manner and form as the plaintiff hath in the said replication alleged. Issue thereon.

The cause was tried before Rolfe, B., at the last Liverpool Assizes, when the jury found that the facts stated in the replication were true, and the learned judge told them that under those circumstances they ought also to find the second issue for the plaintiff, which they accordingly did.

[761] Dundas, in Easter Term, obtained a rule to shew cause why there should not be a new trial, on the ground that the learned judge had misdirected the jury in directing them to find for the plaintiff on the second issue; and also why the judgment should not be arrested.

Cresswell and Crompton shewed cause. The direction of the learned judge was right. The plaintiff is entitled to the verdict on the issue raised on the second plea. The meaning of that plea is, not that there was nothing due to the plaintiff at the commencement of the action, by reason of the defendant having been discharged from his guarantie by the composition deed; but that no debt was ever due originally from R. M'Gregor to the plaintiff as the balance of an account. And as an original debt was proved to exist between the plaintiff and R. M'Gregor, the plaintiff is entitled to succeed on that issue. Secondly, the replication is good. The declaration is not upon a mere ordinary guarantie, but upon an instrument under seal; and as the liability of the defendant arises upon a deed, it can only be discharged by deed, or by operation of law. The contract between the plaintiff, Robert M'Gregor, and the defendant, is, that the defendant shall not be discharged from his liability on the guarantie, notwithstanding the composition deed. There is nothing illegal in the agreement.] Alderson, B. It nowhere appears on the pleadings that the existence of the guarantie, and the agreement respecting it, were not known to the other creditors; if it were known to them, there is nothing fraudulent in the transaction.] The doctrine that all the creditors under a composition deed shall be in the same position, does not apply to this case; for it is clear that a composition has not the legal effect of rendering invalid all prior securities held by a creditor. This is clear from the case of *Thomas v. Courtney* (1 B. & Ald. 1). There, a creditor who had agreed to ac-[762]-cept a composition in full satisfaction of his demand, under an

agreement which did not stipulate for the surrender of securities, was held entitled to retain the produce of securities in his hands at the time of the composition. *Couper v. Smith* (4 M. & W. 519) was an action of assumpsit against a surety on a written guarantie, by which it was provided that the plaintiffs, who were creditors, might compound with the principal debtor as they might think fit, without the same discharging or in any manner affecting the liability of the defendant. A composition deed was afterwards executed between the plaintiffs, as creditors, and the principal, whereby the latter was released without the privity of the surety, and without notice. It was held that the security was not discharged by the release of the principal debtor. Here the record contains no statement of any fraud; and as the defendant was aware of the composition, and agreed that his liability should continue, notwithstanding that composition, he cannot now contend that he is discharged from his guarantie. They also cited *Davey v. Prendergrass* (5 B. & Ald. 187), and *Haigh v. Brooks* (10 A. & Ell. 309).

Dundas and Martin, in support of the rule. The opinion expressed by the learned Judge, as to the meaning of the plea, was incorrect, and he was therefore wrong in directing the jury to find for the plaintiff on that issue. The meaning of the plea is, that no debt existed at the commencement of the action, and that was proved; for it was shewn that the plaintiff had recovered a composition of 10s. 6d. in the pound, and therefore the debt was extinguished and at an end, and did not exist at the commencement of the action. If the principal debtor had been sued, he might have pleaded accord and satisfaction. The guarantie may indeed subsist, but there is nothing for it to operate upon. Secondly, the judgment ought to be arrested. The transaction was fraudulent as against the other creditors, par-[763]-ties to the composition, since if the plaintiff is permitted to recover against the defendant, he will obtain more than the other creditors who joined in the composition. The principle which governs composition agreements is, that all the creditors are to stand on the same footing; therefore a note to secure the residue of a debt given by a debtor to a creditor, as a consideration for signing a composition deed, has been held to be absolutely void: *Cockshott v. Bennett* (2 T. R. 763). In *Knight v. Hunt* (5 Bing. 432; 3 M. & P. 18), where the creditor refused to sign a composition agreement, unless he also received the amount of the composition in coals, such creditor having received the coals, it was held that he could not recover the composition money. [Alderson, B. In that case the illegal contract was made at the time of signing the composition agreement. It has been held not to be illegal for a creditor to sign a composition deed, and yet retain antecedent securities. Is there any case to the contrary?] The debt due at the time of the composition was extinguished, *Britten v. Hughes* (5 Bing. 460; 3 M. & P. 79): the guarantie might perhaps subsist for the security of any fresh debt. In *Howden v. Haigh* (3 Per. & Dav. 661; 11 Ad. & Ell. 1033), a creditor who had merely received additional security for his composition money, was held to be thereby disabled from recovering the remainder of the composition money. [Alderson, B. In that case Littledale, J., expresses a doubt whether the fraud can invalidate the whole of the transaction, and I must own I am alarmed at the extent to which that decision goes.] A debtor who has paid the amount of bills of exchange given by him to his creditor, as an inducement to sign a composition agreement, may recover it back: *Smith v. Cuff* (6 M. & Selw. 160), *Turner v. Hoole* (Dowl. & Ry. N. P. C. (usually annexed as a supplement to 2 Dowl. & Ry.) 27). It was held, indeed, in *Wilson v. Ray* (10 Ad. & Ell. 82), that [764] money paid under similar circumstances could not be recovered, but that decision proceeded on the ground of the plaintiff's having paid the bills voluntarily, and with full knowledge of all the facts. *Davey v. Prendergrass*, which was cited on the other side as an authority that a surety sued in an action on a bond could be discharged by an agreement under seal only, was an action upon a bond, and the agreement was merely to give time to the principal, and not to pay the debt. But here the action is upon a composition deed, whereby the defendant contracted to pay a debt due from Robert M'Gregor. If, therefore, M'Gregor's debt was "annihilated" by the composition deed, as it is said to be by Ashurst, J., in *Cockshott v. Bennett*, the liability of the surety is annihilated also, and cannot be kept alive by any agreement, because such agreement is against public policy. *Thomas v. Courtney* was not the case of a principal and surety; but the point decided was, that the plaintiffs, who were creditors of an insolvent, and had signed a composition, holding at the same time a security for

a debt which they were not bound by the composition to relinquish, and which was afterwards paid, might nevertheless retain it in satisfaction of the old debt due from the principal debtor. Where creditors have refused to sign a composition deed, unless they receive better security than the rest of the creditors, an agreement for that object is void: *Leicester v. Rose* (4 East, 372). The case of *Lewis v. Jones* (4 B. & C. 506; 6 Dowl. & Ry. 567) is in point. That was an action on a promissory note by the indorsee against the party who had indorsed it for the accommodation of the maker. The indorsee, being the creditor of the maker, had agreed to accept from him 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. The agent of the maker had represented to the plaintiff, before the agreement was signed, that the [765] defendant, the accommodation indorsee, would continue liable for the residue of the debt secured by the note, and that the agreement would be void, unless signed by all the creditors. It was held that the surety was discharged by the execution of this agreement. *Smith v. Bromley* (Doug. 696, n.), *Cecil v. Plaislow* (1 Anstr. 202), and *Jackman v. Mitchell* (13 Ves. 581), shew that a person who joins with other creditors in signing a composition deed or agreement cannot legally stipulate for any greater benefit than the other creditors obtain. In *Farrar v. Hutchinson* (9 Ad. & Ell. 641; 1 Per. & D. 437), which was an action brought by partners to recover a debt, it was held that if the defendant, in order to prove payment, gives in evidence a receipt signed by one of the plaintiffs, they are not concluded, but may shew that it was given under circumstances which destroy its effect, as fraud in the partners not signing.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. This case was argued in the last term before my Brothers Gurney and Rolfe, and myself. There were two questions: one, whether, at the trial before my Brother Rolfe, at the last Liverpool Assizes, he was right in directing the jury to find a verdict for the plaintiff on the second issue; and secondly, whether, upon the issue raised by the rejoinder to the replication to the fourth plea, the Court ought to direct the judgment to be arrested. The facts are raised by the pleadings, and are these:—The declaration states a deed of covenant, whereby the defendant became bound as surety for Robert M'Gregor, who had opened an account with the plaintiffs as [766] bankers, for the balance which then was, or which should from time to time thereafter become due to the plaintiffs from Robert M'Gregor, stating that such guarantie should be limited to £500, and that it should be a continuing guarantie; providing also, in case of bankruptcy or insolvency, that not only the £500 should be paid to the plaintiffs by the defendant, but that the plaintiffs should be at liberty to apply the whole of the dividends receivable on their whole debt in discharge of the part not guaranteed. It then states as a breach of this covenant, that the sum of 599l. 13s. 4d. became and was, and from thence hitherto has been, and still is, due and owing to the plaintiffs, as a balance upon the advance of certain monies by the plaintiffs to R. M'Gregor; yet that R. M'Gregor did not pay the same, and that thereby the defendant became liable to pay the sum of £500, the amount of his guarantie.

The second plea, (after excepting a sum of £25), states that no part of the said sum of 599l. 13s. 4d. was due or owing to the plaintiffs from R. M'Gregor, in manner and form as the plaintiffs have alleged.

The fourth plea, (which is pleaded to the same sum of money as the second), states, that after the accruing of the said debt of the said R. M'Gregor to the plaintiffs, he was indebted to the plaintiffs in £1100, of which the said sum of 599l. 13s. 4d. was parcel, and was also indebted to other persons respectively, in divers large sums of money. It then states his insolvency, and an agreement between him and his creditors, and between his creditors mutually, to accept from him a composition of 10s. 6d. in the pound, as a composition in full discharge and satisfaction of the said respective debts in full. It then stated the payment by Robert M'Gregor of the composition to the plaintiffs.

To this the plaintiffs have replied, that, as to £20, part of the sum of £500 claimed by the declaration, it was not [767] parcel of the debt on which the composition was paid (and this was so found by the jury); and further, as to the remainder of such sum, being (after deducting the £25 originally accepted and this sum of £20), £455, that the plaintiffs entered into the composition, and accepted and received the same with the full knowledge, privity, and consent of the defendant, and upon the express

agreement that it should not discharge the defendant from his liability upon the guarantie, but that it should remain in full force, and that the plaintiffs' rights against the defendant, arising out of the debt of £1100, should be reserved to them, and should not at all be altered, varied, or affected by the said arrangement or acceptance of the composition. This was denied by the rejoinder. At the trial, however, the facts stated in the replication were affirmed by the jury, and my learned brother told them that, under these circumstances, they ought also to find the second issue for the plaintiffs, which they accordingly did.

Two points have been made as to the issue on the second plea. It is contended on the part of the plaintiffs, that the meaning of this issue is only that the defendant denies any originally existing debt due as the balance of an account from Robert McGregor to the plaintiffs; and if so, it is clear that the direction was right: but secondly, that if it means that there was no such debt due or owing at the time of the commencement of the suit, still the plaintiff is entitled to recover, because the facts shew that, as between the plaintiff and defendant, the debt originally due from Robert McGregor was still due and owing, notwithstanding the composition paid upon his debt of 10s. 6d. in the pound.

Upon consideration, we think both these points must be decided for the plaintiff. The debt stated in the declaration clearly means the debt due on the balance originally due on the banking account of R. McGregor; it states the non-payment of such balance by him, and the consequent [768] liability of the defendant on his guarantie. Then if so, the plea, which denies that the debt was due and owing in manner and form as the plaintiff has alleged, must have the same meaning, and be therefore confined to a denial of any original debt. The fourth plea ought not to have been allowed on any other supposition; for if the construction of the second plea contended for by the defendant be the true one, the two pleas would amount to the same defence, and so could not stand together.

But granting this, and considering this exposition of the second plea to be the same as that contended for by the defendant, we think the direction right. The question is, whether the transactions expanded on the pleadings amount to an answer, and shew the original debt due from R. McGregor to the plaintiffs to be at an end. The facts must be taken to be these—that a debt of £1100 existed, that a general composition of 10s. 6d. in the pound was agreed on and received, and that all this was done with a distinct agreement between the plaintiffs and defendant, that the liability of the defendant on his guarantie should remain unaltered. It does not appear on the pleadings, nor was it proved at the trial, that this reservation of the plaintiffs' rights against the defendant was not known to the other creditors, neither does it appear affirmatively to have been known to them. But inasmuch as the defendant is seeking to establish that this agreement, which he has in fact entered into, was invalid in law, we think that the fact ought to have been proved by him. In the absence of this proof, we see nothing to shew that the agreement was not binding on him; and if so, he cannot, after this agreement, be allowed to say that there is no debt due, when he has agreed that his guarantie (which depends on a debt being due) shall still, notwithstanding the composition, be enforced against him.

This also disposes of the objection arising as to the issue on the rejoinder to the replication to the fourth plea. Upon [769] the whole, therefore, without entering into the question much and ably argued, as to the effect which an invalid composition would have had on the decision of this case, which perhaps might be a difficult one, we think that on the facts and circumstances here existing and proved, the verdict is right, and that the rule ought to be discharged.

Rule discharged.

INGLIS AND ANOTHER v. HAIGH. Exch. of Pleas. June 25, 1841.—The exception as to merchants' accounts in the statute of limitations, 21 Jac. 1, c. 16, s. 3, applies only to an action of account, or perhaps also to an action on the case for not accounting; but not to an action of indebitatus assumpsit.

[S. C. 9 Dowl. P. C. 817; 10 L. J. Ex. 406; 5 Jur. 704. Followed, *Pritchard v. Scott*, 1855, 3 W. R. 482. Referred to, *Tatam v. Williams*, 1844, 3 Hare, 357.]

Assumpsit for work and labour and commission, money lent, money paid, and on an account stated. Plea, *actio non accrevit infra sex annos*. Replication, that long

before the accruing of the causes of action in the declaration mentioned, the plaintiffs and defendant were, and continued and still are, merchants, and during all that time carried on the trade of merchandise, and that the causes of action accrued in a course of dealing carried on between the plaintiffs and the defendant as merchants and merchant, and were items in an open unsettled account between them as such merchants, and which said account contained various items in favour of the defendant, and the balance due on which said account the plaintiffs sought to recover in this action. Verification. Rejoinder, that no item on either side of the said account accrued due within six years before the commencement of this suit, and that more than six years before the commencement of this suit the plaintiffs had stated the said account to the defendant, as the balance thereof in the replication mentioned. Verification.

General demurrer, and joinder in demurrer.

The case was argued at the sittings after last Easter Term (May 13), by—

[770] Martin, in support of the demurrer. First, on the true construction of the stat. 21 Jac. 1, c. 16, the exception in the 3rd section of that statute takes accounts between merchant and merchant altogether out of the operation of the statute, and leaves the remedy in respect of them as it was at common law. The words of the statute are, "that actions of trespass, detinue, actions for trover, and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, and their factors and servants, all actions of debt grounded upon any lending or contract without specialty," &c., shall be sued for within the several periods therein prescribed. The act is not very accurately worded; but it is observable, that where the action of account is spoken of, the word is properly stated in the singular number; but where merchants' accounts are mentioned, it is in the plural; shewing that the meaning of the legislature was, that all actions of account or on the case, other than such actions as were brought in respect of accounts concerning the trade of merchandise between merchant and merchant, should be subject to the limitations of time afterwards specified; but that all such last-mentioned actions should be left as at the common law. This view of the statute is supported by the argument of Saunders, in the case of *Webber v. Tivill* (2 Saund. 126). [Parke, B. It is clear the exception does not apply to debt, because that is not an action on the case; but it is difficult to conceive that such a distinction can exist as between debt and assumpsit. The question must depend very much on the authorities.] It was formerly considered that debt or assumpsit could not be maintained on an account consisting of several items, but that the action of account was the only remedy in such case: *Farrington v. Lee* (1 Mod. 268; 2 Mod. 311); *Scott v. McIn-tosh* (2 Campb. 238); but there is now no doubt that all the items on the credit side of a mercantile account, however numerous, are recoverable in an action of indebitatus assumpsit. Then the question is, whether, where all such items are more than six years old, the statute of limitations is an absolute bar. In his note to *Webber v. Tivill*, Serjt. Williams thus states the effect of the authorities (2 Saund. 127 b. n. (7)): "It appears from the authorities, that the law is now taken to be, that the exception in the statute applies also to actions on the case: and the distinction is, that where there have been mutual, current, and unsettled dealings and accounts between the parties, and any of the items are within six years, the plaintiff, to a plea of the statute, that the defendant did not promise within six years, may reply generally, that the defendant did so promise; and the reason seems to be, because the mutual accounts between the parties, for any item of which credit has been given within six years, are of themselves evidence of there being such an open account, and of a promise to pay the balance." In *Culling v. Skoulding* (6 T. R. 189), Lord Kenyon says:—"I take it to have been clearly settled, that every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained, and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute." There are indeed cases in equity which appear to conflict with this statement of the law. The first of these was that of *Welford v. Liddell* (2 Ves. sen. 400), in which, however, it did not appear that the account was one between merchant and merchant, and the opinion of the Lord Chancellor (which was as to this point extra-judicial), proceeds upon a ground

altogether beside the doctrine [772] laid down by Lord Kenyon. All the subsequent cases, *Martin v. Heathcote* (2 Eden, 169), *Jones v. Pengree* (6 Ves. 580), *Barber v. Barber* (18 Ves. 286), will be found to have been decided with reference to the supposed authority of *Welford v. Liddel*; and moreover, inasmuch as it has always been held that the Statute of Limitations does not affect trust estates, but the Courts of Equity have only adopted a doctrine *cypres*, by analogy to the statute,—that they will not, in the exercise of their discretion, give relief after the lapse of six years from the final conclusion of accounts between the parties,—the authorities in equity have not any direct bearing on the present case, which turns on the strict legal construction of the statute. (See *per Curiam* in *Rhodes v. Smethurst* (4 M. & W. 42)).

Secondly, the rejoinder does not shew that any account was stated between the plaintiffs and the defendant. The mere statement of an account by the one party to the other, without the latter's assent, cannot conclude him: an "account stated" means an account settled and at an end: *Hughes v. Thorpe* (5 M. & W. 656). "The settled distinction," says Mr. Serjt. Williams (2 Saund. 127, n. (6)), "now seems to be between an open or current account, and one that is stated;" by which it is clear from the context, that he means a settled account; that is, one stated between the parties. In *Webber v. Tirill*, and *Farrington v. Lee* (on which all the subsequent decisions are founded), there was a count on an account stated between the parties; but this is a mere open account, in the ordinary acceptation of the term. The statute has of late received a more liberal construction than formerly. It was once held that this exception extended only to merchants trading beyond sea, and not to inland merchants; *Sherman v. Withers* (Ca. in Chan. 152); and the reason given by [773] the Court for their opinion in *Farrington v. Lee* is, that if an action of *assumpsit* for goods sold, and on an *insimul computasset*, be not barred, then the exception would extend to all actions between merchants and their factors, as well as to actions of account. The dictum of Lord Holt, in *Chevely v. Bond* (Carth. 226; 1 Show. 341; 4 Mod. 105), that "by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of account," was extra-judicial.

Thirdly, the replication is good in form, inasmuch as it shews that the account was one concerning the trade of merchandise, and that it was an open and unsettled account between the parties.

Montague Smith, *contra*. No case has been cited in which this replication has been pleaded and sustained. The exception in the statute does not apply at all to actions of *indebitatus assumpsit*. The contrary opinion has arisen from confounding the exception of merchants' accounts with the doctrine of acknowledgment of the previous items by giving new credit. The plain construction of the statute is, that actions of account, &c., are barred, except such actions of account as concern the trade of merchandise. *Webber v. Tirill* is a direct authority to that effect, and decided so soon after the passing of the statute as the 22 Car. 2. *Martin v. Delboe* (1 Mod. 70; 1 Sid. 465; 1 Lev. 298; 2 Keb. 717), decided in the same year, is another strong case to the same effect. There it was held, that an action of *assumpsit* on a promise by the defendant, a merchant, to pay the plaintiff so much out of the net proceeds of goods to be received from beyond sea, was not within the exception in the statute; and Twisdén, J., says:—"I never knew but that the word 'accounts' in the statute was taken only for actions of account. An *insimul computasset* brought for a sum certain upon an account stated, [774] though between merchants, is not within the exception." *Farrington v. Lee*, and *Chevely v. Bond* (decided in 30 Car. 2, and 3 Will. & Mary), also contain express declarations of the Court to the same effect. There is no later authority than these, nor is there any case in which this replication has been pleaded in an action of this nature: the only instance in which such a replication is to be found is in a case of *Godfrey v. Saunders* (3 Wils. 79), which was an action of account by a merchant against his bailiff or factor. In *Com. Dig. Temps, G. 6*, the result of the authorities is expressly stated to be, that "*assumpsit*, or any action except account, though it be for a merchant's account," must be brought within six years. The only authorities which have been referred to as being to the contrary, are the opinion of Serjt. Williams stated in the note to *Webber v. Tirill*, and the dictum of Lord Kenyon in *Callin v. Skoulding*. The distinction on which that dictum rests is clearly pointed out by Parke, B., in *Williams v. Griffiths* (2 C. M. & R. 48): "There might have been an agreement between the parties to this effect,

that the one should not call upon the other for payment of the money due to him, because he owed him money on the other hand. Before Lord Tenterden's act, that would have been a sufficient acknowledgment to take the case out of the Statute of Limitations, on the ground that the conduct of the parties was equivalent to an acknowledgment, and to a promise to pay the debt." Mr. Serjt. Williams in the note referred to, confounds this doctrine of mutual accounts with that relating to merchants' accounts; and Lord Kenyon evidently fell into the same confusion in *Calling v. Skoulding*, and also in another case of *Cranch v. Kirkman* (Peake, 121), where he held a set-off of several items to an action for goods sold and delivered, to be within the exception of merchants' accounts, as being "in the nature of a running and mutual account between the [775] parties." The Court will rather adopt the (nearly) contemporaneous exposition of the statute, which limits the exception to actions of account. And this construction is most consistent with the reason of the thing: because in the action of account, both parties went into account, the account on both sides was regularly taken, and the plaintiff recovered only the balance; whereas in the action of indebitatus assumpsit, the defendant had no opportunity, before the statutes of set-off, of entering into his cross demand, but was put to his cross action. An indebitatus account supposes a pre-existing debt, and the promise alleged is to pay that debt on request: surely that promise is barred by the statute. It is all but conceded that an action of debt is not within the exception; but indebitatus assumpsit is in the nature of debt; there must be a debt before it will lie. A count on an account stated is said not to be within the exception; yet the balance claimed may still be the balance of a merchant's account; and the replication, therefore, (if good in this case), need only aver that it is such, in order to shew that it also is within the exception. So, a bill of exchange is an ordinary item in a merchant's account: why then should not the same replication apply to that? The bill in equity for an account is substituted for the old action of account, and the decisions in equity have been with reference to the prayer for an account contained in the bill; they are, therefore, strong authorities in favour of the principle of construction contended for by the defendant. In *Robinson v. Alexander* (8 Bligh, N. S. 352), in the House of Lords, the plaintiff's claim was held to be within the exception; but that was on a bill for an account, and there appeared to have been no statement of account by the one party to the other. The present plaintiffs, therefore, are not absolutely barred; they may still have their action of account, or their bill for an account.

[776] The rejoinder is sufficient, because it alleges the account to have been stated by the plaintiffs to the defendant: the plaintiffs are therefore bound by that statement.

Martin, in reply. In all the cases relied upon on the other side, there were counts on an account stated. In *Webber v. Tivill*, there was no direct judgment of the Court on this point, but only an extra-judicial opinion expressed by one of the judges, Morton, J. In *Martin v. Delboe*, the demurrer was clearly not sustainable, because every cause of action between merchants is not excepted. There are no later cases on this subject than those which have been referred to, because practically it became unnecessary, until the passing of Lord Tenterden's act, to put this replication on the record. The authorities, then, being so inconclusive, the Court will decide upon the words of the statute itself, which plainly except all open accounts between merchants, whatever be the form of action. It is said the defendant will be under a difficulty as to taking credit for items on his side of the account; but that is not so, because, by the universal application of the doctrine as to the appropriation of payments, they will be made to extinguish previous items on the other side, and the plaintiffs will recover only the balance.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This case was argued before us at the sittings after Easter Term. It was an action of indebitatus assumpsit, the four first counts being for work and labour, money lent, money paid, and for interest. To these counts the defendant pleaded the Statute of Limitations; the plaintiff replied, that he and the defendant were both merchants, and that the cause of action in the four first counts of the declaration arose in a course of dealing carried on between the plaintiff and defendant as merchant [777] and merchant, and were items in an open unsettled account between them as such merchants, and which said account contained various items in favour of the

defendant, and the balance due on which he the plaintiff sought to recover in the present action. The defendant rejoined, that no item on either side of the account accrued due within six years; and that more than six years before bringing the action, the plaintiff had stated the said account to the defendant, and the balance thereof mentioned in the replication. To this rejoinder there was a demurrer, and joinder in demurrer: and the question for our decision is, whether on these pleadings the plaintiff is entitled to recover. We think he is not.

The plea of the Statute of Limitations is a complete bar, unless the plaintiff, by his replication, can take the case out of its operation. He attempts to do so by bringing it within the exception in the statute as to merchants' accounts. But we think that exception does not apply to an action of indebitatus assumpsit for the several items of which the account is composed, or for the general balance, but only to a proper action of account, or perhaps also an action on the case for not accounting.

Although there is no reported case expressly governing the present, yet there are many coming very near it, and in which the dicta of very eminent judges fully warrant the view we take of the subject.

Webber v. Tirill (2 Saund. 124) was an action of indebitatus assumpsit for goods sold and delivered, money had and received, and on an account stated. Plea, the Statute of Limitations. Replication, that the money sought to be recovered became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned the trade of merchandize. The replication was held bad; and Morton, J., said, that no action but an action of account [778] was excepted. The reporter, it is true, adds that the other judges said nothing thereto, but gave judgment for the defendant without assigning their reasons. And certainly, in that case, as part of the demand was on an account stated, and even the residue did not appear to have accrued due in a course of mutual accounts, it was not necessary to go the full length of what was said by Morton, J.

So in *Martin v. Delboe* (1 Mod. 70; 1 Vent. 89), Twisden, J., is reported to have said, "I never knew but that the word 'accounts' in the statute was taken only for actions of account." That case, however, was an action of assumpsit on a promise to pay a certain sum out of the proceeds of goods sent to the defendant as a merchant, beyond sea, and the Court doubting whether it appeared on the declaration or not to be on an account stated, gave leave to discontinue: so that the question, whether the statute applies to actions of account only, was not decided. The same observation applies to the case of *Farrington v. Lee* (1 Mod. 269, and 2 Mod. 311).

In none of these cases did the facts necessarily call for a decision, whether the exception did or did not at all apply to actions of assumpsit. Still the dicta of the judges in those cases are entitled to great weight, unopposed as they are by any conflicting authority whatever.

But independently of authority, we are of opinion that the reasonable construction of the statute requires such a restriction as the dicta of the judges, in the cases we have referred to, clearly sanction. The words are—"all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants." Now, as was said by Seroggs, J., in the case of *Farrington v. Lee*, if the legislature had meant to include in the exception other actions than actions of account, the language would probably have been "other than such actions as concern the trade of [779] merchandize," and not "other than such accounts." Indeed, it is difficult to say that an action of indebitatus assumpsit for goods sold and delivered, or for money had and received, can, under any circumstances, be described as an action having any reference to accounts: it would have been still more difficult to say so at the time when the Statute of Limitations was passed.

Where a merchant plaintiff brings an action for goods sold and delivered, money paid, or any of the other items which may constitute his demand against the merchant defendant with whom he has had mutual dealings, he is rather repudiating than enforcing accounts. Indeed, by the comparatively modern statutes of set-off, the defendant may now have the benefit of his counter demands; but that was not the case at the date of the Statute of Limitations; and we must construe the statute now as it ought to have been construed immediately after it became law. At that time there was no proceeding at law by which mutual demands could be set against each other, except by action of account, and consequently there was no other action in any

manner connected with accounts properly so called. It does not at all vary the case, that the plaintiff only seeks to recover what he calls the balance due on the account. If that balance had been stated and agreed to, then all the authorities shew that it is altogether out of the exception. If it has not been stated and agreed to, then it is only what the plaintiff chooses to call a balance, the accuracy of which the defendant had, at the time of passing the Statute of Limitations, no means of disputing in an action of assumpsit.

Our view of the case is much assisted by considering that the exception clearly would not apply to an action of debt, brought for the very same demand; and it is difficult to believe that the legislature could have intended to preserve the right in one form of action, but to bar it in another. The statute is unfortunately worded very loosely, [780] and great latitude has been adopted in construing it. For instance, the saving clause in cases of disability (s. 7) does not in terms mention any actions on the case, except actions on the case for words; and yet it has always been held to extend to all actions on the case, from the manifest inconvenience of a contrary construction: see *Chandler v. Filleit* (2 Saund. 120). And if, in holding that the exception as to merchants' accounts is confined to actions of account, we are doing violence to the literal construction of the statute (which, however, we do not feel to be the case), we are certainly deviating far less than was done, by holding that the words "trespass on the case for words," in the seventh section, applied to all actions on the case whatever.

We are aware, that in thus confining the exception to actions of account, we are deciding in some measure in opposition to what is represented, though not very confidently, to be the law by Mr. Serjt. Williams, in one of his very learned notes to the case of *Webber v. Twill*. In note 7, he seems to represent the exception as extending to actions on the case, as well as to actions of account. But, on examination, it will be found that the authorities to which he refers, although the language of the Judges on the subject is not always very distinct, are not in fact cases at all depending on the exception as to merchants' accounts, but are merely cases of mutual running accounts, extending over a space of more than six years before the commencement of the action, but in which there had been items within that period. Those latter items, recognised as part of a current account, have been taken in many cases as amounting to an admission that the whole account is open, and something due; and this, before Lord Tenterden's Act, 9 Geo. 4, c. 14, was sufficient to take the case out of the statute, not on the exception as to the merchants' accounts, but because the adoption of the latter items was [781] held to amount to a new promise to pay the whole balance due on the account, over whatever period of time it might have extended. This distinction is adverted to by Lord Kenyon, in *Catling v. Skoulding* (6 T. R. 193); and there can be no doubt that this latter kind of exception out of the operation of the statute, arising from the existence of items in a current account within six years before action brought, applies to actions of assumpsit, and also to actions of debt. But the cases in which that doctrine has been acted on, have proceeded on principles wholly independent of the exception as to merchants' accounts, and do not appear to us to afford any support to the notion, that that latter exception can be applied to an action like the present.

Our opinion being that the replication is bad, it is perhaps not absolutely necessary for us to say anything as to the rejoinder, by which the defendant seeks to get rid of the replication, by saying that all the items of the account are of more than six years' standing. We think it, however, right to say, that, in giving judgment for the defendant, we proceed solely on the insufficiency of the replication, and not on the rejoinder. Whatever doubt might have existed formerly on the question, whether the exception as to merchants' accounts applied to accounts in which there has been no item on either side for more than six years, that seems to us now to be entirely set at rest by the decision in the House of Lords, in *Robinson v. Alexander* (8 Bligh, N. S. 352). That was a case brought by appeal from the Court of Chancery, being a case of merchants' accounts, in which there had been no item on either side for a period greatly exceeding six years previous to the filing of the bill. The defendant, by his answer, insisted on the Statute of Limitations as a bar to the account sought by the bill, and there is no doubt it would have been a bar, if the exception as to merchants' accounts is confined to [782] cases where there has been some item of account within six years. His Honour the Vice Chancellor held the case to be within

the exception in the statute, and the House of Lords, after taking time to consider, affirmed the decree of his Honour.

We have adverted to this only for the purpose of shewing that our judgment proceeds, not on the ground of there having been no item of account within six years, but solely on the ground that the exception in the statute is inapplicable in such an action as the present.

The judgment must therefore be for the defendant.

Judgment for the defendant.

JORDIN v. CRUMP. Exch. of Pleas. June 25, 1841.—Declaration in case alleged, that the defendant wrongfully and unlawfully set and concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run upon the same, among the bushes near a public footway, running through a close of the defendant's; by means whereof a dog of the plaintiff's, with which he was going on foot along the said footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of and unavoidably by the plaintiff, begun to pursue and was in pursuit of the said rabbit, ran upon the dog-spear and was wounded, &c. Plea, that the defendant set and concealed the said engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, whereof the plaintiff had notice:—Held, on general demurrer, that this plea was a good answer to the action; and that it would have been so even without the allegation of notice.

[S. C. 11 L. J. Ex. 74; 5 Jur. 1113. Referred to, *Clark v. Chambers*, 1878, 3 Q. B. D. 331; *Ponting v. Noakes*, [1894] 2 Q. B. 281.]

Case. The declaration stated, that, whereas before and at the time of the committing of the grievance by the defendant thereinafter mentioned, there had been and was a certain common and public footpath through a certain close of the defendant's, being a coppice of wood; yet the defendant, whilst he was so possessed of the said close, to wit, on &c., wrongfully and unlawfully set, placed, and concealed, and kept and continued, a certain engine or instrument of iron, with divers sharp points, spikes, or spears of iron thereto, commonly called a dog-spike or dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run upon or against [783] the same, so placed and concealed by the defendant, amongst the bushes near the said footway; by means whereof a certain dog, to wit, a sheep-dog of the plaintiff's, with which he the plaintiff was then going and passing on foot in and along the said footway, and which dog, by reason of a certain rabbit having then just before crossed the said footway in the view of the said dog, had then, against the will of the plaintiff and unavoidably by the plaintiff, begun to pursue, and was then in pursuit of the said rabbit, ran and struck and was driven with great force and violence upon and against one of the said sharp points, spikes, or spears of the said engine or instrument, whereby the said spear penetrated the body of the said dog, and grievously maimed and wounded him, whereby the said dog became and was of little or no use or value to the plaintiff, &c.

Seventh plea, that the defendant set and concealed, and so kept and continued the said instrument or engine, for the purpose of preserving the game of the defendant, and for the purpose of disabling and killing the dogs that might come upon the said close, lest they should pursue and destroy the said game, whereof the plaintiff had notice. Verification.

Replication, that the said engine was, by reason of its having been so set and concealed, an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run against the same; concluding to the country.

Special demurrer, assigning for causes, that the replication neither traversed nor confessed and avoided the plea, but that it concluded to the country, whereas it ought to have concluded with a verification. Joinder in demurrer.

The case was argued in Trinity Term (June 2), by

Atherton, in support of the demurrer. The replication is bad, and the defendant is entitled to the judgment of the [784] Court, the plea being a good answer to the action. The act of the defendant in setting the dog-spear is not wrongful at common law: and the stat. 7 & 8 Geo. 4, c. 18, s. 1, has no application to this case. It appears on the face of the plea, and is admitted by the replication, and the plaintiff had notice of the spear being set in the wood: and that being so, he has no ground of action. In the case of *Deane v. Clayton* (7 Taunt. 489; 1 Moore, 203), in which the Court of Common Pleas was equally divided as to whether an action like the present was maintainable, the special verdict, although it found that boards were placed on some parts of the defendant's woodland, with notices painted on them that dog-spikes were set on the premises, yet did not find expressly that the plaintiff had notice of their being so set; and that circumstance is adverted to by Burrough, J., in his judgment in favour of the plaintiff. In *Ilott v. Wilkes* (3 B. & Ald. 304), the plaintiff, who was trespassing in the defendant's wood, had notice that spring guns had been placed in the wood; and on that express ground it was held, that he could not maintain an action for an injury received by him from one of them. On the other hand, in *Bird v. Holbrook* (4 Bing. 628), where the action was held to be maintainable, it was on the ground that the plaintiff had no notice that spring guns had been set. Best, C. J., expressly distinguishes the case from *Ilott v. Wilkes* on that ground; and says, "I am clearly of opinion, that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that if injurious consequences ensue, he is liable to yield redress to the sufferer." *Townsend v. Wathen* (9 East, 277) may be cited for the plaintiff, but that case is clearly distinguishable, because there the plaintiff recovered for the injury done to his dogs, on the ground that the defendant's traps were set so near the highway, and baited in such a manner, that the animals were likely, by their own instinct, to be attracted into them.

[785] Nor has the stat. 7 & 8 Geo. 4, c. 18, s. 1, any application to this case. The words are, "If any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor." In order to bring this case within the purview of the statute, it must be contended that the words, "whereby the same may destroy," apply to the setting of any instrument having a tendency to produce the injury described; but such is not the true construction: the reasonable interpretation of the statute is, that the party is not to be deemed guilty of a criminal act, unless either he intended to destroy life or inflict grievous bodily harm, or unless the destruction of life, or the infliction of grievous bodily harm, actually ensues from his act.

Whateley, *contrà*. First, the plaintiff is entitled to recover independently of the statute. The better opinion appears to be in favour of the judgment of Burrough, J., and Park, J., in the case of *Deane v. Clayton*, and that the question of notice or no notice is not decisive of the case. In this case it is admitted by the plea, that the plaintiff was passing along a public footway, near which the dog-spike was concealed, and that his dog pursued the rabbit against his will, and unavoidably by him. It is clear, therefore, that no negligence can be imputed to the plaintiff: it is even consistent with the statements on the record, that the plaintiff was leading the dog by a string, and that the string broke. The observations of Park, J., in *Deane v. Clayton* are strongly applicable:—"Here these two things do concur, the wilful erection of these spears by the defendant for an unlawful purpose, viz. to kill [786] dogs, and no want of ordinary care in the plaintiff." In *Bird v. Holbrook*, the plaintiff was held entitled to recover, although he received the injury in consequence of his getting over the wall of a private garden; here he was lawfully using a public footpath. It must be remembered also that this is an action for an injury, not to the plaintiff himself but to his dog: and the instinct of the animal, which naturally led him to pursue the rabbit, and took him beyond the control of the plaintiff, is to be considered.

But secondly, the defendant has been guilty of an offence indictable under the stat. 7 & 8 Geo. 4, c. 18, s. 1. The reasonable construction of that clause is, to prohibit the setting of any instruments which have a tendency to inflict grievous injury on others. And it is averred in this declaration, that the defendant "wrongfully

and unlawfully" set and concealed, and kept and continued the instrument in question upon his land.

Atherton, in reply. According to the argument on the other side, all the words in the statute which follow the words "calculated to destroy human life, or inflict grievous bodily harm," might be omitted out of an indictment for setting spring guns; but it is clear an indictment so framed could not be sustained. An act of so penal a nature must be strictly construed. On the other point, the case of *Hott v. Wilkes* is a complete authority.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. The question in this case is, whether the plaintiff is entitled to compensation for an injury done to his dog by certain dog-spears, which were set by the defendant in his wood. [His Lordship stated the substance of the pleadings, and continued.] On these pleadings, it is [787] to be observed, in the first place, that the plaintiff admits that he had notice of the fact of the dog-spears having been set in the wood: and the question is, whether a person passing with a dog through a wood, in which he knows dog-spears are set, has any right of action against the owner of the wood, for the death of or injury to his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured. We are of opinion that he has not.

The setting dog-spears is not in itself an illegal act, nor is it rendered such by the 7 & 8 Geo. 4, c. 18, which prohibits the setting or placing of man-traps, or other engines calculated to destroy human life or inflict grievous bodily harm, with intent that or whereby the same may destroy human life or inflict grievous bodily harm. Now, although it is admitted by these pleadings that the instrument in question was one calculated to do grievous bodily harm to human beings, still it does not appear to have been set in the wood with that intention; and there is, therefore, nothing in the case to shew that the setting of it by the defendant was an illegal act. It is true that the law, in certain cases, makes an exception to the right of setting instruments capable of causing deadly injuries to human life, where such injury will be a probable consequence of setting them; but with the exception of those cases, a man has a right to do what he pleases with his own land. Now, in the present case, the injurious act was done by the dog to the land of the defendant; and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against that danger. If he chose to walk with his dog along a foot-path through ground on which the dog might commit a trespass, he knew the risk he was running; and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of [788] it. In such a case, the party digging the pit would be responsible for the injury, if the pit were dug across the road; but if it were only in an adjacent field, the case would be very different, for the falling into it would then be the act of the injured party himself. There is a case of *Blyth v. Topham* (Cro. Jac. 158; 1 Rol. Abr. 88) to this effect, where it was held that no action lay for the destruction of a mare, which when straying perished by falling into a pit which the defendant had dug upon a common. That case, therefore, is an authority that the fact of a trespass being involuntary makes no difference in this respect.

It will not be necessary for us to investigate at any length the principle on which all the authorities on this subject have proceeded; that has been already done, in a very masterly and elaborate manner, by the Court of Common Pleas, in the case of *Deane v. Clayton*; and we shall merely content ourselves with saying, that we take the same view of the law on this subject as is there taken by Gibbs, C. J. But the present case is much stronger than that; for here the plaintiff had express notice that dog-spears were set in the wood; though, were this even otherwise, our decision would still be in favour of the defendant, on the short ground, that the setting of them was a lawful act, and that the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the foot-path. Two cases were referred to in the course of the argument, and which were both decided subsequently to *Deane v. Clayton*; one of them previously to the passing of the 7 & 8 Geo. 4, c. 18, and one subsequently. The first was that of *Hott v. Wilkes*, and was the case of a party trespassing in a wood, with notice that spring-guns were set there: but the Court held that he was not entitled to recover against

the owner of the wood for damage done [789] to him thereby, it having been his own fault to go where spring-guns were set, for with that knowledge on his part spring-guns ceased to be secret engines of mischief; and that the case was similar to that of a trespasser endeavouring to climb a wall, who should hurt himself by coming in contact, in the dark, with spikes or broken glass stuck upon it, in a case where it appeared that he had a previous opportunity of observing, in broad daylight, that such means of mischief were placed on the wall. The other was a case of *Bird v. Holbrook*, which was decided after the passing of the statute 7 & 8 Geo. 4, c. 18. That was a case where the defendant, for the protection of his property, set a spring-gun in a walled garden, not only without giving notice, but where it appeared by the evidence that he had purposely abstained from giving any, in order that the thief, (as he said), might be detected. The plaintiff was in search of a stray peahen, and having trespassed on the garden, the spring-gun went off, and injured him severely. On this the Court of Common Pleas held that he was entitled to maintain an action against the defendant; but the reason of this decision was, that setting spring-guns without a notice was, even independently of the statute, an unlawful act. The correctness of that position may perhaps be questioned; but if it be sound, the decision in that case was right. Our judgment, however, in the present case, proceeds on the ground, that to set dog-spears in this wood was a perfectly legal act on the part of the defendant; and we therefore think that our judgment must be in his favour.

Judgment for the defendant.

[790] JACKSON v. COBBIN, Clerk. Exch. of Pleas. June 25, 1841.—A declaration in assumpsit stated, in substance, that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff without restriction as to the purpose for which the same should be used and occupied:—Held, on special demurrer, that such a promise could not be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it.

[S. C. 1 Dowl. (N. S.) 96; 10 L. J. Ex. 389.]

Assumpsit. The declaration stated, that the plaintiff, for divers, to wit, two years before, and at the time of the making of the agreement and promise by the defendant thereafter mentioned, had been and was tenant to the defendant of a certain messuage and premises in the said agreement also mentioned, and which said messuage and premises had been and were during all that time held, used, and occupied by the plaintiff as such tenant as aforesaid, for the purpose of carrying on therein the trade and business of a retailer and dealer in beer, and the plaintiff, during all that time, did carry on therein the said trade and business, and the plaintiff had expended divers monies, to wit, to the amount of £100, in and about purchasing the good-will of the said business, when he, the plaintiff, first became such tenant as aforesaid; and the plaintiff was thereupon desirous, at the time of the making of the agreement therein-after mentioned, of becoming tenant to the defendant of the said messuage and premises as next thereafter mentioned, for the purpose of carrying on therein the same trade and business: of all which premises the defendant, before and at the time of the making of the agreement and promise by the defendant thereafter mentioned, had notice; and thereupon afterwards, to wit, on the 24th of December, A.D. 1838, by a certain agreement in writing then made by and between the defendant and the plaintiff, and signed by the plaintiff and defendant respectively, the defendant agreed, in consideration of the rent and conditions thereafter mentioned, to let to the plaintiff, for the term of three years from the 25th of December then instant, the said messuage and premises, at the yearly rent of 14l. 10s., free and clear of all deductions for sewers' rate, land-tax, and all other rates and taxes, whether parliamentary or parochial, which said rent of [791] 44l. 10s. was to include the use and reasonable wear of the several fixtures and fittings contained in the schedule thereto, signed by the defendant and the plaintiff; the said rent to be paid quarterly, and the first payment thereof to be

made on the 25th of March next ensuing the date of the said agreement ; and further, in consideration of the plaintiff putting the aforesaid messuage and premises in good and tenantable repair, and of keeping and delivering up the same, at the end or sooner determination of the said term of three years, together with the said several fixtures and fittings, in as good plight and condition as they then were (reasonable use and wear thereof only excepted) ; and also that no alteration should be made by the plaintiff, and that none of the fixtures and fittings before mentioned should be removed or altered, without the consent in writing of the defendant, and one Amelia his wife, being first had and obtained ; the plaintiff did thereby agree to take the said messuage and premises, at the rent and upon the conditions before mentioned and stipulated : And thereupon afterwards, to wit, on the 24th of December, 1838, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform and fulfil all things in the said agreement contained on his part to be performed and fulfilled, he the defendant then promised the plaintiff to perform and fulfil all things in the said agreement contained on his the defendant's part to be performed and fulfilled, and that he the defendant then had good right and title, and full and lawful power and authority to let the said messuage and premises to the plaintiff for the said term of three years, upon the terms and in manner above set forth, and without restriction as to the purpose for which the said messuage and premises should be used or occupied : And the plaintiff saith, that he, relying upon the said promise of the defendant, afterwards, to wit, on the day and year last aforesaid, did take the said messuage and [792] premises from the defendant, at the rent and upon the terms in the said agreement stipulated, and then entered into and upon the same, and became and was thereof possessed as tenant thereof, under and in pursuance of the said agreement, and carried on in and upon the said messuage and premises his said trade or business, and remained and continued so thereof possessed as tenant as aforesaid, under and by virtue of the said agreement, from thence until he, the plaintiff, was evicted and ejected from the same as hereinafter mentioned : And although the plaintiff, from the time of the making of the said agreement hitherto, hath well and truly performed and fulfilled all things on his part and behalf to be performed and fulfilled, yet the defendant has disregarded his said promise, and hath broken the same in this, to wit, that he the defendant had not, at the time of making the said agreement and promise by the defendant, nor at any time since, a good right or title, or full or lawful power or authority to let the said messuage and premises for the said term of three years, or for any other term whatsoever, upon the terms and in manner above set forth, and without restriction as to the purpose for which the said messuage and premises should be used and occupied ; and by reason thereof, after the commencement and before the expiration of the said term of three years, and whilst he the plaintiff was so possessed as aforesaid, to wit, on, &c., a certain person, to wit, Charles Lord Southampton, who, at the time of the making the said agreement and promise by the defendant, and at the time of the eviction hereinafter mentioned, had a legal right of entry into and upon the said messuage and premises, and title, to the possession of the same adversely to the defendant, and also adversely to the plaintiff, and without the plaintiff's concurrence or assent, or any act of his in that behalf giving or conferring such right and title, entered, by virtue of such right and title, into and upon the said messuage and premises, and into and upon the said possession of the [793] plaintiff, and expelled, put out, removed, ejected, and evicted the plaintiff from the possession thereof, and hath kept from thence hitherto and still doth keep the plaintiff so expelled, ejected, evicted, and put out from the possession of the said messuage and premises ; and so the plaintiff in fact saith, that the defendant has not kept his said promise so made by him as aforesaid, and by reason thereof the plaintiff hath been prevented and hindered from carrying on his said trade or business in the said messuage and premises, and hath lost and been deprived of all the benefit resulting from the said purchase of the goodwill of the said business, and also all gains, profits, and advantages which might and otherwise would have accrued to him from the carrying on his said trade and business therein, and hath also wholly lost divers other monies, amounting in the whole to a large sum of money, to wit, the sum of £100, by him the plaintiff, whilst he was such tenant as aforesaid, expended and laid out in and about the putting of the said messuage and premises into good and tenantable repair, pursuant to his the plaintiff's agreement in that behalf, and hath lost all the gains and profits which he might and otherwise would have made and acquired.

from using the said sum of money so laid out and expended by him as aforesaid; and the plaintiff hath also been forced and compelled to part with and dispose of certain fixtures and other effects which he the plaintiff, whilst he was such tenant as aforesaid, affixed to the said messuage and premises, and which the plaintiff might lawfully have removed or sold to the incoming tenant of the said premises, at the expiration of his the plaintiff's interest therein, for a much less sum of money, to wit, for the sum of £50 less than the sum of money for which he, the plaintiff, might and could have so sold and disposed of the same to the incoming tenant of the said premises: and the plaintiff hath also become and is liable to pay to the said Charles Lord Southampton a large sum of money, to wit, the sum [794] of £100, as and for the costs, charges, and expenses by him sustained in and about recovering possession of the said premises, &c.

Special demurrer, assigning for causes, that the declaration states such a promise by the defendant as the law will not imply, and imposes a much more extensive liability on the defendant than he is subject to in point of law, for that it alleges that the defendant let the said messuage and premises without restriction as to the purpose for which the same should be used or occupied, whereas, from the relation mentioned in the declaration as existing between the plaintiff and the defendant, no such promise can be implied or inferred by law; and for that the promise, for the breach of which the plaintiff has declared, is alleged to have been made after the making of the agreement therein mentioned, and there does not appear, from the declaration, to have been any sufficient consideration for the making of that promise; and for that the declaration does not allege with sufficient certainty that the said Charles Lord Southampton, at the time of the commencement of the said tenancy, and from thence until and at the time of the said eviction therein mentioned, had the legal right of entry in and upon the said messuage and premises, adversely to the defendant and also to the plaintiff, &c. Joinder in demurrer.

Willes, in support of the demurrer. The promise declared on cannot be implied from the alleged relation between the parties, and no consideration for it is disclosed by the declaration. The promise that the defendant "had power to let the messuage and premises without restriction as to the purpose for which the said messuage and premises should be used and occupied," cannot be sustained. It is in effect a warranty of the right to let the land for any use, good or bad; but in the case of a mere sale of a chattel, whether real or personal, there is no implied warranty of any kind. Co. Litt. 101 b., 389 a.; *Chanter v. Hop* [795] kins. (a). And the same rule was applied to a contract of letting in *Granger v. Collins* (6 M. & W. 458), where it was held that a contract for quiet enjoyment cannot be implied from the bare relation of landlord and tenant. It would be an alarming proposition to mesne landlords, that in the absence of an express restriction in an underlease, the sublessee may turn the land to any use, even a nuisance, and, on eviction by the superior landlord under the usual clause of re-entry, not only not be liable to compensate the mesne landlord for the eviction, but even be entitled to claim indemnity from him. This is in substance the cause of action in the present case, and it seems clear that no such action can be maintained unless there be fraud, and then the form of action should be different from the present. [Alderson, B. If such an action were maintainable, the under-tenant might plough ancient meadow, and demand indemnity against an action for waste.] No doubt that consequence would follow, and the same if the land were misused in any other way. [Parke, B. May not the promise be sustained as an express one? The declaration contains a statement of mutual promises, and alleges the defendant's promise to be in consideration of the promise by the plaintiff.] That is not a sufficient consideration, for it is merely a promise by the plaintiff to perform what he was bound to perform by the previous agreement. Besides, that promise, as stated, was founded on an executed consideration, and *Hopkins v. Logan* (5 M. & W. 241), the doctrine of which is sustained by Rolle's quere to *Hodge v. Varisior*, (d) shews that an executed consideration, from which the law implies a promise, will not support any promise other than that which the law implies. [Parke, B., [796] referred to

(a) 4 M. & W. 406. It is otherwise if the article is bought for a particular purpose, and the buyer relies on the seller's judgment in the selection of the chattel for that purpose: *Brown v. Edgington*, 2 Scott, N. R. 496.

(d) 2 Roll. R. 413. See *Janson v. Colomore*, id. 396; *Docket v. Voyel*, Cro. Eliz. 885.

Thornton v. Jenyns.(a)¹] The question in that case was as to the grammatical construction of the statement of mutual promises, and the promise there alleged was not to do any thing which the plaintiff was previously bound to do, like that in this case; but that the corporation of the Bedford Level should do something which neither they nor the plaintiff were previously bound to do. The word "afterwards," in the statement of mutual promises in this case, fixes the time of the defendant's promise as being subsequent to that of the agreement for tenancy, and the case therefore falls strictly within the principle of the *Anonymous case* in 1 Ventris, 258, where it was holden, that a promise by a debtor to pay his debt is no consideration for a counter promise by the creditor, though it might be otherwise if the date were barred by the Statute of Limitations, or the like. In Selwyn's *Nisi Prius*, 8th edit. p. 48, citing *Harris v. Watson* (Peake, 72), and *Stilk v. Myrick* (2 Camp. 317), it is stated that "the mere performance of an act, which the party was by law bound to perform, is not a sufficient consideration." Much less can a mere promise to perform such an act be any consideration. The promise alleged could neither benefit the defendant, nor injure the plaintiff. [He then proceeded to argue that the breach alleged was insufficient, for the reason assigned in the points for argument; but the Court expressed a strong opinion that it was sufficient on general demurrer, and as the case did not eventually turn upon this point, the argument upon it is omitted.]

Hugh Hill, contra. The case suggested by the Court, of waste committed by ploughing up ancient meadow land, does not apply, for it appears by the description of the premises on the record that they cannot be the subject of [797] such waste. [Rolfe, B. The case may be put of a bowling-green, which the tenant would have no right to subvert.] Then it must be presumed that by the words "the purpose for which the said messuage should be used and occupied," the parties meant lawful purposes only. The Court will not presume that any illegality was contemplated. The principle is, that illegality cannot be presumed, and that agreements must be construed so as if possible to exclude it: *Lewis v. Davison*.(a)² [Parke, B. That principle is applicable to offences against the public, such as breaches of the peace, or the like; but does it apply in the case of a mere civil tort or breach of contract?] Then the declaration may be supported on the principle laid down in *Payne v. Wilson* (7 B. & C. 423; 1 Man. & R. 708). Littledale, J., there says, "There is a clear distinction between considerations executed and executory. In Com. Dig., tit. Action on the Case upon Assumpsit, B. 12, it is laid down that 'an assumpsit lies though the consideration be executed in part, as in consideration that he had done a thing at my request;' and afterwards it is laid down, 'so if the consideration is continuing, though the act be executed, as in consideration that the lessee now in possession had paid his rent very well, to save him harmless for prompt payment of the rent, is a continuing consideration while he remains in possession.'" This doctrine strongly applies to the consideration here stated. [Parke, B. The difficulty is, that the promise by the defendant that he had power to let, without restriction as to the purpose for which the land was to be used, cannot be implied from the mere fact of the parties having entered into the alleged agreement for a tenancy, and the only other consideration for the defendant's promise is the promise of the plaintiff to perform what he was previously bound to perform by the agreement. The mode of stating the consideration is objected to by spe-[798]-cial demurrer, and seems to be at least ambiguous.] If that be the opinion of the Court, the plaintiff prays leave to amend.

Leave was then granted to amend within a month, on payment of costs. The plaintiff, however, did not amend within that time, and there was

Judgment for the defendant.

(a)¹ 1 Scott, N. R. 52; 1 Man. & Gr. 136. The reporters have been informed that a writ of error was intended to be brought by the defendant on the judgment of the Common Pleas in that case, but the action was not proceeded with by the plaintiff.

(a)² 4 M. & W. 654. "Ubi quid generaliter conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque." 11 Rep. 74.

AMOS AND OTHERS v. TEMPERLEY. Exch. of Pleas. June 23, 1841.—Indebitatus assumpsit for freight payable by the defendant to the plaintiffs for and in respect of the conveyance by them for the defendant, and at his request, of divers goods in and on board of a certain ship, from divers places to divers other places.—At the trial it appeared that the plaintiffs had received on board their vessel a quantity of coals from the Burnt Island Company, to be carried to London; that the captain signed a bill of lading, by which the coals were made deliverable “unto N. T. [the defendant] for the London Gas Company, or to his assigns, he or they paying freight for the said goods 10s. per ton in cash of true delivery.” On the arrival of the vessel in London, the defendant produced the bill of lading and received the goods under it, and afterwards offered to pay the freight by a bill at two months:—Held, that the defendant was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the company, the property vesting in them.—*Quære*, whether the declaration was sufficient, it not being in the usual form of a common count for freight, and not stating any delivery?

[S. C. 11 L. J. 183.]

Assumpsit. The first count of the declaration stated, that the defendant was indebted to the plaintiffs in £100, for freight payable by the defendant to the plaintiffs, for and in respect of the conveyance by them of divers goods and chattels in and on board a certain ship or vessel, from divers places to divers other places, for the defendant and at his request. There was also a count upon an account stated. Pleas, non assumpsit, and a set-off. At the trial before Lord Abinger, C. B., at the London Sittings after last Hilary Term, it appeared that the plaintiffs had received on board a vessel of theirs, called the “Suffolk Hero,” a quantity of coals from the Burnt Island Company, to be carried to London. The captain signed a bill of lading, by which the coals were made deliverable “unto Mr. Nicholas Temperley for the London Gas Company, or to his assigns, he or they paying freight for the said goods, ten shillings per ton in cash of true delivery.” On the arrival of the vessel in London, the defendant produced the bill of lading, and received the coals under it; and afterwards offered to pay the freight by a bill at two months. It appeared that the [799] coals in fact were the property of the London Gas Company. The plaintiffs obtained a verdict, with liberty for the defendant to move to enter a nonsuit. In Easter Term last, Peacock, citing *Evans v. Marlett* (1 Lord Raym. 271), and *Sargent v. Morris* (3 B. & Ald. 277), obtained a rule on two grounds; 1st, that Temperley was not liable for the freight, and 2ndly, that if liable, he was not so in the form of action adopted in this declaration.

Ball (Platt was with him) shewed cause. First, Temperley is the party liable for the freight. *Evans v. Marlett* is relied on by the other side, but that decision is rather in favour of the plaintiff. It was there held, that upon a general consignment the property in the goods vests in the consignee, notwithstanding it appears upon the invoices that he is trustee only. [Parke, B. That case is the reverse of the present. The report of it in Salkeld (3 Salk. 290, nom. *Evans v. Martell*) is,—“One Harvey loaded goods on board a ship, and consigned them to Evans; but by the invoice the goods appeared to be the property of Harvey, and now on an action brought by Evans against the defendant Martell for these goods, it was adjudged that the invoice signifies little in this case, but that it was the consignment of the goods which gave the property and vested it in Evans, and therefore he might maintain this action; but if they had been consigned to him upon the account of Harvey, that would have altered the case, for then he would have been only factor to Harvey, and he must have brought the action, because the property was then in him.” *Sargent v. Morris*, also relied on by the defendant, is inapplicable to the present case. There, by a bill of lading, the captain undertook to deliver goods therein specified for the consignor, and, in his name, to the consignee; at the time of shipment the consignee had no property whatever in the goods; and it was held, that an action against the owner of the ship for damage done to the goods, by their [800] being imperfectly stowed, must be brought in the name of the consignor, although the consignee had insured the goods, and advanced the premiums of insurance before the ship arrived. But in this case the defendant, on the arrival of the vessel, produced the bill of lading and received

the goods, and afterwards offered to pay the freight by a bill at two months. The case therefore falls within the principle established in *Cock v. Taylor* (13 East, 399). There the master of a ship having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, was held to be evidence of a new contract and promise on the part of such purchaser to pay the freight, and he was held to be liable for the amount in an action of indebitatus assumpsit by the shipowner. Lord Ellenborough there said, "It appears to me that though there were no original privity of contract between these parties for payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading is evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill, or their assigns, he or they paying freight for the said goods." [Parke, B. It does not appear whether the present defendant had authority from the company to contract for the payment of the freight. Lord Abinger, C. B. The goods are made deliverable to Temperley, or any person to whom he may assign them.] Yes; "he or they"—which means Temperley or his assigns—paying freight for them. In *Bell v. Kymer* (5 Taunt. 477; 1 Marsh. 146), the indorsee of a bill of lading of goods shipped by a chartered vessel, deliverable to the consignee or his assigns, he or they paying freight according to the terms of the char-[801]-ter-party was held liable to the charterer in assumpsit for the freight. There Gibbs, C. J., says, "The three puisne Judges in the King's Bench held, that the case of *Wilson v. Kymer* (1 M. & Selw. 157) differed from *Cock v. Taylor*, on the ground that it was a case where the goods were delivered, not on the bill of lading, but upon an express order from the principal to deliver them to the broker; but they all three agreed with *Cock v. Taylor*, that if the goods were delivered to the defendant on the bill of lading, that would be sufficient to support the action." In *Dougal v. Kemble* (3 Bing. 383; 11 Moore, 251), goods were consigned to L. C. & Co., or their assigns, "he or they paying freight for the same." L. C. & Co. indorsed the bill of lading to K. their broker, and then became bankrupt; the shipowner, in ignorance of these circumstances, applied to L. C. & Co. for the freight, and then sued K. for it, and it was held that K. was liable. Wilde, Serjt., who argued for the plaintiff, there says: "By the general rule of law, a party who receives a bill of lading knowing that freight has not been paid, receives it under an implied contract to pay the freight." That proposition is correct, and applies in the present case. And Best, C. J., says: "Whoever obtains the delivery of goods under such a bill of lading, contracts by implication to pay the freight due on them." [Parke, B. The question here is, whether Temperley undertakes for the company.] In *Drew v. Bird* (Moo. & M. 156), the bill of lading stated the goods to be "shipped by A. Bird (the defendant), to be delivered to E. Griffiths for the Imperial Distillery Company, or to his assigns, he or they paying freight for the same." The goods were conveyed to London, and delivered to Griffiths without receiving the freight. Afterwards, and after several ineffectual applications to Griffiths and to the company for payment, the plaintiffs applied to the defendant by letter, and received an answer, that "if Griffiths did not pay, he the defend-[802]-ant would." Lord Tenterden, in summing up the case to the jury said: "Independently of the letter of the defendant, I think there is nothing to entitle the plaintiffs to a verdict. The bill of lading directs them to deliver to Griffiths, he paying freight: they deliver without receiving it: they cannot thereby make Bird liable to them, if he were not so originally, and on the face of the bill of lading nothing appears to charge him. Then the question arises, whether the subsequent letter alters the case. On that letter the proper question for your consideration will be, can you infer from it that the state of the account between Griffiths and Bird was such, that as between them it was Bird's duty to take the payment of the freight upon himself, and that he had consented to do so? If these facts were so, they will furnish a good consideration for Bird's promise to pay it, and the plaintiff will be entitled to recover: if otherwise, the promise will not be binding, and the defendant must have a verdict." In *Renteria v. Ruding* (Moo. & M. 513), Lord Tenterden, C. J., referring to his Treatise on Shipping, p. 286, 5th ed., and reading the passage—"for if a person accepts anything which he knows to be subject to a duty or charge, it is natural to conclude he means

to take the duty or charge on himself, and the law may very well imply a promise to perform what he so takes on himself,"—said, "this seems to me to be the correct principle." In *Tobin v. Crawford* (5 M. & W. 235), goods were shipped at Bombay on board a ship of the plaintiff a shipowner in Liverpool, and by the bill of lading were to be delivered "unto order, or to his and their assigns, on paying freight for the same." The bill of lading was indorsed by the shipper, and forwarded to the defendant's East India agents in London, who indorsed it in blank to C. & Co., their factors in Liverpool. On the arrival of the goods at Liverpool, C. & Co. presented the bill of lading to the plaintiff, and received the goods: the plaintiff debited C. & Co. with the freight. [803] C. & Co. became bankrupt without having paid the freight, whereupon the defendants claimed from them and took possession of the goods. It was held that the defendants were not liable to the plaintiff for the unpaid freight. There the defendants actually took possession of the goods, and yet they were held not liable. If Temperley had become bankrupt, would the Company have been liable for the freight? [Lord Abinger, C. B. The question is, what is the meaning of the bill of lading; does the master contract with Temperley and his assigns?] The master has given credit to Temperley, and he only is liable for the freight. As to the other point, the defendant, if liable at all, is chargeable on the common count for freight.

Peacock and Hugh Hill, in support of the rule. This action cannot be maintained on either of the grounds suggested. First, Temperley is not the party liable. On the face of the bill of lading, the goods are the property of the company, and he is merely their agent. Suppose the goods had been lost or had sustained injury, the company would have been the parties to sue in respect thereof. So, if Temperley had dealt with the goods as his own, the transaction would not have been protected under the 6 Geo. 4, c. 94, inasmuch as it appeared by the bill of lading that he was merely the agent of the London Gas Company. The principle upon which a party becomes liable by receiving goods under such a bill of lading as the present, is, that by accepting the goods he impliedly undertakes to pay the freight. But here the defendant merely accepted the goods in the character of agent, and therefore there was no implied contract on his part personally to pay the freight; the acceptance of the goods being in his character of agent, the contract, if any, to be implied from such acceptance must be considered to have been made in the same character, and so not binding on him personally. In *Cock v. Taylor* the action was against the con-[804]-signee, who was the owner of the goods. Lord Ellenborough there speaks of the ultimate appointee; but who in this case is the appointee? The company are the only appointees of the shipper. The person who receives the goods is not in every case liable for the freight, but only where he has contracted to pay it: *Moorson v. Kymer* (2 M. & Selw. 303). This is an action for the price of carriage: can it be said that the goods were carried for the agent? How does the bill of lading make the defendant liable? The goods are deliverable to him on account of the London Gas Company, and the word "he" may refer to the company, for there is no evidence that it consists of more than one person. They cited also *Domett v. Beckford* (5 B. & Ad. 521). But secondly, even if the defendant be personally liable, the plaintiffs are not entitled to recover upon this form of declaration. They ought to have declared specially, setting out the bill of lading, and then stating that the defendant personally promised to pay the freight, in consideration of the plaintiff's delivering the goods to him, and thereby giving up his lien upon them, as in *Castling v. Aubert* (2 East, 325). At any rate, if the plaintiffs are entitled to recover upon the indebitatus count, it ought to have alleged in the usual way, that the goods were delivered to the defendant at his request.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. This was an action of indebitatus assumpsit for freight; the plea was non assumpsit; and on the trial before Lord Abinger, the plaintiff had a verdict, with liberty for the defendant to move to enter a nonsuit. A rule to shew cause was granted, and the case was argued in last Easter Term.

[805] The facts proved on the trial were, that the plaintiff received on board a vessel of his a quantity of coals from the Burnt Island Company, to be carried to London; the captain signed a bill of lading, by which the coals were made deliverable to the defendant for the London Gas Company, or to his assigns, he or they paying for the freight at a specified rate. On the arrival of the coals in London, the defendant produced the bill of lading, and received the coals under it; and afterwards

offered to pay the freight by a bill at two months. The question is, whether he was personally liable for the freight, and if so, whether the form of the declaration is sufficient. We are of opinion that the defendant was not personally liable; and it is therefore not necessary to say anything as to the sufficiency of the declaration, which is not in the usual form of a common count for freight.

The case of *Cock v. Taylor* (13 East, 399) established the proposition, that the receipt of goods by the indorsee of a bill of lading, by which they were made deliverable to the consignee or his assigns, he or they paying freight, was evidence of a new contract between him and the shipowner to pay the freight according to the terms of the bill of lading; and that case has been followed by many others. But here the defendant is, on the face of the bill of lading, a mere agent to receive the goods, the London Gas Company being the consignees, and the property vesting in them, according to the rule laid down by Lord Holt, in the case of *Evans v. Marlett* (1 Ld. Raym. 271); and the promise to be inferred from the receipt of the goods under such a bill of lading is, *prima facie*, a promise by the defendant, as agent for the company, to pay the freight on their account, and not a promise to be personally responsible for it; and there was no sufficient evidence to the contrary.

Upon the subsequent offer to pay in a bill, no reliance [806] ought justly to be placed as any proof of personal liability. We are all therefore of opinion, that on the facts proved the defendant was not liable, and that a nonsuit ought to be entered. The rule must therefore be absolute.

Rule absolute.

NEILSON AND OTHERS v. HARFORD AND OTHERS. Exch. of Pleas. June 26, 1841.—

The construction of the specification of a patent belongs to the Court, and not to the jury.—If a specification contain an untrue statement in a material circumstance, of such a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification is therefore bad, and the patent invalidated, although the jury, on the trial of an action for the infringement of the patent, find that a competent workman, acquainted with the subject, would not be misled by the error, but would correct it in practice.—In the specification of a patent, the title of which was “An invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required,” the mode of operation was described as follows:—“A blast or current of air must be produced by bellows or other blowing apparatus, and is to be passed from the bellows, &c., into an air-vessel or receptacle, made sufficiently strong to endure the blast, and from that vessel or receptacle, by means of a tube, pipe, or aperture, into the fire, &c. The vessel or receptacle must be air-tight or nearly so, except the apertures for the admission and emission of air, and at the commencement and during the continuance of the blast, must be kept artificially heated to a considerable temperature.” After giving directions as to the materials and dimensions of the vessel, the specification proceeded to state, “The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation.” In other parts of the specification, the same language was used with reference to the ultimate beneficial effect upon the furnace, &c.:—Held, that such was the reasonable construction of the above clause also, and not that the form or shape of the vessel was immaterial to the effect of heating the air within it.—Held, also, that the title of the patent was not inconsistent with the specification, but that the invention of applying to fires, &c., air heated in the manner therein stated, might be described as an “improved application of air.”—Held, also, that in this specification the plaintiff did not claim a patent for a mere principle, but for a mode of applying a well-known principle, viz. the heating of air, by means of a mechanical apparatus to fires and furnaces.—If the notice of objections, delivered by a defendant with his pleas in an action for the infringement of a patent, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 5, be not sufficiently specific, the plaintiff’s course is to apply to a judge at chambers for an order for the delivery of a more specific notice; but if he omit to do so, he cannot object to the generality of the notice at the trial: the only question then

is, whether the notice is sufficiently large to include the objections relied on by the defendant.

[S. C. 1 Webst. P. R. 295. Referred to, *Plimpton v. Malcolmson*, 1876, 3 Ch. D. 582.]

This was an action on the case for the infringement of a patent, dated 11th September, 1828, granted to the plaintiff James Beaumont Neilson for a term of fourteen years, the title of which was "An invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required."

[807] The defendants pleaded not guilty, and also several special pleas, of which the fourth only is material to this report. In that plea the defendants set out the specification of the invention enrolled by the plaintiff Neilson, as follows:

"I, James Beaumont Neilson, do hereby declare, that the nature of my said invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, and the manner in which the same is to be performed, is particularly described and ascertained as follows: that is to say:—A blast or current of air must be produced by bellows or other blowing apparatus, in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air so produced is to be passed from the bellows or blowing apparatus into an air-vessel or receptacle, made sufficiently strong to endure the blast, and from that vessel or receptacle, by means of a tube, pipe, or aperture, into the fire, forge, or furnace. The vessel or receptacle must be air-tight, or nearly so, except the apertures for the admission and emission of the air; and at the commencement and during the continuance of the blast, it must be kept artificially heated to a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so; but so high a temperature is not absolutely necessary to produce a beneficial effect. The air-vessel or receptacle may be conveniently made of iron, but as the effect does not depend upon the nature of the material, other metals or convenient materials may be used. The size of the air-vessel must depend upon the blast, and upon the heat necessary to be produced. For an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions; and for a cupola of the usual size for cast-iron foundries, an air-vessel capable of containing 10,000 cubic inches will be of a proper size. For fires, forges, or furnaces [808] upon a greater scale, such as blast furnaces for smelting iron, and large cast-iron foundries' cupolas, air-vessels of proportionably increased dimensions and numbers are to be employed. The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation. The air-vessel may generally be conveniently heated by a fire distinct from the fire to be affected by the blast or current of air; and generally, it will be better that the air-vessel, and the fire by which it is heated, should be inclosed in brick-work or masonry, through which the pipes or tubes connected with the air-vessel should pass. The manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature. In witness whereof," &c.

The plea then alleged, that the plaintiff, J. B. Neilson, did not, by the said instrument in writing under his hand and seal, at any time within six calendar months after the date of the said letters-patent, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, and by reason thereof the said letters-patent were and are wholly void.

The defendants delivered with their pleas, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 5, the following notice of objections to the validity of the patent:—

"The defendants in this action, besides denying that they have infringed the patent in the declaration mentioned, intend, at the trial of this cause, to rely on the following objections, that is to say:—that the alleged invention is not the subject of a patent, because it claims a principle: that the terms in which the subject of the patent is described, viz. 'an invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows and other blowing apparatus are required,' are ambiguous, and it is doubtful whether the patent is for the invention of the application of hot air, or only for an improved mode of applying hot air: that the said J. B. Neil-[809]-son is not the first and true inventor of the said supposed invention, and that the said supposed invention was publicly used and put in practice

before the granting of the said letters patent. [Here followed a statement of the facts on which the defendants relied as shewing that the invention was not new.] The defendants further contend that the said patent is void, because no sufficient specification of the said invention has been enrolled in conformity with the provisions of the said letters-patent in that behalf: that the description of the apparatus to be applied is so defective, that no workman of ordinary skill would be able to manufacture the said apparatus, merely by reading the said specification: that the said specification is calculated to deceive: that the mode of applying hot air by means of an air-vessel or receptacle, which is vaguely described in the said specification, is substantially the mode or apparatus for which Mr. Botfield had previously obtained his patent: that the said specification, so far as it can be understood as descriptive of an apparatus for forming and supplying hot air, describes an apparatus which does not answer the purpose: that the said specification is invalid on account of its general vagueness: that the said specification is defective, inasmuch as it does not describe the kind of furnace to which the said invention is applicable, and it is not applicable to all kinds of furnaces: that the apparatus described in the said specification to be employed for the purpose of heating air is so defective, that it is incapable of producing any beneficial effect in the blast furnace: that the apparatus used by the defendants is wholly different from that described in the specification, and upon a different principle; and it was invented at the Calder iron works, and other iron works near Glasgow in Scotland; and by John Jeffries and J. Patten, at the Grove iron-foundry, in the borough of Southwark, and not by the said J. B. Neilson: that, if the said apparatus described by the said J. B. Neilson in his specification could be made [810] to raise the atmospheric air to a sufficient degree of heat, it could not be used without a water twyre for introducing the hot air into the blast furnace: that the apparatus which the defendants do use, and any other apparatus which would be capable of raising the atmosphere to a sufficient degree of heat, could not be applied to the blast furnace without the use of a water twyre: that it is alleged in the said specification, 'that the size of the air-vessel must depend upon the blast, and on the heat necessary to be produced: that for an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions, and for a cupola of the usual size for cast-iron founders, an air-vessel capable of containing 10,000 cubic inches will be of a proper size; for fires, forges, and furnaces upon a greater scale, such as blast furnaces for smelting iron, or large cast-iron founders' cupolas, air-vessels of proportionably increased dimensions and numbers will be required;' whereas, in order to produce the effect required, the heating apparatus ought to be made of such a construction, that the surface exposed to the action of the heat should be in proportion to the quantity of air required to be heated, and that instead of the vessel or receptacle being enlarged when a greater quantity of heat is required, the heating apparatus must be reduced in size, and the furnace increased in extent, so as to obtain the maximum of heating surface in proportion to the quantity of heated air required: that it is therein alleged, that 'the air-vessel or receptacle may be conveniently made of iron; but as the effect does not depend upon the nature of the material, other metal or materials may be used;' whereas in fact no other metal can be used which will effect the desired object so well, and at such small expense, as iron: also, that the sizes and proportions of the air-vessels mentioned in the specification render the alleged invention comparatively inoperative and useless. The defendants further object, that the said invention, as described [811] in the said specification, is of no public use or benefit: that the heated air cannot be introduced into the smelting furnaces by a simple pipe, as mentioned in the said specification."

The plaintiffs replied to the fourth plea, that the said plaintiff J. B. Neilson did, by the said instrument in writing under his hand and seal, within six calendar months after the date of the said letters-patent, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed:—on which issue was joined.

The cause was tried before Parke, B., at the Middlesex sittings in last Easter Term. It was contended for the plaintiffs, that the specification was sufficiently accurate and unambiguous, and that the words—"the form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances and situation" did not mean that the form or shape of the vessel was immaterial to the heating of the air, but that, provided the air were heated to a proper temperature,

the form or shape of the vessel in which it was heated was immaterial for the producing a beneficial effect on the fire, forge, or furnace. Secondly, it was contended that the construction of the specification was a matter for the jury, and not for the Court: and thirdly, that the defendants were not at liberty to object to the sufficiency of the specification in this respect, on the ground that they had not stated the objection with sufficient precision, in the notice of objections delivered pursuant to the statute. For the defendants it was insisted, that the notice was sufficiently precise, and that, at all events, it was too late to object at the trial that it was ambiguous, but that the plaintiffs, if it was not satisfactory, ought to have obtained a Judge's order for the delivery of a better notice of objections; and further, that, upon the proper construction of the specification, the statement as to the form or shape of the vessel [812] meant that the form or shape was immaterial to the effect of heating the air therein. The learned Judge was of opinion that the specification must be construed by the Court, and thought that its proper construction was as contended for by the defendants; and he submitted to the jury the following questions:—First, whether a person of common understanding and ordinary skill, and knowledge of the subject of the old blowing apparatus, could, from this specification, construct an apparatus capable of producing a beneficial effect; secondly, the like question as to a person acquainted with the heating apparatus; thirdly, whether the shape and form of the vessel was material to the effect of heating the air. The jury answered all these questions in the affirmative. The learned Judge, at the request of the defendants' counsel, then put to the jury these questions also:—First, whether a person of ordinary capacity and skill, and acquainted with the blowing apparatus, would be able to correct the error in the specification as to the form and shape of the vessel; secondly, the like question as to a person acquainted with the heating apparatus. The jury answered, that such a person would not be misled by the mis-statement in the specification.

The verdict was thereupon entered, under his Lordship's direction, for the defendants on the fourth issue, and for the plaintiffs on the other issues; and leave was given to the plaintiffs to move to enter a verdict for them on the fourth issue also.

Sir W. W. Follett having obtained a rule nisi accordingly, citing *Boulton v. Bull* (2 H. Bl. 463), and *Hill v. Thompson* (3 Meriv. 630).

The Attorney-General, Sir F. Pollock, R. V. Richards, Monteith, and Hugh Hill, shewed cause in Trinity Term (June 9). The first objection made on the part of [813] the plaintiffs is, that the defendants have not complied with the statute 5 & 6 Will. 4, c. 83, s. 5, by delivering a notice of objections sufficiently specific to enable them to insist on the objection taken to the specification. That section of the statute enacts, "that in any action brought against any person for infringing any letters-patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal such letters-patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any Judge at chambers, on summons received by such defendant or plaintiff, or such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such Judge shall seem fit." This enactment was obviously framed with reference to the former state of pleading, before the new rules, when, not guilty being the only plea, great difficulty and hardship was thereby thrown on plaintiffs in actions of this nature. In *Bulnois v. McKenzie* (4 Bing. N. C. 127; 5 Scott, 419), the Court of Common Pleas held that, independently of the statute, the Court has a right to direct that the notice of objections shall be made more specific; and in *Fisher v. Dewick* (4 Bing. N. C. 706; 6 Scott, 587), they refused to set aside a Judge's order for the delivery of more specific particulars. If, therefore, the notice in the present case was in too general terms, the plaintiffs' proper course would have been to apply to a Judge for a more specific statement of the objections; but where they omit to do so, the only question at the trial is, whether the defendants have proved the objections [814] actually stated in this notice; and it is too late then to object that it is too general. [Alderson, B. The question at the trial is only whether the terms of the notice are sufficiently large to include the objection.]

Secondly, the specification does not sufficiently ascertain and describe the nature of the invention. In the first place, the title of the invention—"An invention for the improved application of air to produce heat in fires, &c., where bellows or other blowing apparatus are required"—is ambiguous, and might as well apply to a refrigerating as to a heating apparatus. The patent is granted for an improved application of air, and not for an improvement in the air applied; whereas the specification proceeds to describe an apparatus for the improvement in the air applied, and not an improvement in the mode of applying it. The title refers to air in its natural state, and excludes the notion of any process of heating or otherwise improving it before its application: the specification is for an application of air previously improved by heating. [Lord Abinger, C. B. It appears to us that the title is not inconsistent with the specification. When you look at the specification, it is for an improved application of air, by making it pass through a receptacle in which it is heated before its application to the fire. It is hypercriticism to say that that is not an improved application of air, but an application of improved air.] Then with respect to the directions as to the mode of carrying the invention into effect. The only direction given as to the heating vessel is, that it is to be made sufficiently strong to endure the blast, and air-tight or nearly so, and to be kept artificially heated to a considerable temperature. With respect to its form or shape, it is stated that that "is immaterial to the effect, and may be adapted to the local circumstances or situation." But surely it was essential to the validity of the patent, that the specification should state what should be the form or shape of the vessel. If the plaintiff did not [815] know this, he had not perfected his invention. He had no right to take out the patent for a general notion or principle existing in his own mind. The specification ought, therefore, to have stated both the proper dimensions and form of the air-vessel. Again, it is clear, upon the finding of the jury, that the form and shape of the vessel is, in one sense, material to the effect, and in this respect the specification is untrue. It is for the Court to put a construction upon the specification, as upon any other written instrument; and it is submitted that the true construction of this part of it is, that the form or shape of the air-vessel is immaterial to the effect to be produced therein—that is, to the production of the requisite degree of heat. But the jury have found that the form and shape of the vessel are material to that effect. [Lord Abinger, C. B. Does it not appear, that when the plaintiff uses the word "effect," he means to use it with an implied condition that the proper temperature is kept up? In the concluding clause of the specification, it clearly means the effect upon the furnace, if the air be kept at a proper temperature.] There the condition is expressed; here no condition is hinted at. It is manifest that the inventor thought the form or shape of the vessel was immaterial to the obtaining of the requisite degree of heat; which might have been supposed to be the case, until after the contrary was shewn by experiments. He had evidently not made any sufficient experiments as to the degree of heat necessary to be produced, and was ignorant of the superiority of one form of vessel over another in producing it. He speaks of the vessel in this specification in terms which describe a single open space, and which are quite inapplicable to a vessel consisting (for instance) of a combination of tubes.(a) It is plain he had never acquired the information necessary to enable him to present the invention in a perfect form; but the specification must be such as that a [816] competent workman can follow its directions, without first having recourse to experiments to ascertain the best mode of carrying it into effect: *Rex v. Wheeler* (2 B. & Ald. 345). [Parke, B. Is there any case in which a patentee has been allowed to correct an error in the specification by the testimony of persons of ordinary skill? Alderson, B., referred to *Bloom v. Elsee* (1 C. & P. 558).] That was the case of the mere use of a Gallicism, in employing the French word "vice" to mean a screw; and besides, by the drawing annexed to the specification, and which was to be taken as part of it, the ambiguity was fully explained. But it may further be observed, that in this specification the word "air" never is the nominative case at all. It says, that "the vessel must be air-tight or nearly so," &c.; "and at the commencement &c. of the blast, it (i.e. the vessel) must be kept artificially heated," &c. So, when it states that "it is better that the temperature be kept to a red heat," that clearly means the temperature of the vessel, not of the air within it. The grammatical construction of the clause

(a) The vessel employed by the defendants was of this form.

in question therefore is, (if any condition is to be imported into it), that the form or shape of the vessel is immaterial to the effect, provided the vessel be kept to the proper degree of heat. That is clearly negatived by the finding of the jury. Then, can such a mis statement be corrected by their accompanying finding, that a competent workman would not be misled by it? Surely not. The rule of law on this subject is this:—When the patentee has described his invention in such terms that it is clear from the whole of the specification taken together what he meant to describe, a mere technical misuse of language will not vitiate it—as if air were said to be imponderable, or sulphur were called a metal. But when he deliberately states something as a part of the process or materials of the invention, which is in its nature material, but which [817] on bringing it into use turns out to be untrue or erroneous, that is per se fatal to the patent, and cannot be corrected by the experience of the workmen; for that is calling in another party to perfect the invention: if that be necessary, the patentee is no longer the inventor.

On the same day (June 9, and on a former day in the present sittings (June 18), Sir W. W. Follett, Kelly, and Butt, were heard in support of the rule. In the first place, it was not competent to the defendants to raise these objections to the specification, their notice of objections being of too vague and general a nature to be a sufficient compliance with the requisitions of the statute. The only clause of the notice under which it can be contended that the particular objections now taken can be included, is the general one, “that the specification is calculated to deceive:” but the notice ought to be sufficiently precise and positive in its terms, distinctly to apprise the plaintiff of the nature of the specific objections. It has been held that it is not enough that the notice be a mere echo of the plea, but that it must give more specific information than is given by a plea merely denying the novelty or usefulness of the invention: *Fisher v. Dewick* (4 Bing. N. C. 706; 6 Scott, 587). The statute was passed after the alterations in pleading made by the rules of H. T. 4 Will. 4, and it must be assumed that the legislature were fully cognizant of the effect of those alterations, and did not think that a special plea would of itself furnish sufficient notice of the objections intended to be relied upon. If so indefinite a notice as this were held sufficient, the provisions of the statute would be rendered altogether nugatory. And the plaintiffs were at liberty to object to its insufficiency at the trial, and were not bound to aid the defendant by applying to have it made more specific. In all cases where [818] notice is required to be given by act of Parliament, the objection to the insufficiency of the notice is properly taken at the trial: as in the case of a notice to dispute bankruptcy, and of notice of action to magistrates: *Trimley v. Unwin* (6 B. & C. 537), *Moon v. Raphael* (7 C. & P. 115).

Secondly, the plaintiffs are entitled, upon the finding of the jury on the issue as to the sufficiency of the specification, to have the verdict upon that issue entered for them. It has been suggested that this is a patent merely for a principle: but that is not so; it is a patent for the mode of carrying a principle into effect. The mode of heating air and increasing combustion was known before; this patent is taken out for the novel application of air so heated to certain useful purposes—for passing the air in a heated state, instead of a cold state as formerly, into furnaces; and the mode of operation is by interposing a closed vessel, exposed to heat, between the blowing apparatus and the furnace. That is a sufficiently practical discovery to be the subject of a patent, according to all the authorities: *Minter v. Wells* (1 C. M. & R. 505), *Hornblower v. Boulton* (8 T. R. 98), Webster on Patents, p. 136. Then the only remaining question is, whether there is anything in the specification to render the patent taken out for this discovery void. Now, the jury have expressly found that no person acquainted with the subject could be misled by the supposed error in the specification as to the form and shape of the air-vessel: yet it is said that the Court, on a discussion upon the meaning of the specification, ought to take that question upon themselves, and direct a new trial. But it is submitted that the intelligibility of the specification was altogether a question for the jury. The question upon this issue is, whether the specification has sufficiently described and ascertained the invention for which the patent is taken out. Surely that is a question [819] for the determination of the jury. In many cases the construction of written instruments is for the Court, but not in such a case as this. In *Hill v. Thompson* (3 Meriv. 630), Lord Eldon says: “The utility of the discovery, the intelligibility of the description, &c., are all of them matter of fact proper for a jury.” The question in effect is, whether persons of com-

petent skill and knowledge can work under the specification as framed. In *Boulton v. Bull* (2 H. Bl. 497), Eyre, C. J., and Rooke, J., put their judgment in favour of the plaintiff expressly upon the ground that the jury had found that a workman of competent skill could execute the improvement by means of the specification; and on the same ground the opinion of the Judges in the House of Lords was given in favour of the patent. [Lord Abinger, C. B. It appears to me to be too late at the present day to contend that it is not for the Court to construe the specification, like any other written instrument. Parke, B. It was expressly held in *Turner v. Winter* (1 T. R. 602), that a patent is void if the specification is ambiguous, or gives directions which tend to mislead. Alderson, B. In *Harmar v. Playne* (11 East, 101), the Lord Chancellor sent the question, whether the specification gave sufficient information, to a Court of law for its decision; and one of the rules laid down in *Rex v. Arkwright* (Bull. N. P. 77) is, that "if the specification be in any part of it materially false or defective," the patent is void.]

At all events, if the construction be for the Court, the finding of the jury is most material to be taken into consideration by the Court. They have in effect negatived the only objection on which the defendants could rely at the trial, and found that the specification was not calculated to deceive. Now, all that the law requires is that a specification should contain sufficient information to enable a workman of competent skill to carry the pa-[820]-tent into effect; *Boulton v. Bull*; if it be so, and if that be found by the jury, the specification is sufficient in law, notwithstanding any particular error or mis-statement. If the patentee sufficiently describes the mode of operation, but makes a mistake in a matter known to every body acquainted with the subject, and not of the essence of the invention, such a mistake does not invalidate the patent. [Parke, B. My doubt arose from this, that no case had gone so far as to allow a manifest error to be corrected by parol evidence of what an ordinary workman of competent skill would be able to do.] There is no case in which the patent has on the ground of such an error been held invalid, after the finding of the jury that it could not mislead. The only question is, whether on the whole the inventor has given sufficient information to the public by which the invention can, on the expiration of the term for which the patent is granted, be brought into public use without experiments or expense. It has been said that the description here is applicable only to a vessel consisting of one open space; but that is not so. A more correct word than receptacle could not have been used, to describe a vessel which is to receive and heat the air; and it is equally applicable to a vessel consisting of an open reservoir, of a single pipe, or of a series of tubes: whatever be the form, it must still communicate with the furnace by a pipe, tube, or aperture, and the description in the specification is equally appropriate. Any person who understands the heating of air would know how to enlarge the vessel in the proper way, upon the ordinary principle used for heating air. [Alderson, B. Then, where is the difference between claiming a principle which is to be carried into effect in any way you will, and claiming a mere principle? The patentee must claim some specific *modus operandi*.] So he does here,—namely, to heat the air in its passage from the blowing apparatus to the furnace, in a closed vessel placed there: and conceding the statement as [821] to the form and shape of such vessel to be inaccurate, the verdict of the jury has cured the defect.

But further, the true meaning of the passage is, not that the form or shape of the vessel is immaterial to the heating of the air, but that it is immaterial to the ultimate beneficial effect upon the furnace—to the object for which the patent is taken out. It is always to be remembered, that the patentee was not taking out a patent for a mode of heating air; he assumes that every workman of ordinary skill is acquainted with that process. He therefore does not intend to give any directions on that head. He does not mean to say that the size and shape of the vessel are immaterial to the effect to be produced upon the air therein; but that the party may use any ordinary form of vessel he pleases in which to heat the air, and provided it be kept at a proper temperature, and communicate with the furnace by a pipe, tube, or aperture, it will be the same as regards the effect on the furnace. Such is clearly the meaning of the word effect in the last clause of the specification, and there can be no reason for supposing that it was intended to be used in a different sense here: in this sense the statement is perfectly true. If the air be heated to a proper temperature, which the party knows how to do by the modes already in use, it is immaterial to the effect

on the furnace what is the form or shape of the vessel. Throughout the specification, the word effect (which occurs four times) is used in this same sense. The passage has the same meaning as if it had contained the words, "provided the vessel be constructed on the ordinary principles on which air is heated." The plaintiffs contend, therefore, either that there is no error in the specification at all; or, if there is, that the finding of the jury has remedied it.

Cur. adv. vult.

The judgment of the Court was now delivered by

[822] PARKE, B. In the case of *Neilson v. Harford*, at the request of my Lord Abinger, I proceed to deliver his Lordship's judgment, and that of the rest of the Court, on this question.

We have, after much consideration, and not without some doubt and hesitation, arrived at the conclusion that the present rule obtained by Sir William Follett, for entering the verdict for the plaintiff on the 4th issue, should be made absolute.

Several points were made at the time of the argument, to which we propose very shortly to advert. In the first place, it was contended that the objection to the specification, on which I proceeded at the trial, was not sufficiently raised by the notice given under the provisions of Lord Brougham's act; but we all think it was. We concur with the opinion of the Court of Common Pleas, in the cases cited by Sir William Follett, that the act must be construed to mean that a mere copy of the pleas will not be a sufficient compliance with its provisions. It was passed after the new rules had required the several defences to be pleaded, and must therefore be considered as having intended to give to the plaintiff some additional advantage beyond the information which the record would give him. The statute did not mean to say, nor do we think that the Common Pleas meant to decide, that it would not be sufficient in some cases to give notice in the terms of the plea itself. The objection may be so completely and so fully expanded on the record, that a mere transcript of the plea itself may be sufficient; in other cases the plea may be so general in its language, as to be insufficient as a notice, if transcribed from the plea merely. Each case must depend on its peculiar circumstances. But at Nisi Prius, we think the only question for the Judge is, whether the language of the notice fairly includes the objection taken. If the notice be too general, a previous application must be made to the Court or a Judge at Chambers for redress. Here the [823] language of the notice was very general, and we think included the objection relied on.

Then we come to the question itself, which depends on the proper construction to be put on the specification. It was contended that of this construction the jury were to judge. We are clearly of a different opinion. The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually. Then, taking the construction of this specification on ourselves, as we are bound to do, it becomes necessary to examine what the nature of the invention is which the plaintiff has disclosed by this instrument. It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of some of the Court much difficulty; but, after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this—the interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated, by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which before was of cold air, in a heated state to the furnace.

Now in this specification, after stating that air heated up to a red heat may be used, but that it is not necessary to go so far to produce a beneficial effect, he proceeds

to state that the size of the receptacle will depend on the blast necessary for the furnace, and gives directions as to that ; and then he adds, the shape of the receptacle "is immaterial to the effect, and may be adapted to local circumstances." It is this part of the specification which has raised the difficulty. At the trial I construed this passage as meaning that the shape was immaterial to the degree of effect in heating the blast ; and if this were so, the jury having, by their finding, negatived the truth and accuracy of this statement, the specification would be bad, as containing a false statement in a material circumstance, of a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail. Nor do we think that the point contended for by Sir W. Follett, that if a man acquainted with the process of heating air were employed, the mis-statement could not mislead him, would at all relieve the plaintiff from the difficulty ; for this would be to support the specification by a fresh invention and correction by a scientific person ; and no authority can be found that, in such a case, a specification would be good. To be valid, we think it should be such as, if fairly followed out by a competent workman, without invention or addition, would produce the machine for which a patent is taken out, and that such machine, so constructed, must be one beneficial to the public.

If, therefore, we had thought, on consideration, that the construction which I put on this clause of the specification was the true one, we should have concluded that the patent was bad ; and we should have thought that the verdict should remain as found by the jury on the 4th issue. But, [825] my Lord and my Brothers, after considerable hesitation, are of opinion that a construction may reasonably be put upon this clause which will support the patent ; and though I myself still entertain great doubt whether such is the true construction, I am not prepared to say that it is not, and I am very glad that, in so meritorious an invention as this is admitted to be, in this view of the case, the plaintiff will not be deprived of his reward.

The word "effect" occurs four times in this specification ; and it is a just rule of construction, to judge of the meaning of a particular phrase by taking the whole instrument together. In the first sentence, the patentee, speaking of the temperature being so high as that of a red heat, adds, "that so high a temperature is not absolutely necessary to produce a beneficial effect ;" then he adds, that the receptacle may be made of iron, "but as the effect does not depend upon the nature of the material, other metals or convenient materials may be used." Here he cannot mean that all metals, or convenient materials, will equally be heated by the application of external fire, for some heat more easily, and others more slowly ; but he means that the quantity of the heated air, whether heated in an air-vessel or any other (if heated at a proper temperature), will not materially alter the beneficial effect on the furnace to which it is applied. "Effect" here, then, is equivalent to a beneficial effect ; and the sense of the passage is this,—“but as the effect, to be a beneficial effect, does not depend on the nature of the material,” and so forth. The same is, we think, obviously the meaning of the word "effect," in the concluding sentence of the specification—"the manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature ;" in other words, the effect will be a beneficial effect on the furnace, whatever be the manner in which you apply heat to the air-vessel, provided only that you so apply it as to raise its temperature sufficiently. Then if [826] so, it is not unreasonable, we think, to construe the word "effect," in the sentence on which this question turns, in a similar way, and to hold it to mean an assertion by the patentee, that though the size of the vessel must be regulated as directed, yet the shape of the air-vessel is immaterial to the effect ; that is to say, any shape will produce a beneficial effect, and may be adapted to local circumstances. Now if this be so, still it casts upon him the necessity of proving, to the satisfaction of the jury, that any shape in which the air-vessel could reasonably be expected to be made by a competent workman, would produce a beneficial effect, and be a valuable discovery. On the present occasion we are bound, as to this point, by the finding of the jury, who have arrived at this conclusion of fact ; and if they are right, we think the verdict was not correctly entered for the defendants on this 4th issue, but that it should have been entered for the plaintiffs. The rule, therefore, must be absolute.

There is another point which I need only notice shortly, which was made by the Attorney-General, as to the title of the patent. He contended that the title of the patent was itself defective, and did not agree with the invention, and he insisted also

that it was competent to raise that objection upon the issue raised upon the 4th plea, and probably it was. But we have already intimated, in the course of the argument, that we thought that objection was not well founded. The title of the patent is for the improved application of air. Though that is ambiguous, it is sufficiently explained by the specification, and is not at variance with it, as was the case in *Rex v. Wheeler*.

Rule absolute.

[827] SALMON AND ANOTHER, Assignees, v. MATTHEWS. Exch. of Pleas. June 26, 1841.—The owner of a house, having mortgaged it in fee, and continuing in possession let it as a ready furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished to the defendant, by the week, who, after three weeks' occupation, received notice from the mortgagee to pay rent to him:—Held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture: that the rent of the house and furniture might be apportioned, or if not, that upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement might be inferred by the jury to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as a compensation for the use of the furniture to the assignees.

[S. C. 11 L. J. Ex. 59.]

Assumpsit by the assignees of a bankrupt for the use and occupation of a house and the use of the furniture.—Plea, non assumpsit.

At the trial before Lord Abinger, C. B., at the last Spring Assizes for the county of Warwick, it appeared that the owner of the house, in respect of which this action was brought, having mortgaged it in fee, and continuing in possession, had let it as a ready furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished, by the week, to the defendant, who, after three weeks' occupation, received notice from the mortgagee to pay the rent to him, which he accordingly did. The assignees thereupon brought the present action for the use and occupation of the house and furniture. On the part of the plaintiffs it was contended, that they were entitled to the rent of both the house and furniture; on behalf of the defendant it was insisted, that the rent could not be apportioned, and that the mortgagee had a right to the whole of it, and therefore that the plaintiffs were not entitled to recover. The jury, under the learned Judge's direction, returned a verdict for the plaintiffs for the amount claimed by them in respect of the furniture, leave being reserved to them to move to increase the damages by the amount of the rent of the house, and to the defendant to enter a verdict for him, if the Court should be of opinion that the assignees were not entitled to recover either in respect of the house or the furniture. Rules were accordingly obtained by M. D. Hill for the plaintiffs, and Adams, Serjt., for the defendant, and both rules were argued in last Trinity Term.

[828] Hill and W. T. S. Daniell, for the plaintiffs. The question is, whether the tenant was justified in paying to the mortgagee the whole or any part of the rent of this house and furniture. It is submitted that he was not. The tenant cannot object to the title of the person under whom he was let into the possession of the premises. There is, however, an exception to that rule in the case of mortgagor and mortgagee, and in those cases the Courts have adopted the fiction of a supposed eviction by the mortgagee, and of the tenant being let in again under him; but, in order to have that effect, there must be not only notice to the tenant by the mortgagee, but a compliance with it by him, and payment of rent to the mortgagee. At all events, the assignees are entitled to retain their verdict, for they have a right to the rent arising out of the furniture, which became their property by the bankruptcy. When the tenant paid the whole rent to the mortgagee, the mortgagor might justly complain he had done wrong. If an ejectment were brought by the mortgagee, and he recovered, the tenant could only be compelled to pay the rent of the house, as the mortgagee could not have recovered the furniture, which belonged to the assignees of the mortgagor. It would be strange indeed, if the mortgagee, by ejecting the tenant, would become entitled to the furniture of the assignees. [Alderson, B. What right has the defendant to use the furniture without paying for it?] Undoubtedly he has none. In

Co. Lit. 148 b. it is said :—" Concerning the apportionment of rents, there is a difference between a grant of a rent, and a reservation of a rent ; for if a man be seised of two acres of land, of one in fee-simple, and of another in tail, and by his deed grant a rent out of both in fee, in tail, for life, &c., and dieth, the land intailed is discharged, and the land in fee-simple remains charged with the whole rent ; for against his own grant, he shall not take advantage of the weakness of his own estate in part. But if he make a gift in [829] tail, a lease for life or for years, of both acres, reserving a rent, the donor or lessor dieth, the issue in tail avoideth the gift or lease, the rent shall be apportioned ; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land." In this case the notice given by the mortgagee to the defendant operated as an eviction by title paramount. *Smith v. Raleigh* (3 Camp. 513), and *Stokes v. Cooper* (id. 514, note), are authorities illustrating the same doctrine. In *Neale v. McKenzie* (2 C. M. & R. 84), a lessee of 100 acres of land for one year accepted the lease and entered upon the land, when he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder ; and it was held that the rent was apportionable, and that the landlord was entitled to distrain for such apportioned rent. It is true that decision was reversed in the Exchequer Chamber (1 M. & W. 747), but that was on the ground that the latter demise was wholly void as to the eight acres ; but if it had been analogous to an eviction by title paramount, it was admitted that the rent would be apportionable. In *Tomlinson v. Day* (5 Moore, 558 ; 2 Bro. & B. 680), where A. took a farm under an agreement from B. that A. should have the exclusive right of sporting over the manor in which it was situate, and should also occupy certain glebe land within the parish ; and A. entered into possession, but did not sign the agreement, and it appeared that B. had no power of conferring the right of sporting, nor [830] could he procure the glebe land ; it was held, in an action for the use and occupation of the farm, that evidence was inadmissible to shew the annual value of the land without such right, which might be ascertained by the jury, independently of the amount of the rent reserved by the agreement.

Adams, Serjt., and Mellor, contra. The mortgagee is entitled to the entire rent. The whole of the rent issues out of the house, which is the subject of demise, and not out of the furniture, which is a mere adjunct to it. In *Newman v. Anderton* (2 N. R. 224), Sir James Mansfield, C. J., says, " It must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods, for rent cannot issue out of goods." [Lord Abinger, C. B. It is true that rent cannot issue out of goods, but the owner of them may let them out to a person at an agreed sum.] If in circumstances like the present, rent is to be apportioned, the greatest inconveniences will arise. Two contracts would be created, one with the mortgagee as to the house, and the other with the mortgagor as to the furniture ; but for that there is no authority. The furniture becomes of less value by time and use ; and it must go to a jury to find the value of the furniture, and to apportion it. The tenant can in no case be safe in paying the rent of the furniture to the mortgagor, because he cannot know what it is : he is therefore liable for the whole rent to the mortgagee, there being no separate contract with the mortgagor as to the furniture. No doubt, as long as the property remains unmortgaged, the landlord might distrain for the whole. If there is to be an apportionment, it must vary according to the time when the notice is given, and the value [831] of the furniture. [Lord Abinger, C. B. Suppose an upholsterer, who is directed to let a house, were to put furniture into it, and let the whole together ?] In that case the lessor would be entitled to the rent of the whole. The rent of the house and furniture belongs to the mortgagee, for it cannot be apportioned. In *Rogers v. Humphreys* (4 Ad. & Ell. 299 ; 5 Nev. & M. 511), the respective rights of mortgagor and mortgagee are well explained by Lord Denman, C. J., in delivering the judgment of the Court. In *Johnson v. Jones* (9 Ad. & Ell. 809 ; 1 Per. & D. 651), where to an avowry for rent the defendant pleaded payment of it to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, who had demanded payment from the plaintiff, and

threatened to put the law in force; it was held that such a plea was in substance a plea of payment, and not of eviction. This is an entire rent issuing out of the land, and there can be no severance in respect of the furniture. In *Farewell v. Dickenson* (6 B. & C. 251), where, in debt for rent, the declaration stated a demise of a messuage, land, and premises, with the appurtenances, and the proof was of a demise of the messuage and land, with the furniture, utensils, and implements; it was held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of the real property, and there was no variance. In *Dyer*, 212, pl. 37, the lessor demised a house, with divers implements contained in it, to the defendant, and afterwards the lessor entered and ousted the defendant, and enfeoffed a stranger in fee, under whom the lessee entered again, and then the heir of the feoffee brought an action against him for the rent: it was held, that there "should be of no apportionment of the rent in that case, and no eviction in respect of the implements by title paramount," but that the rent "should follow the reversion of the land, which is the more worthy, and not the reversion of the chattels." So, in *Emott v. Cole* (Cro. Eliz. 255), where the question was, "if a lease be made of lands and goods, rendering rent, if the land be evicted, whether all the rent shall be gone, or there shall be an apportionment in regard of the goods," it was held, that "there shall be no apportionment, for the rent issueth out of the land, and follows it." [Alderson, B. Here a party, who has mortgaged a house, lets it, together with the furniture in it, to a tenant. The mortgagee puts an end to the contract between the mortgagor and the tenant. Then the tenant is bound to know that he is making a new contract with the mortgagee, and ought not to pay the whole rent to him. The owner of the furniture ought not to be prejudiced by the contract made between the tenant and the mortgagee. Lord Abinger, C. B. If the mortgagee ejects the tenant for non-payment of the rent, and brings an action for mesne profits against him, he cannot recover in respect of the furniture. The tenant, on receiving notice from the mortgagee to pay the rent to him, should have offered to pay rent for the house, but should have refused to pay for the furniture.] In *Spencer's case* (5 Rep. 16), it was held, that where a house and land are demised for years, with a stock or sum of money, rendering rent, the rent does not issue out of the stock or sum, but out of the land only. In *Walsh v. Pemberton* (Selw. N. P. 613, 8th ed.), the law is laid down in similar terms.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. In this case, we think both rules ought to be discharged.

This was an action for the rent of a ready furnished house. The house had been mortgaged in fee, but the mortgagor had remained in possession, and had let the [833] house as a ready furnished house to the defendant. After this the mortgagor became bankrupt, and then, by the assent of his assignees, let the house by the week to the defendant. After three weeks' occupation, the mortgagee gave notice to the tenant to pay the rent to him; and it was paid. The present action was brought by the assignees of the bankrupt to recover the rent. At the trial the jury, by the direction of Lord Abinger, found a verdict for the plaintiff for £40, being, as was admitted, a proper verdict, if the assignees were entitled to any compensation in respect of the furniture which belonged to them.

My Brother Adams, on behalf of the defendant, applied for leave to enter a verdict for the defendant, on the ground that, under this letting, the mortgagee was entitled to the whole rent. On the other hand, Mr. Hill applied to increase the damages to £82, being the amount of the whole rent, which, as he contended, belonged to the assignees of the bankrupt.

We think the verdict is right: for either the rent may be apportioned, according to the case of *Dubytofte v. Curterne* (Cro. Jac. 453), cited by Saunders, in his argument in the *Dean and Chapter of Windsor v. Gover* (2 Saund. 303); or, if not, it is clear that, upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement may be inferred by the jury to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as a compensation for the use of the furniture to the assignees.

If so, both rules are to be discharged, and both without costs. We mention this to prevent the costs of these rules being costs in the cause, which would not be just.

Rules discharged.

[834] HIGGINS AND OTHERS v. JOHN SENIOR. Exch. of Pleas. June 26, 1841.—In an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of £10, it is not competent for the defendant to discharge himself on an issue on the plea of non-assumpsit, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time the agreement was made and signed.

[S. C. 11 L. J. Ex. 199. Adopted, *Williamson v. Barton*, 1861, 7 H. & N. 906; *Fisher v. Marsh*, 1865, 6 B. & S. 416; *Cropper v. Cook*, 1868, L. R. 3 C. P. 199; *Calder v. Dobell*, 1871, L. R. 6 C. P. 490; *Fleet v. Thurton*, 1871, L. R. 7 Q. B. 131; *Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 607; *Browning v. Provincial Insurance Company of Canada*, 1873, L. R. 5 P. C. 273. Distinguished, *Holding v. Elliott*, 1860, 5 H. & N. 121.]

Special assumpsit, to recover compensation for the non-delivery of certain quantities of iron, pursuant to agreement, whereby the defendant agreed to sell to the plaintiffs, and the plaintiffs, at the request of the defendant, then agreed to buy of and from the defendant a certain large quantity of iron, to wit, &c.

Pleas, first, that the defendant did not promise modo et formâ; secondly, that the plaintiffs did not agree or promise modo et formâ. Issue thereon.

At the trial before Rolfe, B., at the last Liverpool Assizes, it appeared that the plaintiffs were iron merchants at Liverpool, and the defendant was also an iron merchant and iron commission agent, trading there in the name of John Senior & Co. On the 20th of July, 1840, a person of the name of Mead, who was employed by the plaintiffs to purchase iron, applied to William Senior, a brother of the defendant (and who was then acting for him in his absence from home), to know if he sold for the Varteg Iron Company, and on being answered in the affirmative, Mead said he had a large order for a good house; but William Senior then declined to enter into any contract with him. On the following day, however, the 21st of July, on being again pressed by Mead, he took the order, and Mead went to his office, and in a short time returned to William Senior at the defendant's office, and delivered to him the following bought note:—

“Liverpool, 21st July, 1840.

“Bought of the Varteg Iron Company, per John Senior & Co.

“One thousand tons of good merchantable bar iron of common sizes, of flat, square, and round, at £6 per ton—free on board at Newport, less five per cent. for cash [835] payment, on receipt of invoice and bill of lading, for every parcel of one hundred tons or upwards.

“Two hundred tons to be delivered by the 20th August, four hundred tons in all September, and the remaining four hundred tons by the 14th October, and the whole to be shipped at the lowest rate of freight offering, except in any case where a ship is sent expressly for a cargo.

“SAMUEL MEAD,

“for MESSRS. V. HIGGINS & SONS,
“Iron Merchants, Liverpool.”

William Senior wrote and delivered to Mead the following sold note:—

“Mr. S. Mead.

“Liverpool, 21st July, 1840.

“We have this day sold, through you, to Messrs. V. Higgins & Sons, one thousand tons of Varteg, or other merchantable bar iron of common sizes, of flat, square, and round, at £6 per ton, free on board at Newport, less five per cent. for cash payment, on receipt of invoice and bill of lading for every parcel of one hundred tons or upwards. Five hundred tons to be delivered by the 20th August, four hundred tons in all September, and the remaining four hundred tons by the 14th October, and the whole to be shipped at the lowest rate of freight offering, except in any case where a ship is sent expressly for a cargo.—We are, &c.

“JOHN SENIOR & Co.

“WILLIAM SENIOR.

“Mr. Mead excludes the Measteg iron.—W. S.”

The plaintiffs put in evidence the sold note only, contending that that was the contract between the parties. No iron ever was delivered, though frequent applications were made to the defendant to deliver it according to the contract, both by letter and otherwise. Mead was called [836] as a witness for the plaintiffs, and he proved that there had been a contract made out for Varteg iron on the company's account, which he had made out, but that William Senior gave him the above sold note instead; and that William Senior said he was not sure that he could deliver the whole in Varteg iron, but would take the order to deliver any other iron as good. He also proved that it was a common occurrence for contracts to be exchanged, and that William Senior said the one he gave would accord more with his brother's views. The following letters from the plaintiffs to the defendant were given in evidence by machine copies, a notice for the production of them having been proved:—

“July 29th, 1840.

“Annexed we hand you specifications for part of our contract, made by Mr. S. Mead on our account, which we wish consigned to the King's dock here, freight not to exceed 7s. per ton in full.”

“3rd August, 1840.

“As a portion of our contract with you is to be delivered on or before the 20th instant, we have particularly to request that the above specifications have the precedence: as they are required for immediate shipment, let them be quite separate and marked with white paint as above; and be pleased to instruct the captain to call upon us previous to coming into dock, as he will have to go alongside a vessel: the iron to be in clean blue condition.”

“13th August, 1840.

“Annexed we hand you two specifications as part of our contract on the 21st of July, 1840, and we shall feel obliged by your having them immediately shipped at a low freight, so as to be here if possible within three weeks from this date.

“Please to inform us whether your friends can complete the specifications within the above time.”

[837] “20th August, 1840.

“According to the terms of our contract with you, you are bound to deliver on or before this day to our order in Newport, 200 tons of iron, which we hope has been attended to, although from our not having received any advice, we fear the contrary; we therefore deem it necessary to inform you, should the terms of the contract not be adhered to, we shall hold you responsible for any loss that we may incur thereby.”

No answer was returned to any of the above letters.

At the end of the plaintiffs' case, Cresswell, for the defendant, submitted that the plaintiffs were bound to put in the document signed by Mead; that the plaintiffs' promise was proved to be in writing, and must be put in. It was answered for the plaintiffs, that the paper signed by the defendant's brother, and which had been substituted for the other at his request, was the only contract. On the part of the defendant, William Senior was called, who proved the making of the contract, as above stated, with Mead; that afterwards Mead brought the bought note to him, and that he William Senior wrote the sold note, and they exchanged the one for the other.

The learned Judge, in summing up the case to the jury, said, that if the writing signed by William Senior was the contract, the defendant, in point of law, was liable, whether he intended to act for himself or the company; that the defendant was notoriously an agent, but still if he chose to sign a contract in his own name, he was responsible; that if he had acted as agent, not having authority to make the contract, he was liable for so acting; and that he was responsible whether the party knew he so acted or not; that knowledge made no difference. And he left it as a question to the jury, whether this (viz. the sold note) was a contract by which the parties intended to be bound, or whether the two papers constituted the contract. If the latter, the plaintiffs were not entitled to recover, but [838] if the former, they were. The jury found for the plaintiffs, with £1500 damages, leave being reserved to the defendant to move to enter a nonsuit. Cresswell, in Easter Term last, obtained a rule accordingly, either for a nonsuit or a new trial.

Dundas and Crompton, in Trinity Term, shewed cause. The summing up of the learned Judge was quite right. The defendant, having signed the contract in his own name, is the party liable. *Jones v. Littledale* (6 Ad. & Ell. 486; 1 Nev. & P. 677) and *Magee v. Atkinson* (2 M. & W. 440) are decisive authorities in favour of the plaintiffs. A person who signs a contract in his own name is liable, whether he is in fact an agent only or not, or known to be so to the other contracting party. The parties might have been dealing as agents for the company, or on their own account; it must rather be taken, indeed, that they were not dealing as agents, because the contract was for iron which might have been any other iron than Varteg. But if they intended to act as agents, they have signed the contract in their own name, and are therefore liable; and it is not competent to the defendant to discharge himself, by shewing that the agreement was really made by him as agent for a third person, and that the plaintiffs were aware of it at the time. For the purpose of charging the principal, it may be shewn that the person who made the contract made it on behalf of the principal; but a party cannot so discharge himself from liability on a written contract, on the face of which he appears to be liable. *Sowerby v. Butcher* (2 C. & M. 371: 4 Tyrw. 320) shews that that would be no defence in point of law, and would not exonerate the agent. But *Jones v. Littledale* is directly in point. There Littledale & Co., brokers at Liverpool, sold hemp by auction at their rooms, and gave an invoice describing the [839] goods as "bought of J. & H. Littledale," and received part of the price, but failed to deliver the goods; an action having been brought against them by a purchaser for the non-delivery, and for money had and received, it was held that Littledale & Co. had made themselves responsible as sellers by the invoice, and could not defend themselves by evidence tending to shew that they sold as agents, and had intimated that fact before and at the time of the sale. There cases were cited to shew that parol evidence might be received to prove who was the real principal; but Patteson, J., interrupting the counsel who so argued, said, "Such evidence is admissible to charge a party not mentioned in the invoice; but can it also be received to exonerate the seller named in the invoice, when he is sued as such?" and the Court ultimately decided in the negative. Lord Denman, C. J., in delivering the judgment of the Court, says, "There is no doubt that evidence is admissible on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear, that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." There the purchasers knew that Littledale & Co. were merely agents, and acting as such, yet they were held liable. So, in *Magee v. Atkinson* (2 M. & W. 440), the Judge who tried the cause told the jury that if the defendant (a broker) entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name, he was liable; and that direction was held to be a proper one. *Wilson v. Hart* (7 Taunt. 295) is also an authority in favour of the plaintiffs, although, as [840] is observed by Mr. Smith, in his *Leading Cases* (vol. ii. p. 224), that case "has occasioned some confusion, arising mainly from the too great generality of the marginal note, in which it is broadly stated, that 'the Statute of Frauds does not exclude parol evidence that a contract for the sale of goods, purporting to have been made between A. the seller, and B. the buyer, was, on B.'s part, made by him only as agent for C.' On examination, however, it will be found to be no direct authority as to the admissibility of the evidence in any case; and so far as it is of weight upon this subject, it will be found to support only the second of the two propositions above submitted, namely, that the parol evidence may be admitted to charge the principal, though not to discharge the agent." And he shews clearly that the case turned altogether upon the proof of fraud. In Story on Agency, s. 269, it is laid down as a rule, that "a person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility, either express or implied;" and many instances are given, and authorities cited, in support of that proposition (see pp. 230 to 235). Then the very same case as the present is put in s. 270:—"The doctrine may be further illustrated in cases where there is a written contract, purporting to be made between one person as buyer, and another as seller. Thus, for example, if an invoice, or a sold note, should describe the goods sold as

'bought of A. B.,' as seller, and it should be signed by him, he would be held to be an immediate party to the contract, and liable, as such, for the delivery of the goods to the buyer, notwithstanding he might have sold the goods as the agent of the owner, and have made known that fact to the buyer before or at the time of the sale. For, if the agent contracts in [841] such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility; and in the case put, by the very form of the contract, the agent represents himself to be the seller, and thereby, as between himself and the buyer, he binds himself by that representation as a contracting party." Wherever, therefore, a party has entered into a written contract in his own name, parol evidence cannot be let in to alter it, and to discharge him from the responsibility he has thereby incurred.

Cresswell, John Henderson, and R. Denman, in support of the rule. The true point in this case is, whether by parol the agreement can be pointed to the true party who made it by his agent. *Jones v. Littledale* and *Magee v. Atkinson* have been cited as authorities in favour of the plaintiffs. But the former case was put on the ground that the defendants had insisted on being treated as principals, in order to secure the passing of the money through their hands, and to prevent its being paid to their principals; by which they made themselves responsible. And *Magee v. Atkinson* was decided on the same principle. Neither of those cases affects the present. The contract may be applied by extrinsic evidence to the true party making it. It is impossible, indeed, to say that that is not varying the contract in some respect, because a contract with A. is not a contract with B.; but the evidence does not otherwise alter the nature of the contract. It is equally making a new contract, whether you seek to charge the principal or to discharge the agent; and for the former purpose it has been admitted that it may be done. In *Wilson v. Hart*, a different person was charged from the one who signed the contract; that case, therefore, admits the principle, that you may apply the contract, and substitute a different party as the object of it. That decision [842] is confirmed by *Spittle v. Lavender* (2 Bro. & B. 452). There A. entered into and signed an agreement as agent of B., and B. shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" and it was held that A. was not personally responsible. In *Garrett v. Handley* (4 B. & Cr. 664; 7 D. & R. 144), it was held that an action might be maintained by the several partners of a firm upon a guarantee given to one of them, if there were evidence that it was given for the benefit of all. That shews that additional parties may be made subjects of the contract, besides those who appear to be so on the face of it. Abbott, C. J., in delivering the judgment of the Court, says, "We think it sufficiently appears that the guarantee was intended for the benefit of the firm, and not of Garrett alone. That being so, we are of opinion that the action was properly brought in the name of the parties for whose benefit the contract of indemnity was entered into." The same point was ruled in *Baleman v. Phillips* (15 East, 272). So in *Bowen v. Morris* (2 Taunt. 374) it was held, that an agent could not sue on a contract made for the benefit of others. There Sir James Mansfield, C. J., in delivering the judgment of the Court of Exchequer Chamber, said, "An action lies not against a known agent, who is in the light or state of a broker." The same law is applicable to parol as to written contracts; the evidence alters the contract in the one case as it does in the other; there is no magic in its being written. [Gurney, B. In cases where you seek to charge the principal, another person is added; where you seek to discharge the agent, it is taking one away.] It is equally making a new contract: if you can introduce a party by parol, you may discharge him by parol. In *Seaber v. Hawkes* (5 M. & P. 549), where, in an action for goods sold and delivered, the question being whether the contract was [843] made by the defendant as principal or as agent for third persons, who employed him to make purchases on their account, it was left to the jury to say, whether the defendant told the plaintiff that he was acting as an agent at the time of the purchase: and it was held that this was not a misdirection, as it was incumbent on the defendant to shew, either that he told the plaintiff that he made the purchase on account of his principals, or that the plaintiff knew that he was merely acting as their agent. There the defence was, that the defendant had purchased the wheat as the agent of Messrs. Gibling and on their account. Tindal, C. J., says, "The only question in this case is, whether the contract for the sale of the wheat in question was made with the defendant in his own

individual capacity, or as the agent of Messrs. Gibling. If it were made with him in the latter character, the plaintiff could not be entitled to maintain this action, as his remedy was against Messrs. Gibling." That is an authority expressly in point. As far as that principle is concerned, there is no difference between parol and written contracts. The oral evidence does not usurp the authority of the written instrument. In *Macbeath v. Haldimand* (1 T. R. 172), it was held that an officer appointed by government, treating as an agent for the public, was not liable to be sued upon contracts made by him in that capacity. The same point was ruled in *Unwin v. Wolsley* (ibid. 674), and *Gidley v. Lord Palmerston* (3 Bro. & B. 286). The distinction which has been attempted to be made between charging and discharging a party, has not been established by the authorities cited.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. The question in this case, which was argued [844] before us (Parke, Alderson, Gurney, and Rolfe, BB.) in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not: and that the rule for a new trial must be discharged.

There is no doubt, that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to (*Garrett v. Handley*, 4 B. & Cr. 664; *Bateman v. Phillips*, 15 East, 272), and charge with liability on the other (*Paterson v. Gundasequi*, 15 East, 62), the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange (*Sowerby v. Butcher*, 2 C. & M. 371; 4 Tyr. 320; *Leferre v. Lloyd*, 5 Taunt. 749; 1 Marsh. 318) [845] signed by a person, without stating his agency on the face of the bill; but as to other written contracts, namely, the cases of *Jones v. Littledale* (6 Ad. & Ell. 486; 1 Nev. & P. 677), and *Magee v. Atkinson* (2 M. & W. 440). It is true that the case of *Jones v. Littledale* might be supported on the ground that the agent really intended to contract as principal: but Lord Denman, in delivering the judgment of the Court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." And this is also laid down in Story on Agency, sect. 269. *Magee v. Atkinson* is a direct authority, and cannot be distinguished from this case.

The case of *Wilson v. Hart* (7 Taunt. 295; 1 Moore, 45), which was cited on the other side, is clearly distinguishable. The contract in writing was, on the face of it, with another person named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got possession of them, it was held, on the principle of *Hill v. Perrott* (3 Taunt. 274), and other cases, that the defendant was liable; and as is observed by Mr. Smith, in the very able work to which we were referred, (Leading Cases, vol. ii. p. 225), that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant, not to discharge Read.

Rule discharged.

[846] *BECKHAM v. DRAKE, KNIGHT, AND SURGEY.* Exch. of Pleas. July 10, 1841.
 —A. agreed in writing with B. and C., on behalf of themselves and D., as partners in the business of type-founders, faithfully to serve them, and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account for that period without their consent; and B. and C. agreed to pay him wages after the rate of 3l. 3s. weekly, so long as he should serve them faithfully: —Held, that the right of action for a breach of this agreement, by the dismissal of A. from their service without reasonable cause, did not pass to the assignees of A. on his bankruptcy: the contract relating to the employment of the personal skill and labour of the bankrupt, and the damages for the breach of it being compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate.

[For further proceedings, see 9 M. & W. 79; 11 M. & W. 315, and (in House of Lords), 2 H. L. C. 579; 9 E. R. 1213 (with note).]

Assumpsit. The declaration stated, that the defendants were united in co-partnership, and used and exercised the trade and business of type-founders, stereotype-founders, and letter-press printers; and that the said W. M. Knight and J. Surgey were the ostensible partners, and W. W. Drake was a secret partner in the said co-partnership: that at the time of making the memorandum of agreement thereafter mentioned, the plaintiff was in the employ of the defendants as their foreman, but without any permanent engagement, and the defendants were desirous of continuing their connexion together for seven years from the 20th of October, 1834: and thereupon, on the 23rd of October, 1834, the said W. M. Knight and J. Surgey, on behalf of themselves and the said W. W. Drake, as such partners as aforesaid, made and entered into a certain memorandum of agreement with the plaintiff, as follows:—

“Memorandum of an agreement made and entered into this 23rd day of October, A. D. 1834, between William Moxey Knight and John Surgey, of Bishop’s Court, Old Bailey, in the city of London, type-founders, stereotype-founders, and letter-press printers, and co-partners, of the one part, and Daniel Beckham, of the same place, of the other part, as follows: Whereas the said D. Beckham hath been for some time in the employment of the said W. M. Knight and J. Surgey, as their foreman, in carrying on their said trades of type-founders, &c.; and the said parties to these presents are mutually desirous of continuing their connexion together for the term of seven years from the date of these presents. Now these presents witness, that the said D. Beckham, for the considerations herein-[847]-after mentioned, doth hereby covenant and agree to and with the said W. M. Knight and J. Surgey, and the survivor of them, in manner following, (that is to say), that he the said D. Beckham shall and will well and faithfully serve the said W. M. Knight and J. Surgey, and the survivor of them, for and during the term of seven years, to commence and be computed from the day of the date of these presents, as their foreman, in the management and carrying on of their said trades of type-founders, &c.; and shall and will, to the best of his power, promote and advance the success and prosperity of the said W. M. Knight and J. Surgey in their said trades; and also that he the said D. Beckham shall not nor will, during the said term of seven years, be engaged or concerned in the same or any other trade or business, either on his own account, or on account of, or for the benefit of, any other person whatsoever, other than the said W. M. Knight and J. Surgey, and the survivor of them, without the consent of the said W. M. Knight and J. Surgey, or one of them, in writing, first had and obtained for that purpose: and the said W. M. Knight and J. Surgey, for the considerations aforesaid, do hereby, for themselves and the survivor of them, covenant and agree to and with the said D. Beckham, that they the said W. M. Knight and J. Surgey, or the survivor of them, shall and will employ the said D. Beckham as their foreman, in carrying on, managing, and conducting the said trades of type-founders, &c., during the said term of seven years, if the said W. M. Knight and J. Surgey, or either of them, shall so long live, and the said D. Beckham shall well and faithfully observe and keep the covenants and agreements hereinbefore on his part contained; and that they, the said W. M. Knight and J. Surgey, or the survivor of them, shall and will pay to the said D. Beckham wages after the rate of 3l. 3s. of lawful money weekly. And it is hereby mutually agreed and declared by and between the said parties hereto, that in case either of the

[848] said parties shall not well and truly observe, perform, and keep the covenants and agreements herein on their respective parts contained, that then and in such case the party so failing or making default shall and will pay to the other of them £500, by way or in the nature of specific damages. In witness," &c.

The declaration then averred performance of the agreement by the plaintiff during the time he remained in the service of the defendants, and that the plaintiff was ready and willing to have continued in the service of the defendants, and to have performed the agreement, but that the defendants, before the expiration of the seven years, without reasonable or sufficient cause, dismissed and discharged him from their service, &c.

The defendant Knight allowed judgment to go by default. The two other defendants severally pleaded: first, non assumpsit; secondly, the bankruptcy of the plaintiff. To the latter plea the plaintiff demurred generally, on the ground that the contract set out in the declaration being a contract for the personal labour of the plaintiff, his cause of action did not pass to the assignees.

The defendants' points were, that the breach of contract complained of, having occurred before the bankruptcy of the plaintiff, the damages resulting therefrom formed part of the personal estate of the bankrupt at the time of his bankruptcy, and therefore passed to his assignees.

The case was argued on the 25th June, by

Stammers for the plaintiff. The principles upon which this demurrer is to be supported are laid down in the case of *Chippendale v. Tomlinson* (Cooke's Bankrupt Laws, 260), where Lord Mansfield said, "The only question is, whether the assignees of a bankrupt are entitled to the profits arising from his personal labour. The assignees cannot let out the bankrupt. They cannot [849] contract for his labour." Similar expressions are used by Lord Kenyon in *Silk v. Osborne* (1 Esp. 140). He said, "the assignees could not hire out the bankrupt to make a profit of his labour for their benefit; but that for such demands he should maintain an action in his own name." It would therefore seem to follow, that if the assignees could not have sued for the wages in this case, supposing the contract to have been fulfilled, they cannot have an interest in the damages which are given in lieu of the wages, upon a breach of the contract.

Another ground upon which the plaintiff is entitled to judgment, is put in Cullen's Bankrupt Laws, p. 177, where he says, "But a right of action for slander is not assignable, on account, it is said, of its uncertainty; but another reason may be added, namely, that it does not arise out of a subject of property, but is only a right to a satisfaction for a mere personal injury, which in its own nature cannot pass to a representative." So here, the cause of action does not arise out of a subject of property, but is merely a right to recover damages for the wrongful dismissal of the plaintiff from his employment, the £500 mentioned in the contract, being only in the nature of a penalty, within the principle of the case of *Kemble v. Farren* (6 Bing. 141).

But a more general ground upon which this demurrer may be supported is, that the cause of action is personal to the bankrupt, and therefore did not pass to his assignees. This principle was recognised by this Court in the recent case of *Howard v. Croxther* (ante, 601), in which it was held that a right of action for seduction does not pass to the master's assignees on his bankruptcy; and it has also been recognised in cases of libel and slander, which are injuries to the character of the bankrupt, in an action for an assault, which is an injury to his person, and in actions for criminal conversation and breach of promises of marriage, [850] in which the injury is, in part or in whole, to the feelings of the bankrupt. Other cases are mentioned in *Chamberlain v. Williamson* (2 M. & Selw. 408). And in this case the cause of action is as much personal to the bankrupt as in any of those above cited, this being an injury in respect of the bankrupt's personal skill and labour. In *Siboni v. Kirkman* (1 M. & W. 419), Parke, B., appears to extend the same principle to executors. He says, "Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability after his death; that is this, that they are not liable in those cases where personal skill or taste is required." Similar expressions are used by Patteson, J., in *Wentworth v. Cock* (10 Ad. & Ell. 42; 2 Per. & D. 251).

E. V. Williams, contra. The true test of decision in this case is, whether the right of action would pass to an executor, and it is submitted that it clearly would. *Hancock*

v. *Cassyn* is in point (8 Bing. 358; 1 M. & Scott, 521). There the defendant, the lessee of premises, underlet them to N., and put him in possession under an agreement to grant N. a lease, when he should have paid a sum of £1200 by certain instalments during three years, in the meantime paying rent to the defendant on certain days, with a power of distress on non-payment. The defendant received rent from N., but omitted to pay the superior landlord, who thereupon distrained on N. for the arrears; and N. having become bankrupt, it was held, that the damage incurred by the distress was an injury to his personal property, and gave a right of action to his assignees. It may be stated as a general principle, that every action which is founded upon a contract with the bankrupt passes to his assignees. They can maintain an action for unliquidated damages which accrued before the bankruptcy, by non-performance of a contract with the [851] bankrupt: *Wright v. Fairfield* (2 B. & Adol. 727). In *Raymond v. Fitch* (2 C. M. & R. 588), it was held that an executor might sue for the breach of a covenant with the testator, not to fell or lop timber trees excepted out of the demise, the breach having been committed in the testator's lifetime, and no part of the timber loppings appearing to have been removed by the defendant. In that case all the authorities on this subject were collected, and Lord Abinger, C. B., in delivering the judgment of the Court, says:—"The maxim, that *actio personalis moritur cum personâ*, is not applied in the old authorities to causes of action on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with it, except where the remedy is given to the personal representatives by the statute law." On the same principle, those actions which do not pass to the assignees in bankruptcy are merely actions of tort to the person, in the natural sense of that word. The words of the act (5 Geo. 4, c. 16, s. 63), "all the present and future personal estate of the bankrupt," are very ample, and are sufficient to include a chose in action, which, after the breach of the contract, the right to damages amounts to.

Stammers, in reply. An assignee of a bankrupt does not stand in the same situation as an executor; for whatever may be the position of an executor as representing his testator, it is certain that the assignees of a bankrupt are only entitled to take such property as would be distributable among the creditors. Now, it would be giving the creditors a species of property to which they have never before been deemed to be entitled, if they could take any interest in the personal skill and labour of the bankrupt, or in any contract founded thereon. The distinction [852] which has been contended for on the other side, between contracts and torts, is not correct. If the assignees are entitled to every cause of action arising from a contract, they would be entitled to the damages for a breach of promise of marriage, which clearly do not pass to them, although they arise from a cause of action *ex contractu*, for which the only remedy is in *assumpsit*. Again, it is said that the torts for which alone the bankrupt can maintain an action in his own name, are torts to the person of the bankrupt, in the natural sense of the word; but that clearly is not so: if it were, how could the bankrupt maintain an action in his own name for slander, libel, or any of those injuries which affect his character or feelings? The true distinction is, that the assignees may maintain an action for the bankrupt's real property, and upon every contract relating to it, for the bankrupt's personal property, and upon every contract relating to it, and even upon any contract arising out of a subject of property, as in *Wright v. Fairfield*; but on the other hand, for any thing affecting the bankrupt's person, or any of its incidents, whether it be his body, his character, his feelings, or (as in this case) his personal skill and labour, the assignees cannot interfere. They are the assignees only of his property, not of his person, or any of its incidents. The laws of this country do not, like some ancient systems of law, absolutely deliver up the bankrupt to the mercy of his creditors; they consign to his assignees all his property, real and personal, but he is protected with the utmost jealousy from their interference in everything that relates to his person or personal requirements, his character, or his feelings. The true rule is that laid down in Cullen's Bankrupt Laws, that, if the cause of action does not arise out of a subject of property, it will not pass to the assignees.

Cur. adv. vult.

The judgment of the Court was now delivered by

[853] PARKE, B. This is an action on a contract, whereby the defendants agreed to employ the plaintiff for seven years, as foreman in a business requiring his personal

skill. The contract was broken by dismissing the plaintiff altogether; the plaintiff then became bankrupt, and the question is, whether the right of action for the breach of the contract passed to his assignees.

There is a clause in the agreement, that, in case either of the parties shall not observe the contract, he shall pay to the other £500 by way of liquidated damages; but there being many stipulations on each side, of different degrees of importance, it is admitted that the case cannot be distinguished from that of *Kemble v. Farren* (6 Bing. 141), and consequently, the defence is not rested on the ground, that by the breach a sum certain became due to the bankrupt, which the assignees had a right to as being in the nature of a debt. The question then is, whether the right to sue for unliquidated damages for the bygone breach of such a contract, passes to the assignees?

Under the 6 Geo. 4, c. 16, s. 63, "all the present and future personal estate of the bankrupt, and all debts due to him," are assigned and rendered recoverable by the assignees; and under these terms are comprised not merely personal chattels and debts, properly so called, but all rights of action for injuries to personal chattels, and for breaches of contract relative to the personal estate of the bankrupt, whereby that estate is prevented from coming to the hands of the assignees, or diminished in value. In such cases, if the wrongs had not been committed, or if the contract had been performed, the bankrupt's personal estate would have been larger: *Hancock v. Caffyn* (8 Bing. 358; 1 M. & Scott, 521). The terms of the section include also every beneficial contract, executory or part executed, which the assignees could perform, and thereby add to the personal estate: *Gibson v. [854] Carruthers* (ante, 321). This contract is not one of that description. On the other hand, the right of action for damages, for torts committed towards the bankrupt's person or reputation, clearly does not pass to the assignees; nor for trespasses quare clausum fregit, and to things fixed to the freehold: *Clarke v. Calvert* (8 Taunt. 742; 3 Moore, 96); nor for trespasses per quod servitium amisit (*Howard v. Crowther*, ante, p. 601); nor would a right of action for the breach of all contracts pass. There are some for which an executor could not sue, as for breach of promise of marriage to a female, without special damage to the personal estate: *Chamberlain v. Williamson* (2 M. & Sel. 408); nor would it seem that he could sue for breach of contracts relating to the person of the deceased, as for negligently carrying him by a coach or vessel, or negligently conducting his cure, whereby his person was injured, or negligently conducting a suit, whereby he was imprisoned. And the rights of an executor are not so limited as those of an assignee; he stands in the place of the testator, by the common law, and represents him as to all his contracts and personal rights, whether they are available as assets for the payment of his debts, or not; for his liability to pay debts is the consequence, not the object of his appointment: but an assignee is appointed by statute for the purpose of distribution amongst creditors, and takes only those beneficial matters (to use the language of Lord Tenterden, in *Wright v. Fairfield* (2 B. & Adol. 727),) which may be applied. There would be no difficulty in saying, therefore, that actions for branches of such contracts as relate to the person simply would not pass to the assignees. But suppose the result of a breach of contracts relating to the person to be a damage, not to the person only, but also to the personal estate; as, for instance, if, in the case of negligent carriage or cure, there were consequential damage, that the plaintiff had expended [855] his money, or had lost the profits of a business, or the wages of labour, for a time; or suppose a joint contract to carry both the person and the goods, and both were injured, the executor probably might sue for a breach of such contract, and recover damages to the extent of the injury to the personal estate; and there is no other who could sue: but could the assignee of a bankrupt sue in any of these cases? Could the right of action on the contract be divided into two on the bankruptcy, and the bankrupt sue for one part, and the assignee for another? It might, perhaps, where the contract itself originally related to both; but could it where the contract relates to the person only, and the consequence of a breach of it is an injury to the personal estate as well as to the person? No case has yet gone so far as to hold that any right of action on such a contract passes to the assignees, by reason of consequential damages to the estate; and it cannot be lost altogether; and the sounder principle seems to us to be, that the bankrupt should sue upon it, as it relates to the person of the bankrupt (the damages, when recovered, if recovered before the certificate, of course belonging to the assignees,

as after-acquired personal estate); and that the assignees can only sue for the breach of such contracts as in their nature relate to personal estate, or to some subject of property which does not pass to the assignees.

In that view of the case, the present action would not pass: it relates to the person; it is for the employment of the personal skill and labour of the bankrupt, and the damage for the breach of it would be compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate, by reason of his not being able to earn so much in another employment. We think that the plaintiff is entitled, notwithstanding his bankruptcy, to sue on such a contract as this, and that our judgment on this demurrer must be for the plaintiff.

Judgment for the plaintiff.

[856] WILLIAMS AND ANOTHER, Assignees, v. THE GREAT WESTERN RAILWAY COMPANY. Exch. of Pleas. July 10, 1841.—In trover for waggons, wheelbarrows, iron rails, &c. &c., a verdict was given for the plaintiffs at the trial for £1850, but afterwards, on the argument of a special case, was reduced by consent to £600, and the following rule was drawn up:—"It is ordered, by consent, that the verdict found for the plaintiffs on the trial of this cause be reduced to the sum of £600, and that as to the residue of the claim, the verdict be entered for the defendants:"—Held, that this was the proper course, the issue being divisible, and that the plaintiffs were not entitled to have the verdict entered generally for them, but the defendants were entitled to a verdict and to their costs, as to so much of the cause of action as they had succeeded on.

Trover. The declaration stated, that the plaintiffs, as assignees of Henry Kirby, a bankrupt, were lawfully possessed of certain waggons, bodies of waggons, sets of wheels, wheelbarrows, deal planks, 200 tons of iron, 200 tons of iron rail, 500 pieces of wood, 500 pieces of wooden sleepers, and fifty casts; that they came into the possession of the defendants by finding, and that the defendants converted them to their own use. The defendants pleaded, first, except as to six bodies of waggons, nine sets of wheels, seventy-six wheelbarrows, 165 planks, and 500 pieces of wood—not guilty; secondly, except as to the goods and chattels in the first plea mentioned, a denial of the plaintiff's property as assignees; and thirdly, as to the causes of action mentioned and excepted in the first plea, payment into Court of £150.

At the trial before Maule, B., at the Summer Assizes for Somersetshire, 1840, it appeared that Kirby, the bankrupt, had agreed before his bankruptcy, with the Great Western Railway Company, to execute certain works on their line, and had provided materials and implements for that purpose. At the time of his bankruptcy, some of these were lying loose on the railway, others had been temporarily fixed there, and others were lying in an adjoining field, which Kirby had hired of the proprietor. The assignees contended, that none of this property (which formed the subject of the present action) had passed to the defendants; the defendants insisted that all of it, with the exception of the articles specified in the first plea, had vested in them under the contract. The value of the whole was agreed between the parties at the sum of £1850, and a verdict was taken for the plaintiffs for that amount, subject to a motion to enter a nonsuit. The parties afterwards agreed [857] on a special case, which was argued in last Trinity Term, when the Court, by consent of the parties, ordered a verdict to be entered for the plaintiff for £600. The rule was drawn up by the officer in the following terms:—"It is ordered, by consent, that the verdict found for the plaintiffs on the trial of this cause be reduced to the sum of £600; and that, as to the residue of the claim, the verdict be entered for the defendants."

Bere, for the plaintiffs, now applied to the Court to alter the terms of the rule, and to direct the verdict to be entered generally for the plaintiffs; referring to *Anderson v. Chapman* (5 M. & W. 483), and *Bird v. Penrice* (6 M. & W. 754).

PARKE, B. This case differs from *Anderson v. Chapman*. That was an action on the case for the negligent conveyance of merchandise shipped on board a vessel of the defendant, and the plaintiffs there were seeking to recover on one entire contract, and their failure of proof of negligence, as to a portion of the goods, merely went in reduction of damages. Here, however, the issue is divisible; and the defendants

having succeeded as to a part of the cause of action, are entitled to their costs as to so much.

ALDERSON, B., and GURNEY, B., concurred.

Application refused.

[858] MONDEL v. STEEL. Exch. of Pleas. 1841.—Special assumpsit on a contract to build a ship according to a specification, assigning a breach in not building the ship with scantling, fastening, and planking, according to the specification, and alleging special damage. Plea, that the defendant had sued the plaintiff for the balance of the agreed price of the ship, after payment of £3500, and also for a sum of £150 for extra work, in the form of an action for work and labour, and for goods sold and delivered; that issue was joined, and, on the trial of the cause, the now plaintiff gave evidence in his defence of the same breach of contract alleged in the declaration, and insisted, if the amount of compensation to which he was entitled exceeded or equalled the balance and value of the extra work, that he the now plaintiff was entitled to a verdict; if less, then he was entitled to a deduction, upon the amount of both, to the extent of such amount of compensation: that the Judge who tried the cause so directed the jury, and the jury found that the now defendant had committed a breach of the contract, and that the now plaintiff was entitled to some compensation, which they deducted from the price of the ship and the value of the extra work: that the now defendant had judgment for the amount, after such deduction had been made, since the commencement of this suit:—Held, that the plea was bad on general demurrer.—Held, also, that all that the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction from the agreed price, according to the difference between the ship as she was at the time of delivery, and what she ought to have been according to the contract: but that any claim for damages on account of the subsequent necessity for repairs could not be allowed in the former action, and might be recovered in this.—In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to shew how much less the subject-matter of the action was worth by reason of the breach of the contract: and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more.

[S. C. 6 Dowl. (N. S.) 1; 10 L. J. Ex. 426. Referred to, *Heyworth v. Hutchinson*, 1867, L. R. 2 Q. B. 451; *Davis v. Hedges*, 1871, L. R. 6 Q. B. 689; *Towerson v. Aspatria, etc., Society*, 1873, 27 L. T. 276.]

Special assumpsit on a contract to build a ship for the plaintiff, at a certain rate per ton, and according to a certain specification (setting it out); and the breach assigned was, for not building the ship with scantling, fastening, and planking, according to the specification; by reason whereof the ship, in a certain voyage, was so much strained that it became necessary to refasten and repair her; and thereby the plaintiff lost the use of her during the time she was undergoing such repairs.

Plea, that the plaintiff ought not further to maintain his said action in respect of the said alleged breach of contract in the declaration mentioned, because the defendant says that he the defendant, heretofore, to wit, on &c., before the Barons of her Majesty's Court of Exchequer at Westminster, in the county of Middlesex, impleaded the plaintiff in an action on promises, and by the said action sought to recover from the plaintiff, over and above a sum of 2l. 4s. 9½d. hereinafter mentioned, the sum of 86l. 6s. 4d., being the balance of the price of the said ship in the said declaration mentioned, calculated according to the provisions and terms of the said memorandum of agreement [859] therein also mentioned, and which remained unpaid to him the now defendant, after the payment by the now plaintiff to him of the sum of 3l. 5s., in the said declaration also mentioned, and after credit being given to the now plaintiff for two other sums hereinafter mentioned; and also to recover from the now plaintiff the further sum of 134l. 3s. 2d., being the value of certain work, labour, and materials done and provided for the now plaintiff by the now defendant in and about the said ship, and

which were extra of and in addition to the work, labour, and materials mentioned and included in the said memorandum of agreement. [The plea then set out the whole of the pleadings in that action, which was *indebitatus assumpsit* in £4000, for work and materials, goods sold and delivered, and on an account stated:—pleas, 1st, except as to 2l. 4s. 9½d., parcel &c., non assumpsit; 2ndly, as to the 2l. 4s. 9½d., payment into Court of that sum, which the now defendant accepted; 3rdly, except as to 2l. 4s. 9½d., payment, which was denied by the replication; 4thly, except as to 2l. 4s. 9½d., a set-off for work and materials, goods sold and delivered, money paid, and on an account stated. The plea then proceeded as follows:—]—And the defendant further saith, that all the said issues were duly joined between him the now defendant, and the now plaintiff, and afterwards, to wit, at the General Sessions of Assize holden at Liverpool, in and for the southern division of the county palatine of Lancaster, on &c., before Sir William Henry Maule, Knight, one of the Justices of our Lady the Queen of her Court of Common Pleas at Westminster, and Sir Robert Mounsey Rolfe, Knight, one of the Barons of our said Lady the Queen of her Court of Exchequer at Westminster, Justices of our said Lady the Queen of her Court of Common Pleas of the said county palatine, the said issues so as aforesaid joined came on in due and regular form of law, to be tried before the said Sir Robert Mounsey Rolfe, and the same [860] were then tried in due course of law, by a jury of the county duly summoned, chosen, and sworn in that behalf, between the now defendant and the now plaintiff. And the defendant further says, that at the said trial he, the now defendant, duly proved and gave in evidence the said memorandum of agreement in the said declaration mentioned, and further proved the delivery to and acceptance by the now plaintiff of the ship thereby contracted to be built, and that the price thereof, calculated according to the provisions and terms of the said memorandum of agreement in that behalf, amounted to the sum of 360*l.* 3*s.* 10*d.*, whereof the now plaintiff had paid him, the now defendant, the said sum of £3500 in the said declaration mentioned, and was also entitled to credit for two other sums, namely, 1*l.* 7*s.* 6*d.* and 3*l.* 10*s.*, leaving the said sum of 8*l.* 6*s.* 4*d.*, the balance, unpaid to the now defendant; and he the defendant further proved and gave evidence that he, the now defendant, had done and provided for the now plaintiff, and at his request, for the said ship, work, labour, and materials, to the value of 134*l.* 3*s.* 2*d.*, which was extra of and in addition to the work, labour, and materials in the said memorandum of agreement mentioned. And the now defendant further says, that the now plaintiff, at the said trial, and in defence of the said causes of action of him the now defendant, and in answer thereto, averred and gave evidence of the very same and identical breach of contract alleged by the now plaintiff to have been committed by the now defendant in the said declaration in this suit, that is to say, that the now defendant did not build the said ship of the very best materials, in conformity with the said specification in the said declaration mentioned, and did not build the same with the whole of the scantling, fastening, and planking inside and outside, such as is mentioned in Lloyd's Survey Book for a twelve years' ship, but omitted and neglected so to do. And the defendant further says, that the now plaintiff, at the said trial, produced witnesses and [861] gave evidence in support of his said alleged defence, and in answer to the said causes of action of him the now defendant; and then insisted at the said trial, that if the said jury were of opinion and found that the now defendant had committed the said breach of contract, or any part thereof, and that the amount of compensation or of damages to which he the now plaintiff was entitled by reason thereof, exceeded or equalled the amount of the said balance, and the value of the said extra and additional work, labour, and materials as aforesaid, that he, the now plaintiff, was entitled to have the verdict found for him. And further, that if the said jury were of opinion and found that he the said plaintiff was entitled to any compensation or damages in respect of the said alleged breach of contract, or any part thereof, although the same might be less in amount than the amount of the said balance, and the said value of the said extra and additional work, labour, and materials, that he the now plaintiff was entitled to have the same deducted from the said last-mentioned amount; and the said now plaintiff then prayed the said Baron to state to and inform the said jury, that he the now plaintiff was so entitled. And the defendant further saith, that in pursuance of such prayer of the now plaintiff, and in accordance therewith, the said Baron did then, in summing up the evidence at the said trial, state to and direct the said jury, that if they found and were of opinion that the now defendant had com-

mitted the said alleged breach of contract, or any part thereof, that they should decide and ascertain what was the amount of compensation or damages to which the now plaintiff was entitled by reason thereof; and that if the said compensation or damages equalled or exceeded the amount of the said balance, and the value of the said extra and additional work and labour and materials, that they should find their verdict for the plaintiff in this action; and that if the amount of compensation or damages to which [862] they found the plaintiff in this action was entitled, was less than the amount of the said balance and the value of the said extra and additional work and labour and materials, that they should deduct such compensation or damages from the said amount, and find their verdict for the defendant in this action for the difference only. And the defendant further says, that the said jury, in pursuance of such direction, did then find that the defendant in this action had committed a breach of the said contract in the declaration in this action mentioned, and that the plaintiff in this action was entitled to compensation and damages in respect thereof; and then found their verdict for the now defendant, for the difference only between the said compensation and damages which they so found the plaintiff in this action was entitled to by reason of the said breach of contract, and the amount of the said balance, and the value of the said extra and additional work and labour and materials as aforesaid, that is to say, for the sum of £120 only, which was considerably less than the amount of the said balance as aforesaid, and the value of the said extra and additional work and labour and materials. And the defendant further says, that the said jury then found all the said issues so as aforesaid joined for him the defendant, and assessed his damages on occasion of the premises in the said action, besides his costs and charges by him in his said suit, to the said sum of £120 as aforesaid, and those costs and charges to 40s.; and such proceedings were afterwards had in her Majesty's said Court of Exchequer at Westminster, that afterwards, and after the commencement of this suit, to wit, on &c. aforesaid, it was considered by the said Court that the now defendant should recover against the now plaintiff his said damages, costs, and charges by the jury aforesaid in form aforesaid assessed, and also £262 for his costs and charges by the said Court adjudged of increase to the now defendant, with his assent, which said [863] damages, costs and charges in the whole amounted to £384, and the now plaintiff in mercy, &c.; as by the record and proceedings thereof still remaining in the said Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed or made void. And the defendant in fact saith, that the said alleged breach of contract by the now defendant, or by the plaintiff in the declaration in this suit alleged, is the very same identical breach of contract so alleged and proved by the now plaintiff at the said trial, and relied upon by him as aforesaid, and for and in respect of which he obtained such compensation and damages as aforesaid. Verification and prayer of judgment.

Special demurrer, and joinder in demurrer.

Cleashy, in support of the demurrer. The plea is bad in substance. The facts stated in it afford no answer to the present action, which is brought to recover the special damage resulting from the breach of contract. He was then stopped by the Court, who called on

Martin to support the plea. The plea shews that the defendant has already received a compensation for the breach of contract, and that is an answer to the action. If a person elects to receive compensation for a breach of warranty or contract, it is a satisfaction. An impression formerly prevailed, that when a party contracted to pay a stipulated price for work and labour, the party performing it was entitled to recover the stipulated price, and that the only remedy for a breach of the contract was by a cross action. But in *Basten v. Butter* (7 East, 479) a different opinion was entertained, and it was there held, that where the plaintiff declared upon a quantum meruit for work and [864] labour and materials, it was competent to the defendant, even without notice to the plaintiff, to prove that the work was not worth so much as the plaintiff claimed; and if it appeared that the plaintiff had been paid on account as much as the work was worth, he could not recover. In *Poulton v. Lattimore* (9 B. & C. 259; 4 Man. & Ry. 208), where, by a contract for the sale of cinque-foin seed, the vendor warranted it to be good new-growing seed, and soon after the sale the buyer was told that it did not correspond with the warranty, and he afterwards sowed part and sold the residue; it was held, that in an action to recover the price, it was competent to

the buyer to shew that the seed did not correspond with the warranty. Bayley, J., there says, "From the nature of the article and of the contract of warranty, I think the vendee was not bound to return the seed without using it; that by keeping it he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in this action, in order to shew that the seed was of less value than the seller represented it to be." And Littledale, J., says, "I am of opinion, that where goods are warranted, the vendee is entitled, although he do not return them to the vendor or give notice of their defective quality, to bring an action for breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages or in answer to the action, if the goods be of no value." [Alderson, B. If two-thirds of the seed were bad, and one-third good, the vendor would be entitled to damages for that which is good.] This is the case of a single article, that of a ship. This doctrine is more fully gone into in the case of *Street v. Blay* (2 B. & Adol. 456), where it was held, that a person who had purchased a horse warranted sound might, in an action by the vendor for the price, give the breach [865] of warranty in evidence in reduction of damages. It was there said by the plaintiff's counsel in argument, that "a defence of this kind is in the nature of a cross action upon the warranty, and is admitted in order to avoid circuity of proceedings," and that view is adopted by Lord Tenterden, C. J., in delivering the judgment of the Court:—"The cases have established that the breach of warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action." It would be quite absurd to say that it is to avoid circuity of action, if the other right of action is not extinguished. [Parke, B. This is not the case of a warranty; it is an agreement to build a ship of a given description, and if it is not built according to the agreement, the vendee is not bound to receive it; but if he does receive the ship, is he not bound on a new contract on a quantum meruit, to pay for it?] In *Thornton v. Pluce* (1 M. & Rob. 218), Parke, J., was of opinion, that where a tradesman furnishes work differing from the specification agreed on, he is not entitled to the actual value of the work, but only to the agreed price, minus such a sum as it would take to complete the work according to the specification. [Parke, B. The rule there laid down does not apply to the present case: that action was on a quantum meruit.] The object is the avoiding circuity of action, and that must necessarily involve the extinguishment of the other right of action. The cases shew, that although the plaintiff might have sued originally for the damage sustained for the breach of contract, yet that, having given the breach in evidence in reduction of the damages claimed in the former action, he has thereby exercised the option which the law allowed him, and, as in the case of a set-off, has precluded himself from bringing this action. *Allen v. Cameron* (1 Cr. & M. 832) meets the objection as to the distinction between a warranty and a contract of this [866] kind. There A. contracted, in consideration of 220l. 10s., to sell and plant a quantity of trees on B.'s land; and also that he would, at his own costs and charges, keep in order the trees for two years after the planting, and that such as should die during that period should be replaced by him; and in an action to recover the price, it was held that evidence of non-performance by A. of any part of the contract on his part, was admissible in reduction of damages. Bayley, B., there says, in the course of the argument, "*Street v. Blay* goes almost the whole length of this case;" and in giving judgment he says, "Is the plaintiff liable to an abatement from the amount agreed on in respect of misconduct on his part, or non-fulfilment of what he is bound to perform? The case of *Street v. Blay* puts this in a plain and satisfactory point of view, not leaving the defendant to a cross action to recover for the diminution in value by reason of the plaintiff's non-performance of the contract, but entitling him to deduct the amount of damage he has sustained thereby; that is a very plain and intelligible rule, and the present case shews the wisdom of it." That authority goes the entire length of what the present defendant is contending for. The contrary doctrine would be exceedingly unjust. If a party elects to derive a benefit by a plea in a former action, it estops him from bringing a cross action. The policy of the law is to compel the party to come forward with the whole of his case, and not to permit him to lie by and see his opponent's case, and then bring a cross action. In *Hennell v. Fairlamb* (3 Esp. 104), it was held that a party cannot bring an action for what has been the object of a set-off in a former action by the defendant against him. That is the view taken of this subject in Chitty on Pleading, (vol. i. p. 571, 6th edition), where

it is said, "These statutes were passed for the benefit of defendants, and they are not imperative; so that a defendant may waive his right to set [867] off, and bring a cross action for a debt due to him from the plaintiff; and where he is not prepared, at the time the plaintiff sues him, to prove his cross demand, it is most advisable not to plead or give notice of set off; for, in case he should go into evidence upon the trial in support of his cross demand, and fail in the attempt, he cannot afterwards proceed in a cross action for the amount; and a party cannot bring an action for what he has succeeded in setting off in a former action against him." He also cited *Eastmure v. Laws* (7 Scott, 461), *Outram v. Morewood* (3 East, 347), and Com. Dig. Action (K. 3).

Cleasby, in reply. There was nothing whatever in the former action to denote what amount of damage had been sustained in consequence of the breach of the contract. It is an assumption, to say that the defendant has made his election. Even if this were like the case of *Street v. Blay*, the giving in evidence a breach of the agreement in reduction of damages, in the former action, would not prevent the defendant in that action from afterwards bringing an action to recover the special damage sustained by the breach of contract. Avoiding circuitry of action means that the party should not be compelled to pay the whole sum specified in the agreement, and then be driven to a cross action. The distinction between the present case and those cited is, that this claim could not be pleaded as a set off, so that the plaintiff in the original action would at all events be entitled to recover nominal damages. There is no analogy between this case and a set-off, because this matter was no answer to the former action. No claim was made in respect of the breach of the contract, but the defendant merely insisted on the breach of contract as shewing that the plaintiff in that action was not entitled to recover the sum agreed upon, but only on a quantum meruit. [868] Suppose the defendant in that action had paid into Court all that the plaintiff was entitled to recover, could not he afterwards sue for the breach of contract? A set-off is a satisfaction of the counter claim, which this was not. It does not appear that the jury have given any compensation for the special damage arising from the breach of contract. The plea, therefore, is no answer to the action.

Cur. adv. vult.

The judgment of the Court (a) was now delivered by

PARKE, B. In this case, the declaration is in special assumpsit on a contract to build a ship for the plaintiff, at a certain rate per ton, and according to a certain specification: and the breach assigned is for not building a vessel with scantlings, fastenings, and planking, according to such specification; by reason whereof the ship, on a voyage from London to New South Wales and back, was so much strained that it became necessary to re-fasten and repair her.

To this declaration there was one plea, to which it is unnecessary to allude, as it was admitted to be bad on special demurrer, and is to be amended; and a second plea, on which the question, which we have taken time to consider, arises.

This plea states in substance, that the defendant had sued the plaintiff for the balance of the agreed price of the vessel, after payment of £3500, and also for a sum of £134 odd for extra work, in the form of an action for work and labour, and for goods sold and delivered; that issue was joined, and, on the trial of the cause, the plaintiff gave evidence in his defence of the same breach of contract alleged in the declaration; and insisted, that if the amount of compensation to which he was entitled, exceeded [869] or equalled the balance of the price and the value of the extra work, the now plaintiff was entitled to a verdict; if it was less, that he was entitled to a deduction from the amount of both, of such amount of compensation. The plea proceeds to state, (and, we must assume, correctly, for the purposes of this argument, though the statement has arisen from mistake), that the learned judge before whom the cause was tried, my brother Rolfe, so directed the jury; and that the jury found that the now defendant had committed a breach of contract, and was entitled to some compensation, which they deducted from the price of the vessel and value of the extra work; and the now defendant had judgment for the amount, after such deduction had been made, since the commencement of this suit.

The plaintiff demurred to this plea, assigning several causes of special demurrer, which it is not necessary to notice, as we are all of opinion that it is bad in substance.

The ground on which it was endeavoured to support the plea, in a very ingenious

(a) Parke, B., Alderson, B., Gurney, B., and Rolfe, B.

argument, was this: that a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter claim for breach of the contract in the one instance, or the warranty in the other, in the nature of a cross action: and that if he exercised that option, he was in the same situation as if he had brought such an action; and consequently, could not, after judgment in one action, bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord Tenterden in giving the judgment of the Court in the case of *Street v. Blay* (2 B. & Ald. 462), his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific [870] article sold, in mitigation of damages, "on the principle, it should seem, of avoiding circuity of action." But we are all of opinion that no such inference is to be drawn from that expression; what was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value, by reason of the non-compliance with the warranty; and that this abatement was allowed in order to save the necessity of a cross action. Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butler* (7 East, 479), a different practice, which had been partially [871] adopted before in the case of *King v. Boston* (7 East, 481, n.), began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to shew that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value; *Kist v. Atkinson* (2 Camp. 64), *Thornton v. Place* (1 M. & Rob. 218), &c. The same practice has not, however, extended to all cases of work and labour, as for instance, that of an attorney, *Templer v. McLachlan* (2 T. R. 136), unless no benefit whatever has been derived from it; nor in an action for freight; *Shiels v. Davies* (4 Camp. 119). It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above-mentioned, as it is in those where an executory contract, such as this, is made for a chattel, to be manufactured in a particular manner, or goods to be delivered according to a sample; *Germaine v. Burton* (3 Stark. 32); where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a quantum valebat; whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed, there is difficulty in finding a reason for such presumption. It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages [872] which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on

that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.

The opinion, therefore, attributed on this record to the learned Judge is, we think, incorrect, and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract: but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered.

We have already observed in the course of the argument, that the defence made in the second plea cannot be supported on the ground that it discloses a mutual agreement by the plaintiff and defendant to leave the amount of the cross claim to the jury as arbitrators, and that they have made an award. The plea does not state any such agreement, or an equivalent thereto. Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

[873] *PRIOR v. HEMBROW AND DARE*, Executrix and Executor of John Hembrow, Deceased. Exch. of Pleas. July 10, 1841.—Differences and disputes having arisen between the trustees and managers of a chapel, as to the conduct of B., one of the trustees; and an information and bill having been filed in the Court of Chancery, at the relation of all the trustees (except B.) against B. and another person praying an account against B., in respect of such part of the trust funds as had come into his hands; and B. having, by his answer, charged the relators with breach of trust in their management of the trust fund, an order was made by the Vice-Chancellor, with the consent of all parties, that the cause and all matters in difference should be referred to arbitration, the arbitrator to have full authority over the costs of the suit and reference. The order expressly provided that the death of any of the parties should not operate as a revocation of the arbitrator's authority, but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference, one of the relators, being a party thereto, died; and afterwards the arbitrator made his award, and thereby directed that the costs of the reference should be borne and paid by the parties by whom they were incurred. The plaintiff, who was one of the relators, paid the solicitor, who had been retained for them in the conduct of the reference, his bill of costs, and brought an action for money paid, against the executors of the deceased relator, for his proportion of the costs incurred after his death, including the costs of the award:—Held, that the executors were liable in such action for their testator's proportion of the costs of the reference incurred after his death, and also of the costs of the award.—Where several persons jointly contract for a chattel to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor that his executors shall pay his proportion of the price of the article to be furnished.

[S. C. 10 L. J. Ex. 371.]

The following case, relating to the liability of the defendants, as the representatives of John Hembrow, deceased, to contribute to certain costs paid by the plaintiff under the circumstances hereinafter mentioned, was stated for the opinion of this Court, pursuant to stat. 3 & 4 Will. 4, c. 42, s. 25.

The declaration was in debt for money paid by the plaintiff to the use of the defendants, as executrix and executor of John Hembrow, deceased. Plea, *nunquam indebitatus*, on which issue was joined.

Before and at the time of the filing of the original and supplemental informations and bills in the Court of Chancery hereinafter mentioned, the plaintiff, the said John Hembrow, deceased, and ten other persons (of whom William Bateman, one of the defendants in the said informations and bills, was one,) were the trustees and

managers of two chapels, or places of public worship, called respectively Tottenham Court Road Chapel and the Tabernacle, which chapels were founded by the Rev. George Whitfield, for the purposes of public worship by congregations of Protestant dissenters.

[874] Tottenham Court Road Chapel is copyhold of inheritance holden of the manor of Tottenham, and in the year 1831 the said trustees and managers (with two other persons, who died before the proceedings hereinafter mentioned), were duly admitted to the said chapel, to hold the same according to the customs of the said manor. In the same year (1831) the Tabernacle Chapel was assigned to the said trustees and managers (together with the said two other persons since deceased), for the residue of a term of years therein granted, by a lease of the corporation of the city of London. The chapels were held by the said trustees and managers, "in confidence that they would continue to carry on the same good work therein, in the same way and under the same kind of management as had been done ever since the decease of the Rev. George Whitfield, and that they would take care to appoint successors like minded, to fill up vacancies as they arose."

The said trustees and managers, from the time of their appointment in the year 1831, exercised general control and superintendence over the chapels; received the pew rents, and other income and profits, and paid the ministers and other disbursements.

In the year 1834 differences and disputes arose between the said trustees and managers, and the Rev. John Campbell, the officiating minister of the said chapels (in which the said William Bateman took part with the said John Campbell), concerning the right of the said trustees and managers to remove the said John Campbell, and also concerning the management of the said chapels, and other matters connected therewith; and thereupon, in November 1834, an information and bill was filed in the Court of Chancery, wherein the Attorney-General, at the relation of the plaintiff in this action, the said John Hembrow, and the said other trustees and managers (except the said William Bateman), was the informant; the said relators were the plaintiffs, and the said William Bateman and John Camp-[875]-bell were the defendants, which said information and bill was afterwards amended, and a supplemental information and bill between the same parties was also subsequently filed.

The prayer of the original information and bill was as follows:—"That the defendant may answer the premises, and that the said chapels may be established by the decree of the Court, as places for the public worship of Almighty God by persons professing and believing the doctrines professed and believed by Calvinistic methodists, according to the doctrines of the said articles of the Church of England, and the Assembly's catechism aforesaid, the plaintiffs being ready and willing to do all such acts, and concur in all such measures as may be deemed necessary for that purpose; and, if necessary, that it may be referred to one of the Masters of the Court, to settle and approve of a scheme for the future maintenance and conduct of the said chapels accordingly, regard being had to the intentions of the said George Whitfield, and to the rules and regulations, and usage and custom, by which the same have been hitherto managed, conducted, and regulated, from the time of the foundation thereof; and that the said William Bateman may be decreed to do and concur in doing all such acts as may be necessary to be done by him for the establishment of the said chapels, and the future regulation and government thereof; and that an account may be taken, under the decree and direction of the Court, of the several sums of money received by the said William Bateman for pew and seat rents, and collections or otherwise on account of the said chapel called the Tabernacle, and of his application thereof; and that he may be removed from being any longer a trustee of either of the said chapels, or treasurer of the said chapel called the Tabernacle, and that proper persons may be appointed to be trustees of the said chapels, in the place and stead of the said William Bateman and the said deceased trustees; and that the [876] said defendant, William Bateman, may be restrained, by the injunction of the Court, from receiving any further sums of money for pew or seat rents or otherwise on account of the said chapel; and that the said John Campbell may be restrained, by the order and injunction of the Court, from using or exercising or attempting to use or exercise the office of minister to the said chapels, or pastor to the congregations worshipping therein, or from interfering or intermeddling with the performance of divine service in the said chapels, or either of them; and that the said William Bateman may be

restrained, by a like injunction, from authorizing the said John Campbell to officiate as minister in the said chapels, or either of them."

The defendants filed answers to these informations and bills, and their answers (amongst other things) charged the relators and plaintiffs with misconduct and breach of trust in the management of the said chapels, and of the income thereof.

On the 22d of November, 1837, an order was made by the Vice-Chancellor, by consent of the Attorney-General, and of the said relators and plaintiffs, and of the said defendants, whereby it was ordered that the said causes, and all matters in difference between the said parties, respecting the subject matters in the information in the said causes mentioned, should be referred to the award of William Fuller Boteler, Esq., with liberty for him to consider and determine, as the Attorney-General might have done, whether the supplemental information was properly filed, and was properly framed, with power for him to direct what was proper to be done between the parties in the premises; and the said William Fuller Boteler was to make his award on or before the 1st day of Easter Term, 1838, to be delivered to the parties in the said suits, or any of them who should require the same, with power to enlarge the time for making the said award. And by the like consent, it was ordered that the costs of the said suits, and of [877] the reference, and relating thereto, should be at the discretion of the said arbitrator; and by the like consent, it was ordered that the death of any of the said parties should not operate as a revocation of the authority of the said arbitrator, but that his award should be delivered to the personal representatives of the deceased party or parties, and none of the said parties should be at liberty to revoke or determine the reference thereby made.

On the 13th of March, 1840, (being within the period to which the arbitrator had duly enlarged the time for making his award), the said arbitrator duly made his award in writing of and concerning the matters so referred to him, and thereby, amongst other things, awarded and ordered in what way the said chapels should be established; and he also awarded and set forth a scheme for the maintenance and conduct of the affairs of the said chapels, and did also award that the said John Campbell should be and continue minister of the said chapels; and, after reciting that the relators and the plaintiffs and the defendants had, by their solicitors, waived the taking of any accounts against each other, except as regards the particular items of account thereafter mentioned, the said arbitrator awarded upon those particular items. And as to the costs, the said arbitrator did award and order as follows: "And as to the costs of the said suit, and of this reference, and relating thereto, I do award and order that so much of such costs as have been incurred by the said relators and plaintiffs, and by the said defendants respectively, in and about establishing the said chapels, and the scheme, rules, and regulations for the maintenance and conduct of the affairs of the same, as between solicitor and client, shall be paid and reimbursed to them respectively out of the funds and monies of the said chapels; and in case there shall not be sufficient funds or monies of the said chapels immediately applicable to the payment of such costs, I do order that the amount thereof, when ascertained, shall be a charge upon [878] the said chapels and the property thereof, to be paid to the parties respectively to whom the same shall be due, with interest in the meantime, half-yearly, at the rate of £4 per cent. per annum. And as to so much of the costs of the said suits, and of this reference, and relating thereto, as have been incurred by the said defendant William Bateman, by reason of the attempt made by the relators and plaintiffs to remove him from the office of manager of the said chapels, I do award and order that the same be paid to the said William Bateman by the said relators and plaintiffs. And as to all other costs of the said suits, and of this reference, and relating thereto, including the costs of the supplemental information, (which I determine to have been properly filed and properly framed), and other charges and expenses in the premises, the payment of which is not hereinbefore ordered and provided for, I do award and order that the same be borne by the parties respectively by whom the same have been incurred. And I do order that the costs, the payment of which is hereinbefore ordered, shall be taxed by one of the Masters of the High Court of Chancery. And I do order that the disposable funds and monies of the said chapels be applied, in the first place, in payment of the interest due on the present mortgages and incumbrances on the chapels, and the balance due from the chapels to the defendant William Bateman, and the other debts (other than principal monies due upon mortgage) of the said chapels, before the payment of the costs hereinbefore

directed to be paid out of the funds or monies of the said chapels. And I do order that the said information be no further proceeded with, and that all suits and controversies between the said relators and plaintiffs, and the said defendants, touching the matters referred to me, shall from henceforth cease."

Mr. Rowland Wilks was employed and retained as the solicitor for the said relators and plaintiffs in the said causes and arbitration, by all the said relators and plain-[879]-tiffs, including the said John Hembrow; and the said Rowland Wilks acted as such solicitor in the said causes and in the said reference.

On the 3rd of December, 1837, the said John Hembrow died. The defendants in this action (his executors) were not made parties to the said causes by any supplemental or other information or bill, or other proceeding; and although the defendants were aware of the said suits, and of the same having been so referred to Mr. Boteler as aforesaid, they did not in any way interfere or appear in the said suits and arbitration, nor did they revoke any authority given by their testator with reference thereto.

The bills of costs of the said Mr. Wilks, under the above employment and retainer in the said causes and arbitration, amount to the sum of £2793, of which about £1162 was incurred in the lifetime of the said John Hembrow; and the share of the said John Hembrow of so much of the said costs of the said Mr. Wilks as were incurred in his lifetime, is, for the purposes of the present case, to be considered as having been paid partly by the said John Hembrow in his lifetime, and partly by the defendants since his death. All the residue of the said costs has been paid by the plaintiff to the said Wilks.

One moiety of the costs of the said award of the arbitrator, amounting to 302l. 10s., has also been paid by the plaintiff to the arbitrator; the other moiety was paid by the defendants in the said causes. No part of the costs awarded to be paid to the said William Bateman by the said relators and plaintiffs, has been paid to him. There have not been, since the making of the said award, and are not now, any funds or monies of or belonging to the said chapels, out of which any costs could be paid or repaid as directed by the said award. Neither the heirs nor the personal representatives of the said John Hembrow have in their power or control, or in reversion or expect-[880]-ancy, any funds or property belonging to the said chapels, or relating thereto.

The questions for the opinion of the Court are: first, whether the defendants are liable to contribute to the payment of the costs of Mr. Wilks incurred in the matter of the said arbitration, subsequently to the death of the said John Hembrow, under the circumstances mentioned in this case; and secondly, whether the defendants are liable, under the circumstances mentioned, to contribute to the payment of the moiety of the said costs of the said award.

If the Court shall be of opinion in the affirmative on both questions, the defendants agree that judgment shall be entered against them by confession for 147l. 18s. 6d. debt, and 1s. damages; if in the affirmative on the first question only, the defendants agree that the like judgment shall be entered against them for 120l. 8s. 6d. debt, and 1s. damages; and if in the affirmative on the last question only, the defendants agree that the like judgment shall be entered against them for 27l. 10s. debt, and 1s. damages; but if the Court shall be of opinion in the negative on both questions, then the plaintiff agrees that judgment shall be entered against him of nolle prosequi. The judgment to be entered for the plaintiff or defendants (as the case may be) immediately after the decision of the case, or otherwise as the Court may direct. The Court to have power to amend the pleadings as it may think fit; and copies of the said informations and bills in Chancery and the answers thereto, and of the order of the Vice-Chancellor and of the award, to be considered as part of the case, and referred to accordingly.

Cresswell, for the plaintiff. Under the terms of the order of reference, John Hembrow, if alive, would clearly have been liable as a co-contractor in an action for contribution; and one of the terms of the order being, that [881] the death of any of the parties thereto should not operate as a revocation of the arbitrator's authority, but that the award should be delivered to the personal representatives of the deceased party, his executors are now liable in this action. It is quite clear that any person may bind his executors as far as his assets are available, and there is no difficulty in such cases, unless it be a contract to do something which requires the personal skill

of the testator ; where another person is employed by the testator to do the thing for him, his executors are clearly liable. It has been held that, in such a case as the present, the submission is not avoided by the death of one of the parties to it. In *Cooper v. Johnson* (2 B. & Ald. 394), it was held that the death of either party is a revocation of the arbitrator's authority ; but Abbott, C. J., pointed out the propriety of inserting a clause like that in the present case, for the purpose of obviating the inconvenience arising from the death of either party before the award is made : and from that recommendation this form has been adopted. In *Blundell v. Brettargh* (17 Ves. 232) Lord Eldon, C., was of opinion that an order of this nature would bind the representatives. His Lordship says : " I admit the full effect of the repeated occurrence of the words ' heirs, executors, and administrators ' [which had occurred in that case] ; but if the whole instrument shews that the terms were to be settled by an award to be delivered to the parties, the only way of considering it is, that they are contracting for themselves, their heirs, &c., that they themselves shall execute all acts, as such award so delivered shall prescribe ; or if they do not live long enough after the terms have been so settled, that their heirs, &c., shall execute. If the mode and means of settling the terms are an award and umpirage, the terms must, unless otherwise contracted, be settled while the parties are living, as the death of one has the effect of [882] revoking the power to make the award." Now here the submission is not that the arbitrator should make his award to be delivered to the parties, but to them or their personal representatives. In *M'Dougal v. Robertson* (4 Bing. 435 ; 2 Y. & J. 11 ; 1 M. & P. 147), where a submission to arbitration contained a stipulation that it should not be vacated by the death of either of the parties, but that notwithstanding such an event matters should be proceeded in, the final award having been made after the death of one of the parties, it was held that a surety for the fulfilment of it was liable. If that were not so, it would come to this, that a man cannot make his executors bound by his contract ; but it is clear that they are so to the extent of the assets. If one of two sureties pays the other's share of the debt, he is entitled to recover his proportion. In *Holmes v. Williamson* (6 M. & Selw. 158), where the plaintiff and defendant were two of a committee appointed at a vestry meeting for the purpose of prosecuting nuisances on the waste lands and highways of the parish, which committee appointed an attorney, who prosecuted and obtained a verdict, and afterwards sued the plaintiff for his bill of costs, which was referred to arbitration, and £235, with costs of the action, were awarded against the plaintiff, it was held that the plaintiff might maintain assumpsit against the defendant for contribution. That case is expressly in point. Here there are several parties employing Wilks as the attorney, who might sue either of them for his costs, and as the plaintiff has paid, he is entitled to recover contribution from the others. In *Holmes v. Williamson*, it was argued, first, that as payment of reasonable costs was provided by the Highway Act, and charged on the surveyor, the plaintiff could not seek contribution in respect of a payment for which he was not liable ; and secondly, that an action did not lie by one member of a committee [883] against another member of it for contribution, there being nothing to raise any implied assumpsit between them ; but the Court say, — " there is nothing to prevent a body of individuals meeting together, and agreeing to prosecute any particular person, and appointing a committee for that purpose ; and if the members of that committee retain an attorney to carry on the proceedings, to whom can he look but to his employers for payment ? This was nothing like a proceeding under the Act." On the second point the Court said, that " if one of several contractors has been compelled to pay the whole, he might seek contribution from the others, and recover for money paid." [Lord Abinger, C. B. There is no doubt about that. The question is, whether the defendants' being executors makes any difference. The parties were trustees, not partners ; and if any one of them died, the trust survived to the others, and they would be liable to Wilks.] These defendants are, by the terms of his agreement, placed in the situation of their testator. The parties, it is true, were trustees, but they were not taking the step as trustees ; they were individually liable to the attorney. If they were proceeding as trustees, in a case where a trust fund would be liable, the case would be very different ; but they were acting here merely as individuals, and contracted with Wilks as such : and the testator having bound his executors, they are liable for his proportion. He undertakes, notwithstanding his death, that the arbitration shall proceed, and that the award shall be delivered to his executors. The costs are not to be paid out of any

fund; they are directed by the arbitrator to be charged on the parties. It is the same as if they were individuals carrying on any mercantile adventure. Hembrow has contracted that his executor shall stand in the same situation as he does. [Lord Abinger, C. B. Can a party contract that his executor should go on with an arbitration?] Yes, so far as to make his assets liable. He may leave his executor a discretion to do so or [884] not, and may bind his estate for the consequences, and his executor as his representative. The executors could not have revoked the authority of the arbitrator; but they knew that the reference was proceeding, and did not interfere, and so became virtually parties to the order of reference. Suppose all the parties had died, and this award was made, what would have become of the costs? The award would be binding even then. If all were to die, the authority as to the costs would remain; otherwise what would become of the parties on the other side? The question is, what was the agreement between the parties? If it was that the arbitration should go on, and that the executors should be liable, it amounts to this, that the executors are parties, and that they are liable as far as they are assets. [Alderson, B. This seems to depend entirely on the effect of the clause providing for the death of either of the parties to the reference; and that seems to have been introduced in accordance with the suggestion of Abbott, C. J., in *Cooper v. Johnson*.] Yes; but this order goes further, and says that the award shall be delivered to the personal representatives; and they become parties to the reference for all purposes.

Kelly, contra. This is not a suit in equity, but an action at law, and must depend on legal principles. It is not contended that an action of some kind might not be maintainable, but this is an action for money paid to the use of the defendants as executors, to which want of assets would be no answer. The declaration alleges a payment at their request, which is material, and must be either express or implied. An express request is not shewn. Then are the circumstances such as that a request would be implied? The facts are simply these. Eleven persons, who are trustees of a charity, consent to a reference, and a solicitor is employed. Before the award is made, and before a part of the costs are incurred, one of the trustees dies. The [885] award became, as to him, immaterial, and could not affect his interests. Whether the arbitrator awarded that the plaintiffs should pay their own costs or not, it would not affect their situation with respect to Wilks. His remedy was against the survivors. Then the question is, supposing he had recovered against them, could these survivors bring any action for contribution against the executors of the deceased? It is apprehended not. There are many cases in which a request has been implied, but they are cases in which the defendant was himself liable to pay the money, and there is no case in which this action has been held maintainable, where the defendant was not himself liable in respect of the suretyship. In *Decker v. Pope* (cited in 1 Selw. N. P. 27, 8th edit.), which was an action brought by an administrator de bonis non of a surety, who, at the defendant's request, had joined with another friend of the defendant in a bond for the payment of the price of some goods that were sold to the defendant, and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use, Lord Mansfield directed the jury to find for the plaintiff, observing, that "where a debtor desires another person to be bound with or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use." He added, that he had conferred with most of the judges upon it, and they agreed in that opinion. When one man is compelled to pay money which another is by law bound to pay, he is entitled to be reimbursed by the latter. The foundation of the liability is, that the defendant was bound to pay the party the very money the plaintiff has paid. In *Spencer v. Parry* (3 Ad. & Ell. 331; 4 Nev. & Man. 770), where a tenant, by a written agreement under which he took the premises, engaged to pay taxes which, by statute, [886] were due from the landlord, and made default; and the landlord having been obliged to pay, sued him for the amount as money paid to his use; it was held, that as the landlord was originally liable for the taxes, and exempted from them only by agreement with the tenant, he should have declared specially on such agreement, and could not recover in *indebitatus assumpsit*. That case goes much further than the present, because there the defendant was liable for the money, but as he was not liable to the person to whom the plaintiff paid it, it was not money paid to the defendant's use. Now this was money paid to a person who had no right to call upon the executors to pay

him, and who could not have compelled them to pay it. [Alderson, B. The substantial question, according to that case, is, are they liable to pay at all?] Whether these defendants are liable at all, is another question; but it is submitted they are not. This is not like the ordinary case where the executors are in the situation in which their testator would have been had he survived. What is the effect of this stipulation in the order of reference? It does not make the executors parties to the award. Its effect merely was to prevent the arbitration being revoked, and the case being, after so much expense incurred, sent back to the Court of Chancery. There is nothing in it to make the executors liable, or to shew that such was the intention. [Lord Abinger, C. B. Could not the executors move to set aside the award?] No: they are not parties to it; much less parties to the reference. [Alderson, B. They would be liable to the costs of the suit in equity.] That shews that the trusts remain. The executors have no interest in the award, nor was it ever intended that they should have any; and therefore it is not stipulated that they are to come before the arbitrator. The arbitrator has not decreed that the executors shall pay any costs. The defendants are here sought to be charged personally, and not merely as executors.

[887] Cresswell, in reply. The defendants are not charged in their own right, but as executors. It has been held, that a count for money paid to the use of the executors may be joined to counts on promises to the testator; which shews that the executor is charged in that action in his representative, and not in his individual capacity. *Corner v. Shew* (3 M. & W. 353), *Ashby v. Ashby* (7 B. & C. 444). In the latter case there is a semble to the marginal note, "that a count for money paid by the plaintiff to the use of the defendant as executor, may be joined with such a count upon an account stated." It is put as a semble, because it was not the point decided; but all the Judges say so. Each of these parties is a surety for the other, and the law therefore implies a promise to indemnify any one for what he shall be called upon to pay for the others. In *Hutton v. Eyre* (6 Taunt. 289; 1 Marsh. 603), it was held that one joint contractor who pays money for another under an equitable claim, may recover it from the other as money paid to his use. [Lord Abinger, C. B. Suppose Hembrow had died without a will, would his administrator have been a party to the reference?] Yes, for some purposes he would, though he would not be personally liable. [Alderson, B. If the executors were not parties to the reference in some sense, it would amount to a revocation.] The defendants are liable as Hembrow's representatives, so as to bind his estate, and to render them liable to apply it to that purpose. If he has agreed that his estate shall be liable after his death, the arbitrator had full power over the costs, and might have awarded Hembrow to pay the whole; but he orders them to pay their costs proportionably, and his executors are therefore liable.

Cur. adv. vult.

The judgment of the Court was now delivered by

[888] ALDERSON, B. This was an action brought by the plaintiff against the defendants, as executors of John Hembrow, deceased, to recover from them a sum of 147l. 18s. 6d. as money paid by the plaintiff to the use of the defendants as such executors. The plaintiff and the testator, and several other persons, were trustees and managers of the chapel in Tottenham Court Road; and disputes having arisen as to the conduct of one of their body of the name of Bateman, an information and bill was filed in the Court of Chancery, at the relation of all the trustees except Bateman, against Bateman and another person, praying, amongst other things, an account against Bateman in respect of such part of the trust funds as had come to his hand, and also praying for the interposition of the Court as to the future management of the trust. Bateman, by his answer, amongst other things, charged the relators and plaintiffs with breach of trust in their management of the trust funds. By an order of the Vice-Chancellor, on the 22nd November, 1837, the cause and all matters in difference were referred to Mr. Boteler, who was to have full authority over the costs of the suit and of the reference; and the order expressly provided, that the death of any of the parties should not operate as a revocation of the arbitrator's authority, but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference J. Hembrow, the testator, died, and the defendants, as his executors, proved his will; and Mr. Boteler duly made his award, and thereby, amongst other things, directed that the costs of the reference should be borne and paid by the parties by whom the same were incurred.

The present plaintiff paid to the solicitor employed in the conduct of the reference the full amount of his costs, and the defendants paid to him the amount of the testator's share of those costs incurred in his lifetime.

The present action is brought to recover 147l. 18s. 6d., [889] being the testator's proportion of the costs incurred after his death, including 27l. 10s., as his proportion of the costs of the award.

The facts are brought before the Court on a special case stated under the provisions of 3 & 4 Will. 4, c. 42, s. 25, which was argued before my Brothers Gurney and Rolfe and myself, last term, and the question for our decision is, whether the plaintiff is entitled to recover. We think he is. It cannot perhaps be stated as a universal proposition, that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute rateably inter se, so as to bind the executors of a deceased co-contractor. Every such case must stand on its own ground. Here the joint employment of the solicitor was for the equal and several benefit of all; those who might die were interested in the reference, as well as those who survived. If Bateman could have established the point raised by his answer, that the relators had misapplied the trust funds, they would have been severally liable, and the assets of any who might die would have been liable to make good the breach of trust. It was an express stipulation in the order of the Vice-Chancellor, which having been made by consent must be taken as the agreement of the parties, not only that the reference should not fail by the death of any of the parties, but further, that the award should be delivered to the executors of any party dying pending the reference. This case, therefore, appears to us to stand on the same footing as that of several persons jointly contracting for a chattel, to be made or procured for the common benefit of all—the building of a ship, for instance, or the furnishing of a house, and as to which the executors of any party dying, before the work is completed, are by agreement to stand in the place of the party dying. In such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the de-[890]-ceased contractor, that his executors should pay their proportion of the price of the article to be furnished.

We see no distinction in principle between such a case and the present, and we therefore think the plaintiff is entitled to judgment for the full amount of his demand.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

PALMER AND ANOTHER v. GOODEN AND OTHERS. Exch. of Pleas. 1841.—Plea, to an action of covenant for rent due for turnpike toils, that before it became due, the trustees, on &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c., from thence hitherto. Replication, that the trustees did not enter into or upon the said part of the said tolls, or eject, &c., the defendant from the possession thereof, modo et formâ.—Held, on error in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that this replication was good on special demurrer, although it put in issue not only the expulsion but also the entry, the latter being immaterial and impossible; and that the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him, and to accept the issue as tendered.

[S. C. 1 Dowl. (N. S.) 673; 11 L. J. Ex. 424.]

A writ of error having been brought on the judgment of the Court of Exchequer in this case (7 M. & W. 486), it was now argued by

Erle, for the plaintiffs. The objection to the replication, which is pointed out by the demurrer, is that it puts in issue two facts, a material and an immaterial one—the expulsion and the entry. But first, the plea contains a statement of one point of defence only, namely, an eviction. The entry and expulsion together amount to an eviction. If the defendant had alleged in the plea that the plaintiff had evicted

him, that might have been traversed in the same terms by the replication. This case, [891] therefore, falls within the principle of the authorities which decide that wherever a plea consists of several facts constituting together one defence, all may be put in issue by a single traverse: *Robinson v. Raley* (1 Burr. 316), *O'Brien v. Saxon* (2 B. & Cr. 908; 4 D. & R. 579), *Brogden v. Marriott* (2 Bing. N. C. 473; 2 Scott, 712). But at all events, the entry is involved in the idea of expulsion, and a traverse of the expulsion alone would therefore involve a traverse of the entry. And as the traverse of that which is impliedly contained in the averment does not vitiate the pleading, neither can it do so, if it be expressed and traversed. In the case of an eviction from a corporeal hereditament, there cannot be an expulsion without an entry; and if it be said that this is not so in the case of tolls, which are incorporeal, the defendants are estopped, by tendering a traverse of entry and expulsion, from saying that an entry is impossible. In *Gilbert v. Parker* (2 Salk. 629), it was held, that on a plea alleging seisin generally, a traverse may be taken that the party is sole seised, because that, being necessarily implied in the allegation, is traversable as much as if it were expressed. So where, in an action against the marshal for an escape, he pleaded that, after the prisoner's return into custody, the defendant did afterwards keep and detain him in his custody in execution, &c., and the replication traversed that the defendant did keep and detain him, &c., *modo et formâ*; it was held that a detention down to the commencement of the action, being virtually implied in the plea, was also included in the traverse: *Chumbers v. Jones* (11 East, 406). In *Hodgskin v. Queenborough* (Willes, 129), it was expressly held that a traverse of the expulsion alone was sufficient, in reply to a plea alleging entry and expulsion; and if the expulsion involves the notion of an entry, [892] the latter is also included in the traverse *modo et formâ*. The averments of payment by the defendant, and acceptance in satisfaction by the plaintiff, may be included in one traverse, because the latter involves the former: *Webb v. Weatherby* (1 Bing. N. C. 502; 1 Scott, 477). What is the meaning of an entry on tolls, and what further facts have the plaintiffs imposed upon the defendants in proof, by including the entry in the traverse? The defendants must at all events prove what amounts in law to an eviction: *Hunt v. Cope* (Cowp. 242), *Cibel v. Hill* (1 Leon. 110), *Bushell v. Lechmore* (Ld. Raym. 369).

Again, if the entry is immaterial in this case, the including it in the traverse will not vitiate: *Reynolds v. Blackburn* (6 Dowl. P. C. 19). Now, it is clear the entry on tolls is mere surplusage—it is altogether impossible. Where several causes of justification are pleaded, if one be established, that is sufficient. So also, where an immaterial fact is included in an issue along with a material one, the traverse is in effect of the material only: *Bac. Abr.*, Pleading, (K. 2); *Com. Dig.*, Pleader, (C. 28); *Spilsbury v. Micklethwayte* (1 Taunt. 146).

Lastly, the plea is bad, as setting up an impossible defence, wholly inapplicable to an incorporeal hereditament.

Cowling, *contra*. The replication is bad. It is contrary in form to all the precedents. It is not disputed that several facts forming one entire defence may be denied by one traverse; but here the facts alleged do not form one entire defence. The expelling, amoving, &c., of the defendant constitutes the eviction, and the entry is superfluous. Neither does the one proposition involve the other, because there may be an eviction (nay, even a disseisin) [893] without an entry, and the statement as to the latter is therefore immaterial: *Vin. Abr.* Disseisin, (C. 5 & 7). In *Dalston v. Reeve* (1 Ld. Raym. 77), a plea of eviction to an action of covenant for rent reserved on a demise of tithes was held good. That shews that there may be an eviction from an incorporeal hereditament. The same is assumed in *Tomlinson v. Day* (2 Brod. & B. 680). Here the words "with force and arms entered" &c., are mere surplusage: so also, the word "then" is not to be read as importing that the parties expelled the defendant at the same moment that they entered. All that the plea amounts to is, that the defendant was expelled after the demise, and before any rent became due. In *Hodgskin v. Queenborough*, it was expressly held, that the expulsion was the only material part of the plea; and therefore that a traverse of that only was sufficient. The precedents are not uniform as to the plea containing an allegation of entry as well as expulsion. In a precedent in *Rastall's Entries*, 175 b., pl. 10, the plea alleges an expulsion only. In *Chitty's Pleadings*, vol. iii. p. 877, the plea is given in the same form as here, but the replication (p. 1102) traversing the expulsion only. In *Cibel v. Hill*, also, as far as can be collected from the report, the issue was on the

expulit only. Then, if the expulsion be the only material fact, it follows as a corollary, that it only can be traversed. In *Wotton v. Hele* (2 Saund. 175), the entry was admitted with a protestando, and the expulsion only was traversed. The plaintiff ought not to send to the jury a traverse of an immaterial fact. Suppose here the jury found the entry, but not the expulsion, how must the verdict be entered? It is laid down distinctly in Stephen on Pleading, 289, that immaterial matter ought not to be traversed. *Regil v. Green* (1 M. & W. 328) is an authority to the same effect. The cases cited on the other side are not disputed. The averment [894] of seisin no doubt means sole seisin. *Hunt v. Cope* shews only that a trespass is not an eviction. *Reynolds v. Blackburn* proceeded on the ground that the plea was double, and therefore the plaintiff was bound to traverse both the allegations in it. Here the plea contains one matter of defence only, viz. the expulsion; to which, therefore, the traverse should have been confined.

Erle, in reply, was stopped by the Court.

TINDAL, C. J. In this case the defendants, by their plea, allege that before the sum claimed in the declaration for turnpike tolls due to the plaintiffs, as trustees of a turnpike road, became due, the trustees entered into and upon a certain part or portion of the said demised tolls, which is stated, and then ejected, expelled, put out, and removed the defendant Gooden from the possession thereof, and kept and continued him so ejected, &c., from thence hitherto. The replication says, that the trustees did not enter into or upon the said part or portion of the demised tolls, or eject, expel, put out, or remove the defendant from the possession thereof, modo et formâ. The objection is, that the plaintiffs in their replication have followed the defendants in the terms of the plea. If the allegations in the plea had constituted distinct matters, each of which would be an answer to the action, the objection would be good; but, having heard the argument, the Court are unable to give any distinct meaning to the first allegation, the entry upon, and also to the second, the expulsion from, the tolls. It is impossible for the most acute mind to conceive such a thing as an entry upon tolls. It is admitted, therefore, that the allegation of the entry is altogether immaterial; indeed, that it is almost insensible. But a party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of total surplusage and immateriality. No case has been cited of an expulsion from realty, where the issue has been held bad for also including the entry, although we have been referred to a case where the issue was held good without it. But however that be, the same reason cannot apply to the case of an incorporeal hereditament, as to which it seems impossible to conceive the application of an allegation of entry. On the short ground, therefore, that *utile per inutile non vitiatur*, it appears to me, and to the rest of the Court, that the judgment of the Court below was wrong, and ought to be reversed.

Judgment reversed.

SADLER v. DIXON. Exch. Chamber. 1841. To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded, that, though the vessel was lost by perils of the sea, yet such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having, at the trial, found a verdict for the defendant, the underwriter, on this issue:—Held, in error (affirming the judgment of the Court of Exchequer), that the plea was bad, and that the underwriters were liable for the consequence of the wilful, but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast.

[S. C. 11 L. J. Ex. 435. In Court below, 5 M. & W. 405; 151 E. R. 172 (with note).]

Assumpsit on a policy of insurance, dated 22nd January, 1838, on the ship "John Cook" and cargo, at and from the 17th January, 1838, until the 17th July, 1838, at

noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The declaration averred the loss of the ship to have taken place on the 19th May, 1838, by perils of the sea. The defendant pleaded, first, that the vessel was not lost by perils of the sea; 2ndly, the following special plea:—"That, though true it is that the said vessel was, by the perils of the sea, wrecked, broken, damaged, and injured, and became and was wholly lost to the plaintiffs; for plea nevertheless the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by [896] the perils of the sea, as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct [the same not being barratrous (a)¹] of the master and mariners of the said ship, whilst the said ship was at sea, as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost, as therein mentioned, to wit, on the 19th May, 1838, by wilfully, wrongfully, negligently, and improperly [but not barratrously] throwing overboard so much of the ballast of the said ship, that, by means thereof, she then became and was top heavy, crank, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured; and by means and in consequence of the said wilful, wrongful, negligent, and improper [but not barratrous] conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost, by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome, without being so wrecked, broken, damaged, injured, and lost, as in the said first count is mentioned." Verification.

Replication, that the said wrecking, breaking, damaging and injuring the said vessel, or the loss of the same by the perils of the sea, as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged, &c.: on which issue was joined:—and at the trial before Parke, B., at the Spring Assizes for Northumberland, 1839, the defendant below obtained a verdict on that issue. A rule having been obtained to shew cause why the judgment should not be entered for the plaintiff below, [897] non obstante veredicto, the case was argued in the Court of Exchequer, in the following Trinity Term. That Court, after time taken to consider, made the rule absolute, (a)² and the judgment was accordingly entered for the plaintiff below. A writ of error was brought upon this judgment, which was argued in this Court in the vacation after Hilary Term, 1840, by Cresswell for the plaintiff in error, and Alexander for the defendant in error. The arguments being substantially the same as those urged in the Court below, they are not stated in detail.

The Court took time to consider, and the judgment of the Court was delivered by

TINDAL, C. J. This was an action on a policy of insurance upon the ship "John Cook" and cargo, from the 17th of January, 1838, for six calendar months, and the loss was stated in the declaration to have happened from perils of the sea, within the time for which the policy was made. The plea alleges the loss to have been occasioned wholly by the wilful, wrongful, negligent, and improper conduct, the same not being barratrous, of the master and mariners of the said ship; that is to say, "by wilfully, wrongfully, negligently, and improperly, but not barratrously, throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, and wholly unseaworthy, and unfit and unable to encounter the perils of the sea, which she might and would have been able to have encountered; and in consequence of the said wilful, wrongful, negligent, and improper, but not barratrous conduct of the said master and mariners, the said ship became wrecked and lost by perils of the sea, which perils, but for the said conduct of the master and mariners, she would have safely encountered."

The replication traversed, "that the said wrecking and [898] damaging of the said vessel, or the loss of the same by perils of the sea, as in the first count mentioned, was occasioned by such conduct of the master or mariners of the said ship, in manner

(a)¹ The words within brackets were inserted in the plea during the argument in the Court below, at the suggestion of the Court.

(a)² See the case reported, 5 M. & W. 405.

and form, &c.;" upon which traverse issue was joined, and found for the defendant. And the Court below having given judgment for the plaintiff non obstante veredicto, the question raised by the writ of error is, whether the plea is or is not good in law.

No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty on the part of the assured as to the seaworthiness of the ship, in the case of a policy on a particular voyage, and of a time policy; nor do we think any such distinction can be held to exist; at all events, no distinction by which the obligation, on the part of the assured, in the case of a time policy, can be held to be increased or extended. But the broad ground of argument taken by the plaintiff in error has been, that if the loss is occasioned by the wilful and wrongful act of the master and crew, but not amounting to barratry, it must be held to be occasioned by a cause, against which the underwriter had not bound himself to indemnify.

Looking, however, at the allegation in the plea, it appears to us, that the meaning of the words "wilful and wrongful" is so qualified by the express averment that such conduct of the master and mariners did not amount to barratry, as that the existence of any fraudulent or improper motive, on the part of the master and crew, is altogether excluded; and, therefore, in effect, that the meaning of the word wilful is reduced to little, if anything, more than the word "voluntary"—a term that must be necessarily applied to every act done by the master and mariners in the course of conducting the navigation and working of the ship; so that every act of heaving or casting the anchor, or of setting the sails, or of directing the helm, which may have been the immediate occasion of the [899] loss of the ship, may, in that qualified sense, be termed their "wilful act." And again, the word "wrongful," when fraud and all other improper motives are excluded by the qualification above adverted to, bears no stronger sense in the plea than that the particular act done was not the right course, but, on the contrary, a negligent or incorrect course to pursue. And, after all, the general allegation of the character and quality of an act, as that it is wrongful, or malicious, or injurious, or the like, cannot carry a charge against the party to whom it is imputed further than the particular act itself specified in the pleadings will warrant. The question, therefore, in substance becomes this: whether the throwing the ballast overboard by the master and crew, (which must be considered as their voluntary act), and also a negligent and improper act), whereby the ship became unseaworthy, excuses the underwriter. It is obvious, that such an act (all unlawful motive being excluded by express averment) may be attributable to an error or defect in judgment, both as to the fact of discharging the ballast at all, and further, as to the exact extent to which it was actually discharged; and it seems difficult, on principle, to hold that the underwriter shall be excused where the loss is occasioned by the mere want of judgment or the negligence of the master and mariners,—which occurred in this particular case,—and that he shall not be also held to be excused in every case, where the loss can be traced to mistake of judgment, or an act of carelessness or negligence in the ordinary navigation of the vessel; in which latter cases the loss is confessedly held to fall within the meaning of perils of the sea.

But without entering into a further discussion of the principle, we think, upon the later authorities, the rule is established, that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage. [900] The case of *Law v. Hollingworth* (7 T. R. 160) must be allowed to bear against the principle so laid down by those later authorities. The ground of decision in that case appears to have been, that there was no pilot on board during the time the ship was sailing up the river Thames, which was required by the statute 5 Geo. 2, and that it was an implied contract on the part of the assured, that there should be such person. This at least appears the ground of Lord Kenyon's judgment, although certainly the other two Judges seem to have considered that it was a loss arising from an act of gross negligence. The decision of that case may be maintainable, on the ground of an implied warranty to observe the positive requisitions of an act of Parliament; but if it is to be taken as an authority, that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew, throughout the voyage, we think it cannot be supported against the weight of the later authorities: (see *Busk v. Royal Exchange Company* (2 B. & Ald. 73), *Walker v. Maitland* (5 B. & Ald. 171), *Holdsworth v. Wise* (7 B. & C. 794), *Bishop v. Pentland*

(7 B. & C. 219; 1 Man. & R. 49), and *Shore v. Bentall* (7 B. & C. 798, n.; 1 Man. & R. 11)).

Upon the whole, we think the plaintiff below is entitled to judgment non obstante veredicto, and that the judgment of the Court below must be affirmed.

Judgment affirmed.

[901] THE MAYOR, ALDERMEN, AND BURGESSES OF SWANSEA *v.* HOPKINS.
Exch. Chamber. 1841.

[See below, 4 M. & W. 621; 150 E. R. 1569 (with note).]

This was a writ of error brought on the judgment of the Court of Exchequer in the case of *Hopkins v. Mayor, &c. of Swansea*,^(a) and was argued by J. Henderson for the plaintiffs in error, and by E. V. Williams for the defendants in error. Their arguments were substantially the same as those urged in the Court below.

LORD DENMAN, C. J., said that the Court were of opinion that the judgment ought to be affirmed; for, although they doubted whether any action could have been maintained at common law, upon the bye-law alone, they were of opinion that, by virtue of the provisions of the stat. 5 & 6 Will. 4, c. 76, s. 2, the plaintiff had a right enforceable by an action of debt against the corporation for the benefit he enjoyed before the statute under the bye-law, upon the principle laid down by Lord Holt, in 6 Mod. 27. The declaration was therefore good; and the Court were clearly of opinion that the plea was no answer to it, on the grounds stated in the judgment of the Court below.

Judgment affirmed.

[902] MEMORANDA.

Early in Trinity Vacation, Sir John Campbell, Knight, her Majesty's Attorney-General, was appointed Lord High Chancellor of Ireland, and was created a Peer of the United Kingdom, by the title of Baron Campbell, of St. Andrews, in the county of Fife.

Sir Thomas Wilde, Knight, her Majesty's Solicitor-General, succeeded to the office of Attorney-General.

At a later period of the vacation, the Lord Chancellor (Lord Cottenham) resigned the Great Seal, which was delivered to the Right Hon. Lord Lyndhurst, with the title of Lord Chancellor.

Lord Campbell resigned the office of Lord Chancellor of Ireland, and was succeeded by Sir Edward Burtenshaw Sugden, Knight.

Sir Thomas Wilde resigned the office of Attorney-General, and was succeeded by Sir Frederick Pollock, Knight.

Sir William Webb Follett, Knight, was appointed her Majesty's Solicitor-General.

In pursuance of the act 5 Vict. c. 5, s. 19, empowering her Majesty to appoint two additional Judges assistant to the Lord Chancellor, to be respectively called Vice-Chancellor; James Lewis Knight Bruce, of Lincoln's Inn, Esq., one of her Majesty's counsel, was appointed the first Vice-Chancellor, and James Wigram, of Lincoln's Inn, Esq., [903] one of her Majesty's counsel, was appointed the second Vice-Chancellor, under the said act. They were subsequently sworn of her Majesty's Privy Council, and respectively received the honour of knighthood.

Early in the same vacation, William Whateley, of the Inner Temple, Esq.; Richard Godson, of Lincoln's Inn, Esq.; Sutton Sharpe, of the Middle Temple, Esq.; Charles James Knowles, of the Middle Temple, Esq.; Matthew Talbot Baines, of the Inner Temple, Esq.; and the Hon. James Stuart Wortley, of the Inner Temple, were appointed her Majesty's counsel; and Charles Austin, of the Middle Temple, Esq., received a patent of precedence, to rank next after Mr. Baines.

Later in the vacation, Alexander James Edmund Cockburn, of the Middle Temple, Esq., was also appointed one of her Majesty's counsel.

And John Vincent Thompson, of Lincoln's Inn, Esq., was called to the degree of the coif, and gave rings with the motto—*Nec ultra nec citrà*.

(a) 4 M. & W. 621; where the pleadings and facts are fully set forth.

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